AGRICULTURE DECISIONS

Volume 72

Book One

January – June 2013

UNITED STATES DEPARTMENT
OF AGRICULTURE

This 72nd edition of Agriculture Decisions *honors Peter M. Davenport, who served as a United States Administrative Law Judge for more than two decades. Judge Davenport worked in the U.S. Department of Agriculture's Office of Administrative Law Judges from 2005 until 2015, when he retired after presiding as Chief Administrative Law Judge for five years.*

PETER M. DAVENPORT
CHIEF ADMINISTRATIVE LAW JUDGE

Chief Judge Peter M. Davenport was initially appointed as a United States Administrative Law Judge for the Department of Health and Human Services in May of 1994 and was assigned to the Paducah, Kentucky Office of Hearings and Appeals. In 1995, following the establishment of Social Security Administration as an independent agency, he transferred to that agency and remained in Paducah, Kentucky until May of 1996, when he moved to the Lexington, Kentucky Office of Hearings and Appeals.

In January of 2005, Judge Davenport transferred to the United States Department of Agriculture in Washington, D.C. In June of 2007, he was recalled to active duty as a Colonel in the United States Army for service with the Provincial Reconstruction Team in Anbar Province, Iraq, where he held successive positions as Team Leader for the Rule of Law and Agriculture Teams and before leaving country was given overall responsibility for the Agriculture, Infrastructure and Economic Development Teams. He was named the Acting Chief Judge for the Department of Agriculture in January of 2010 and was appointed Chief Judge in June of 2010. Judge Davenport

Prior to becoming a judge, Judge Davenport spent ten years in the private practice of law in Lexington, Kentucky and served over eleven years as an Assistant United States Attorney for the Eastern District of Kentucky doing both civil and criminal work. His undergraduate and law degrees are from the University of Kentucky, and he has an LLM degree in Taxation from the National Law Center, George Washington University, Washington, D.C. Judge Davenport is a member of the Judicial Division of the American Bar Association and has served as the Secretary, Treasurer, Second and First Vice President, and President of the Federal Administrative Law Judges Conference.

Judge Davenport is married to the former Sherry Arlidge. He has three children from a prior marriage, Katherine Elizabeth Davenport Wisz (David), who is an Administrative Law Judge for the Social Security Administration in Raleigh, North Carolina; Taylor Davenport, who practices intellectual property law in Raleigh, North Carolina; and Second Lieutenant Sara Madison Davenport, USAFR, who is in medical school at the University of Kentucky in Lexington, Kentucky.

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture that consists of decisions and orders issued in adjudicatory 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*; therefore, rules and regulations are not included in *Agriculture Decisions*.

FORMAT

The Office of Administrative Law Judges (OALJ) publishes a comprehensive volume of *Agriculture Decisions* for each calendar year. Two books comprise the annual volume: Book One, which contains the decisions and orders issued from January through June of that year; and Book Two, which contains decisions and orders issued from July through December.

Each *Agriculture Decisions* book is divided into four sections, or "Parts." Part One is organized alphabetically, by statute, and contains general decisions and orders (*i.e.*, all decisions and orders other than those that pertain to the Packers and Stockyards Act or to the Perishable Agricultural Commodities Act). Part Two covers decisions and orders relating to the Packers and Stockyards Act. Part Three contains decisions and orders that involve the Perishable Agricultural Commodities Act, including reparations decisions. Part Four includes an alphabetical list of decisions and orders reported and a subject-matter index.

Parts One, Two, and Three of *Agriculture Decisions* incorporate the following: (1) Initial Decisions issued by the Administrative Law Judges, along with any corresponding appeal decisions by the Judicial Officer; (2) a list of Miscellaneous Orders entered by the Administrative Law Judges and complete texts of any Miscellaneous Orders entered by the Judicial Officer; (3) a list of Default Decisions issued by the Administrative Law Judges; and (4) a list of Consent Decisions. While *Agriculture Decisions* generally does not include full texts of Miscellaneous Orders, Default Decisions, or Consent Decisions, those decisions and orders are available in their entirety, in portable document format (pdf), via the OALJ website: http://www.dm.usda.gov/oaljdecisions/decision-index.htm.

PUBLICATION

Beginning with Volume 72 (circa 2013), *Agriculture Decisions* is published exclusively online. Volume 71 (circa 2012) was the final print edition (*i.e.*, "hard copy") of *Agriculture Decisions*.[1] All *Agriculture Decisions* books, including those from older volumes, [2] are available for electronic download at http://www.dm.usda./gov/agriculturedecisions.

[1] Individual softbound copies of Volume 71 are available until supplies are exhausted.

[2] As of June 2015, Volumes 57 (circa 1998) through 72 (circa 2013) are available on the OALJ website. Volumes 39 (circa 1980) through 56 (circa 1997) have been scanned but, due to privacy concerns, do not yet appear online. The Editor of *Agriculture Decisions* is in the process of redacting personally identifiable information (PII) from these books. Once the appropriate redactions have been completed, Volumes 39 through 56 will be uploaded to the OALJ website.

In addition to uploading *Agriculture Decisions* publications, OALJ also posts "current" decisions and orders, uploading them individually as they are issued. These decisions and orders are displayed in pdf format on the OALJ website and are listed in reverse chronological order. Decisions and orders issued prior to the current year are also available in pdf archives, arranged by calendar year.

Published decisions and orders (*i.e.*, those that appear in *Agriculture Decisions*) may be cited by providing the volume number, page number, and year [*e.g.*, 1 Agric. Dec. 472 (U.S.D.A. 1942)]. Further, decisions and orders posted on the OALJ website may also be cited as primary sources. When citing to a decision or order that appears on the OALJ website but has not yet been published in *Agriculture Decisions*, the docket number and date of decision or order should be included [*e.g.*, *Smith*, Docket No. 15-0123 (U.S.D.A. Oct. 1, 2015)].

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AGRICULTURE DECISIONS

Volume 72

Book One

Part One (General)

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ADMINISTRATIVE WAGE GARNISHMENT

DEPARTMENTAL DECISIONS

In re: SHELLY MATHESON.
Docket No. 13-0016.
Decision and Order.
Filed January 23, 2013.

AWG.

Charles Wist, Esq. for Petitioner.
Michelle Tanner for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to the position of administrative wage garnishment.

On November 2, 2012, a prehearing order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on November 30, 2012.

At the request of the parties, the case was rescheduled to December 27, 2012. At the time of the place and hearing all parties were present.

Michelle Tanner represented Rural Development (RD) and Mr. Charles Wist, Esq. represented the Petitioner. The parties were sworn.

Petitioner acknowledged receipt of RD's narrative and exhibits RX-1 through RX-5. RD acknowledged receipt of Petitioner's narrative along with an exhibit consisting of the RD Servicing and Collection's regulations. RD was allowed extra time to obtain a copy of the foreclosure order filed in Montgomery County, Texas. That substitute Trustee Deed has been received which I now mark as RX-6. Petitioner was allowed additional time to clarify portions of the Petitioners income

and expense statement. I have not included overtime pay in determining Petitioner's income potential. I have not included Petitioner's voluntary 401K and tithing contributions in determining her "expenses." Petitioner also filed a Post Hearing Submission along with a revised signed expense statement (December 30, 2012).

I have considered the Petitioner's brief. RD's exhibits RX-1 and RX-2 shows she agreed to be jointly and severally obligated on the loan given to her. RD's exhibit RX-5 @ p. 3 of 5 shows that RD has been actively pursuing its rights by Tax Offset since May 19, 2006. The judicial sale of the property occurred on/about October 1998; therefore, I reject any notion of laches in enforcement of the debt. (See Petitioner's brief regarding the Debt Collection Improvement Act). Petitioner has submitted numerous copies of certified mail envelopes that did not reach her at the address where she received mail. RD's obligation and the Substitute Trustee's duty to give notice of the pending judicial sale is a "good-faith" attempt to give notice. The state of Texas recognizes the ultimate (fail-safe) notice to the world by publication of the pending sale in a newspaper of general circulation in the jurisdiction where the property is situated. (*See* RX-6). I have reviewed Petitioner's income and expense statement and have prepared a Financial Hardship Calculation.[1]

On the basis of the record before me the following facts and conclusions of law and order will be entered.

Findings of Fact

1. Petitioners Shelley Matheson and her husband, Darin Matheson, purchased and financed their home in Montgomery County, Texas by borrowing money from Rural Development on October 17, 1985 in the amount of $42,340 (RX-1).

2. The loan became in default and the loan was accelerated for foreclosure on March 24, 1996 (RX-2).

3. A foreclosure sale was scheduled and held on October 6, 1998 (RX-2).

4. At the foreclosure sale, the home was purchased for $30,563 (RX-2 @

[1] The Financial Hardship Calculation is not posted on the OALJ website.

p. 6 of 31, RX-6).

5. Prior to the judicial sale, the borrowers owed $74,707.36 for principal, interest, and fees. After the proceeds were applied to the debt, additional interest that was owed was waived from the account. An additional foreclosure cost of $11 was added to the account, for a total due of $42,139.41. (RX-4).

6. The remaining balance of funds due was submitted to treasury for collection on June 29, 2001. (RX-2 @ p. 12 of 31). The amount of $29,984.26 is at treasury for collection, plus an additional amount of remaining potential collection fees for $8395.59 for a total due of $38,379.85. (RX-5@ p. 4 of 5).

7. Petitioner is jointly and severally liable on the debt along with Darin Matheson.

8. Petitioner is divorced and has no dependents.

9. Petitioner has current debts from Federal guaranteed student loans, dental treatments, and VISA credit card. At the current rate of retirement, some of her debts will be satisfied in about 10 months.

10. Petitioner lives modestly and has no vehicle. She uses public transportation.

11. Petitioner has been employed for more than one year.

12. At the Petitioners request a financial hardship calculation was performed. For the purposes of the Financial Hardship Calculation, I am not crediting any new payments to her 401K plan or her tithing to her church. I am not including overtime wages.

Conclusions of Law

1. Petitioner is jointly and severally liable to the USDA Rural Development in the amount of $29,984.26 for the mortgage loans extended to her.

2. In addition Petitioner is jointly and severally liable for $8,395.59 as potential collection fees to the U.S. Treasury.

3. All Procedural Requirements for Administrative Wage Offset Set Forth in 31 C.F.R. Paragraph 285.11 Have Been Met.

4. Rural Development is not entitled to garnish the wages of Petitioner at this time. Rural Development may reassess Petitioner's financial position in 10 months.

ORDER

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment as might be specified in 31 C.F.R. § 285.11 (i).

In 10 months, the financial position of Petitioner may be reevaluated. A Copy of this Decision and Order shall be served upon the parties by the hearing clerk's office.

___

In re: ANDREW ISON.
Docket No. 12-0646.
Decision and Order.
Filed January 24, 2013.

AWG.

Petitioner, pro se.
Esther McQuaid for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of a administrative wage garnishment. On November 7, 2012, a prehearing order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of

information and documentation concerning the existence of the debt, and setting the matter for telephonic hearing on December 18, 2012.

On the date and time set for the hearing, both parties were present. Esther McQuaid represented Rural Development (RD) and Mr. Ison was self-represented. RD observers Ms. Clifton and Ms. Zahner were present, but did not testify. The parties were sworn. Petitioner acknowledged receiving RD's narrative and exhibits RX (1-4). Petitioner did not submit any exhibits. Prior to the hearing, I requested that RD provide the judicial sale documents from McDuffie County, Georgia. RD provided the judicial sale document for the property sold in McDuffie County Georgia which I now mark as RX-5. RD also forwarded an explanation of the application of foreclosure sale proceeds which I now make as RX-6. Petitioner was offered an opportunity to forward his income and expenses from which I could prepare a Financial Hardship Calculation, but has not done so. Mr. Ison has been employed for more than one year.

Findings of Fact

1. On September 30, 2003, Petitioner and co-borrower, Kimberly Wilcox, obtained a home mortgage loan in the amount of $111,650.00 which was guaranteed by USDA for a property in Thompson, Georgia. Exhibit RX-1.

2. At the time of the signing of the note, the borrowers also signed RD form 1980 – 21, which is the housing loan guarantee form. RX-2.

3. The borrowers defaulted on the mortgage on about August 1, 2004. RX-3 @ p. 3 of 10, RX-5.

4. At the time of the default, the unpaid balance was $110,562.71.

5. The property was sold in a judicial sale on August 5, 2005 with the contract price of $95,200.00. RX-5.

6. After consideration of the various expenses incurred, USDA RD paid a loss claim to Chase bank, the servicing lender, in the amount of $34,395.79. RX-3 @ p. 8 of 10.

7. On August 31, 2005, the borrowers were sent a 60 day notification of the debt at the most at the most recent address on file. The letters were returned as undeliverable and were unable to be forwarded. The debt was referred to treasury on October 31, 2005.

8. Treasury has collected $6236.36. RX-4.

9. The remaining debt of $28,159.43 of the borrowers remains due. RX-4.

10. In addition, borrowers owe potential collection fees of $7884.64 for a total of $36,044.07.

11. Petitioner suggested a potential financial hardship, but failed to provide any documentation justifying a financial hardship consideration.

Conclusions of Law

Petitioner is jointly and severally liable to USDA Rural Development in the amount of $28,159.43 for the mortgage loan extended to him.
In addition, Petitioner is jointly and severally liable to USDA Rural Development for potential collection fees in the amount of $7884.64.

All procedural requirements for administrative wage garnishment offset set forth in 31 CFR § 285.11 have been met.

Rural Development is entitled to the administratively garnish the wages of the Petitioner at 15% of his disposable pay.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amounts as may be specified in 31 CFR § 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: BECKY VANCE.
Docket No. 12-0433.
Decision and Order.
Filed January 25, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on January 24, 2013, having been postponed at the request of Cobb Young, Esq., of Joplin, Missouri, from August 7, 2012. Becky Vance, the Petitioner ("Petitioner Vance"), failed to participate in the hearing. [Petitioner Vance failed to participate by telephone. Petitioner Vance failed to respond to the "Hearing Rescheduled" notice, which was filed and sent to her in December 2012, which directed her to advise us of the phone number we could use to reach her for the hearing. Petitioner Vance did not answer at the phone number we had for her.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Vance's Hearing Request dated April 16, 2012, with all attachments, is admitted into evidence.

4. USDA Rural Development's Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List, were filed on June 12, 2012, and are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. USDA Rural Development's position is that Petitioner Vance owes to USDA Rural Development **$30,720.37** (as of about January 24, 2013), in repayment of a United States Department of Agriculture / Rural

Development / Rural Housing Service ***Guarantee*** (*see* RX 1, especially p. 2) for the loan made by JP Morgan Chase Bank, N.A. on March 5, 2009 ("the debt"). RX 2. Chase Home Finance, LLC became the holder of or agent for the holder of the indebtedness. JP Morgan Chase Bank, N.A. is the parent company of Chase Home Finance LLC (the Servicing Lender). I refer to these entities as Chase, or the lender.

6. Petitioner Vance borrowed $106,671.00 to buy the home in Missouri, the balance of which is now unsecured ("the debt"). Petitioner Vance's promise to pay USDA Rural Development, if USDA Rural Development paid a loss claim to the lender, is contained on the same page of the ***Guarantee*** that Petitioner Vance signed, and is recited in the following paragraph, paragraph 7.

7. The ***Guarantee*** establishes an **independent** obligation of Petitioner Vance, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

8. USDA Rural Development did pay a loss claim on the requested loan to the lender, $31,238.15 on December 27, 2010. RX 6, p. 9; RX 7. This, the amount USDA Rural Development paid, is the amount USDA Rural Development seeks to recover from Petitioner Vance under the ***Guarantee*** (less the amounts already collected from Petitioner Vance, through ***offset***). *See* RX 10, especially p. 1.

9. Potential Treasury collection fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$30,720.37** would increase the current balance by $8,601.70, to $39,322.07. *See* RX 10, p. 2.

10. The amount Petitioner Vance borrowed on March 5, 2009 was $106,671.00. RX 2. The Due Date of the Last Payment Made was August 1, 2009. RX 6, p. 4.

11. Foreclosure was initiated on January 15, 2010. RX 6, p. 5. At the Foreclosure Sale on February 8, 2010, the lender was not outbid, so the home sold to the lender, Chase, for $87,975.00. Chase then sold the REO (real estate owned) on June 2, 2010, for $94,000.00. RX 6, pp. 5-6; RX 7.

12. Getting the security (the home) resold was an expensive process. First, all the costs of foreclosure were incurred, and Petitioner Vance is expected to reimburse for those costs; because no one outbid the lender at the foreclosure sale, all the costs to sell the REO were then incurred, and Petitioner Vance is expected to reimburse for those costs as well. RX 7 shows that the lender expenses to sell the property were $13,291.70. Meanwhile, interest continued to accrue, taxes continued to become due, and insurance premiums continued to be paid. Interest alone from August 1, 2009 (the Due Date of the Last Payment Made) until near the end of June 2010 (28 days after the REO was sold), was $5,677.20. RX 7. No additional interest has accrued since near the end of June 2010 and none will accrue, which makes repaying the debt more manageable.

13. Collections from Treasury (from Petitioner Vance, through ***offset***), leave **$30,720.37** unpaid as of about January 24, 2013 (excluding the potential remaining collection fees). *See* RX 10, especially p. 1, and USDA Rural Development Narrative, plus Giovanna Leopardi's testimony.

14. The second issue is whether Petitioner Vance can withstand garnishment without it causing financial hardship. Petitioner Vance has provided no evidence, no Consumer Debtor Financial Statement, no wage statements, no testimony - - nothing - - for me to evaluate the factors to be considered under 31 C.F.R. § 285.11. Consequently, I must assume Petitioner Vance can withstand garnishment at 15% of Petitioner Vance's disposable pay without it causing Petitioner Vance financial hardship. 31 C.F.R. § 285.11.

15. Petitioner Vance is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

16. Garnishment of Petitioner Vance's disposable pay is authorized. *See* Paragraph 14. Petitioner Vance, you may want to telephone Treasury's collection agency to **negotiate** repayment of the debt, after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Vance, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Vance, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

17. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Vance and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

18. Petitioner Vance owes the debt described in paragraphs 5 through 13.

19. Garnishment is authorized, **up to 15%** of Petitioner Vance's disposable pay. 31 C.F.R. § 285.11.

20. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Vance's pay, to be returned to Petitioner Vance.

21. Repayment of the debt may also occur through ***offset*** of Petitioner Vance's **income tax refunds** or other **Federal monies** payable to the order of Ms. Vance.

ORDER

22. Until the debt is repaid, Petitioner Vance 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).

23.USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment of Petitioner Vance's disposable pay, **up to 15%** of Petitioner Vance's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, with a courtesy copy sent also to Cobb Young, Esq.

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In re: KENNETH PERKINS.
Docket No. 13-0045.
Decision and Order.
Filed January 25, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

FINAL DECISION AND ORDER

This matter is before me upon the request of the Petitioner, Kenneth Perkins, for a hearing in response to the efforts of Respondent to institute a federal administrative wage garnishment against him. On November 16, 2012, I issued a prehearing order requiring the parties to exchange information concerning the amount of debt.

In his prior case, AWG Docket No. 10 – 0303, Mr. Perkins appealed as to account number 0016837224. An order regarding that case was issued by me on or about March 29, 2011 not permitting the garnishment of Mr. Perkins's wages as a result of a Financial Hardship Calculation. This appeal concerns account number 0004515671. I conducted a telephone hearing on January 9, 2013. Both parties were present. Mr. Perkins was self-represented. Ms. Giovanna Leopardi represented RD. The parties were sworn. Mr. Perkins acknowledged receiving RD's narrative and exhibits RX-1 through RX-5. In addition, RD submitted an

additional document on January 8, 2013 which I now mark as RX-6. Mr. Perkins has been working for more than one year. He is already being garnished via the TOP (Tax Offset Program) as a result of the final Decision and Order dated March 29, 2011. In this petition, Mr. Perkins challenged the application of prior IRS intercepts. Following the instant hearing, Mr. Perkins was to fax to Ms. Leopardi any IRS intercepts he contended were inappropriately applied. Ms. Leopardi was to match or trace those intercepts to see if they were properly applied. There have been no additional filings from Mr. Perkins since the date of the hearing.

Findings of Fact

1. On November 25, 1997, Petitioner Kenneth Perkins and Abigail (his wife) obtained a USDA FMHA home mortgage loan for a property in Compton, Kentucky. Petitioner was a signor to the Assumption agreement for $32,376.81 (account number 4515671). RX-1.

2. The borrowers defaulted on the loans. A foreclosure sale was held in January 13, 2003. (*See* Exhibit RX – 7 in the prior case, AWG 10 – 0303).

3. On December 6, 2000, the borrowers were given notice of an acceleration of the debt. RX 6.

4. Prior to the sale, the borrowers owed $32,002.04 on account number 4515671. In addition, the borrowers owed $10,818.80 for interest and $4737.47 for a fee balance on the same account for a total of $47,558.31.

5. After the application of a portion of the foreclosure sales proceeds, Mr. Perkins now owes $18,786.84 on account number 4515671. RX-at page 1 of 3.

6. Mr. Perkins is jointly and severally liable on the debt under the terms of the promissory note.

7. Mr. Perkins stated that he has been gainfully employed for more than one year.

Conclusions of Law

1. Petitioner Kenneth Perkins is jointly and severally indebted to USDA's Rural Development program in the amount of $18,786.84 on account number 4515671.

2. In addition, Mr. Perkins is jointly and severally liable for $3070.95 as remaining potential collection fees to the US treasury. RX-5 at page 7 of 8.

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 Rural Development of his current address, employment circumstances, and living expenses.

5. The findings of fact in paragraphs 1 through 10 (erroneously numbered as 16) found in the prior Decision and Order dated March 29, 2011 are *res judicata* as to this debt.

6. Any wage garnishments determined by Rural Development or Treasury after consideration of the facts and circumstances of Mr. Perkins's income expenses shall proceed firstly against account number 16837224 until it is satisfied.

ORDER

1. The requirements of 31 C.F.R. § 288.11 (i) & (j) have been met.

2. Rural Development may assess the debtor's financial position and modify the garnishment percentage as circumstances dictate.

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

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ADMINISTRATIVE WAGE GARNISHMENT

In re: LOWANDA WHITE.
Docket No. 13-0071.
Decision and Order.
Filed January 25, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held as scheduled on January 22, 2013. Lowanda White, the Petitioner (Petitioner White), who represents herself (appears *pro se*), failed to participate in the hearing. [Petitioner White failed to participate by telephone. Petitioner White failed to respond to the Hearing Notice, which was filed and sent to her in December 2012, which directed her to file her contact information and to let us know the phone number we could use to reach her for the hearing. Petitioner White did not answer at the phone number we had for her and, even though we left a message with the phone number to return the call, she did not return the call.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner White's Hearing Request (dated October 6, 2012) is admitted into evidence, with all enclosures, including her Consumer Debtor Financial Statement.

4. USDA Rural Development's Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List, filed on November 20, 2012 (plus the Narrative, Witness & Exhibit List filed again on January 22, 2013 with Corrected Narrative), are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner White owes to USDA Rural Development **$38,239.23** (as of November 8, 2012) (*see* RX 6, pp. 1-2) in repayment of a USDA Rural Housing Service loan borrowed in 1999 for a home in Texas, the balance of which is now unsecured ("the debt"). *See* RX 1.

6. Potential costs of collection (Treasury fees) in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$38,239.23**, would increase the current balance by about $10,706.98, to $48,946.21. RX 6, p. 2, plus the Narrative.

7. The amount Petitioner White borrowed in 1999 from USDA Rural Housing Service was $68,675.00. RX 1.

8. The "next due" date was August 14, 200**2**; that is, the loan was 72 months past due, when, on August 4, 2008, the loan was accelerated for foreclosure. RX 2, p. 7. There had been Chapter 13 bankruptcy filings, 5 of them. During the bankruptcy proceedings, USDA Rural Development was not permitted to move forward.

9. The loan was accelerated for foreclosure on August 4, 2008 due to "MONETARY DEFAULT". RX 2. The Notice of Acceleration (and of Intent to Foreclose) shows $58,078.72 unpaid principal and $23,768.95 unpaid interest (as of August 4, 2008). RX 2, p. 1. This did not include other costs, such as unpaid insurance and unpaid real estate taxes that had to be advanced by USDA Rural Development.

10. A foreclosure sale was held on May 4, 2010. USDA was the highest bidder at the foreclosure sale; USDA bid $69,264.00. RX 3, p. 1. In addition to the unpaid principal, the following were due:

$ 28,346.18	unpaid interest
$ 25,249.41	fees/costs (includes unpaid taxes, unpaid insurance, and other costs)
$ 132.86	interest on fees/costs

RX 5 and Michelle Tanner's testimony.

11. Proceeds from the foreclosure sale ($69,264.00) were applied to reduce the debt. RX 3, p. 1. Since the proceeds were applied to the

balance, in 2010, no additional interest has accrued. No additional interest will accrue, which makes repaying the debt more manageable.

12. After the $69,264.00 foreclosure sale proceeds were applied, the remaining debt was $38,818.56. *See* the detail summarized at RX 5, which shows an ***offset***, probably of Petitioner White's income tax refund, applied to principal on April 19, 2010.

13. An additional foreclosure bill ($615.00), added to the balance after the foreclosure sale proceeds were applied, brought the balance to $39,433.56. RX 5, p. 2. This balance, $39,433.56, was referred to U.S. Treasury for collection on February 7, 2011. RX 6, p. 1. U.S. Treasury collections during 2012, itemized on RX 6, p. 1, brought the balance to **$38,239.23** as of November 8, 2012. RX 6 and Michelle Tanner's testimony.

14. Petitioner White still (as of November 8, 2012) owes the balance of **$38,239.23** (excluding potential collection fees), and USDA Rural Development may collect that amount from her.

15. Petitioner White wrote on her Hearing Request, "I am not able to pay my bills & take care of my children with this large amount coming out of my check." Petitioner White's Consumer Debtor Financial Statement dated October 6, 2012 submitted with her Hearing Request shows 4 children. The older children probably contribute toward paying the household expenses, but nevertheless I agree with Petitioner White, that to prevent financial hardship, garnishment to repay "the debt" (*see* paragraph 5) must be limited. 31 C.F.R. § 285.11.

16. Petitioner White is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

17. Petitioner White, you may want to telephone Treasury's collection agency to **negotiate** the repayment of the debt. Petitioner White, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner White, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the

claim for less. Petitioner White, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

18. The Secretary of Agriculture has jurisdiction over the parties, Petitioner White and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

19. Petitioner White owes the debt described in paragraphs 5 through 14.
20. Garnishment **up to 5%** of Petitioner White's disposable pay is **authorized through July 2014**; and thereafter, garnishment **up to 10%** of Petitioner White's disposable pay is authorized. 31 C.F.R. § 285.11.

21. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner White's pay, to be returned to Petitioner White.

22. Repayment of the debt may also occur through ***offset*** of Petitioner White's **income tax refunds** or other **Federal monies** payable to the order of Ms. White.

ORDER

23. Until the debt is repaid, Petitioner White 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).

24. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 5%** of Petitioner White's disposable pay **through July 2014**; and thereafter, garnishment **up to 10%** of Petitioner White's disposable pay is authorized. 31 C.F.R. § 285.11.

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

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ADMINISTRATIVE WAGE GARNISHMENT

In re: MATTHEW HART, N/K/A MATTHEW ARMSTRONG.
Docket No. 13-0095.
Decision and Order.
Filed January 30, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

FINAL DECISION AND ORDER

This matter is before me upon the request of Petitioner Matthew (Hart) Armstrong for a hearing in response to the efforts of Respondent to institute a federal administrative wage garnishment against him. On December 12, 2012, I issued a Prehearing Order requiring the parties to exchange information concerning the amount of debt.

On December 14, 2012, Rural Development (RD) filed its narrative and exhibits RX-1 through RX-12. RD filed an exhibit an additional exhibit on January 25, 2013 which I will now mark as exhibit RX-13. Petitioner filed some financial information along with the narrative previously filed on November 12, 2012. On January 17, 2013 at the time set for the hearing, both parties were present. Michelle Tanner represented RD. Mr. Hart represented himself. The parties were sworn.

Findings of Fact

1. On October 12, 2007 Petitioner Matthew Hart obtained a USDA FMHA Home Mortgage Loan for a property in Gaylord Michigan. RX-2.

2. Prior to signing the loan, Petitioner also signed RD Form 1980 – 21, the Housing Loan Guarantee, on September 17, 2007. RX-1.

3. Petitioner defaulted on the Mortgage Loan, and the loan was subsequently accelerated for foreclosure.

4. A foreclosure sale was scheduled and held on February 5, 2009. The Trustee acquired the property at the highest bid price of $36,125.00. RX-3.

5. At the time of the foreclosure sale, the amount due on the loan was $86,029.18. RX-7, RX-8.

6. After the application of the liquidation appraised value ($28,700.00) and additional reductions ($4,688.70), and because of the poor housing market, the lender was paid a lost claim of $52,640.48. RX-8.

7. An additional $18.70 was reduced from the amount owed by Petitioner. RX-8.

8. As a result of the Tax Offset Program (TOP) and wage garnishments through January 22, 2013, the amount owed by Petitioner has been reduced to $50,879.09. RX-13.

9. In addition, Petitioner owes the US Treasury $14,246.14 as potential collection fees for a total due of $65,125.23. RX-13.

10. Petitioner has stated that he has a financial hardship, but has not filed a statement of Income and Expenses within the time allowed following the oral hearing.

11. Petitioner has been employed for more than one year.

12. He has child support garnishments from a prior marriage as well as a temporary garnishment for child support arrearages. He supports a family of four and his current spouse is not employed. He also has outstanding legal fees relating to the prior marriage.

13. Petitioner was given one week to file his income and expense forms, but has not done so and therefore I cannot perform a financial hardship calculation.

Conclusions of Law

1. Petitioner Matthew (Hart) Armstrong is indebted to USDA's Rural

Development program in the amount of $50,879.09.

2. In addition, Petitioner is also liable for $14,246.14 as remaining potential collection fees to the US treasury.

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

4. Petitioner is under a duty to inform USDA Rural Development of his current address, employment circumstances, and living expenses.

5. Petitioner would likely suffer financial hardship if he were to incur additional garnishments at this time; however I am unable to perform a definitive evaluation without his financial statement.

ORDER

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment at this time. After three (3) months, RD may re-assess the Petitioner's financial position.

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

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In re: DORIS P. MILLER.
Docket No. 13-0126.
Decision and Order.
Filed February 1, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the December 14, 2012 request of Doris P. Miller ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on January 15, 2013, the parties were directed to provide information and documentation concerning the existence of the debt and the matter was set for a telephonic hearing to commence on January 31, 2013.

On January 8, 2013, Respondent filed a Narrative, together with supporting documentation[1] identified as RX-1 through RX-7. That evidence was admitted to the record. Petitioner did not file exhibits.

At the hearing, Petitioner represented herself and testified. Michelle Tanner represented USDA-RD and testified. I advised Petitioner that she could supplement the record with information regarding past bankruptcy filings, and could request reconsideration of my Decision in this matter if she locates documents.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

1. On October 9, 1986, the Petitioner[2] received a home mortgage loan in the amount of $38,500.00 from USDA-RD to purchase residential real property located in Calhoun City, Mississippi. RX-1.

2. The Petitioner experienced a loss of income and requested a moratorium which increased the amount originally due on the note. RX-2.

3. The loan fell into default and was accelerated for foreclosure on March 16, 2011. RX-3.

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[1] References to Respondent's exhibits herein shall be denoted as "RX-#."
[2] Petitioner's then husband, Eric J. Miller, was a co-borrower on the note.

4. A third party purchased the home for $20,000.00 at foreclosure sale held on November 29, 2011. RX-3.

5. At the time of the sale, the amount due on the loan was $50,103.70, which reflects principal, interest, recoverable costs and late charges. RX-3.

6. After application of the sale proceeds, the amount unpaid on the loan was $30,045.18. RX-4.

7. A foreclosure fee of $434.16 was added to the account on May 29, 2012. RX-3.

8. USDA-RD offered to compromise the debt, but Petitioner could not comply with the offer and did not sign a compromise agreement.

9. Petitioner testified that she had filed at least one, and perhaps two bankruptcy petitions, but was not certain whether indebtedness relating to her home mortgage loan was discharged under the Bankruptcy Code.

10. Petitioner's account records suggest that the bankruptcy was dismissed without full discharge.

11. USDA-RD entered the outstanding balance on the account as a debt due from Petitioner, and referred to the United States Department of Treasury ("Treasury") for collection pursuant to law. RX-7.

11. Petitioner works full time, earning $8.50 per hour.

12. Petitioner supports her disabled adult child.

13. Petitioner's income and expenses reflect that she could not withstand garnishment at the maximum statutory rate of 15%.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Petitioner is indebted to USDA Rural Development in the amount of $30,479.34 exclusive of potential Treasury fees for the mortgage loan extended to her and her co-borrower.

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

4. The Petitioner's income and expenses cannot withstand wage garnishment at the statutory maximum rate of 15%.

5. Wage garnishment as not greater than 5% of Petitioner's wage may be implemented after ninety (90) days from the date of this Decision and Order.

6. The garnishment shall be deferred for a 90 day period because Petitioner may have information that pertains to the discharge of debt under bankruptcy law.

7. Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, Petitioner shall NOT be subjected to administrative wage garnishment until after ninety (90) days from the date of this Decision and Order.

Petitioner may request reconsideration of this Decision and Order should she locate and file with the Hearing Clerk information pertaining to the filing of bankruptcy petitions in the past.

The Hearing Clerk's address is: Hearing Clerk, Office of Administrative Law Judges, U.S. Department of Agriculture, 1400 Independence Avenue SW, Room 1031, South Building, Washington, D.C. 20250-9203, 202-720-4443; Fax: 202-720-9776; email: OALJHearingClerks@dm.usda.gov.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll-free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of amounts due from the government. Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA-RD, or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

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In re: AMANDA COGBURN, F/K/A AMANDA BOEN.
Docket No. 13-0138.
Decision and Order.
Filed February 6, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the January 2, 2013 request of Amanda Cogburn, formerly known as Amanda Boen ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on January 11, 2013, the parties were directed to provide information and documentation concerning the existence of the

debt and the matter was set for a telephonic hearing to commence on January 31, 2013.

On January 9, 2013, Respondent filed a Narrative, together with supporting documentation[1] identified as RX-1 through RX-10. That evidence was admitted to the record. On January 25, 2013, Petitioner filed a Consumer Debtor Financial Statement, identified as PX-1, and on January 29, 2013 filed supplemental documentation, identified as PX-2. Those exhibits are admitted to the record.

At the hearing, Petitioner represented herself and testified. Michelle Tanner represented USDA-RD and testified.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

1. On December 10, 2009 the Petitioner received a home mortgage loan in the amount of $117,300.00 from Arvest Mortgage ("Lender") to purchase residential real property located in Bentonville, Arkansas. RX-2.

2. Pursuant to an agreement with the Lender, USDA-RD had agreed to indemnify the Lender for any losses it experienced as the result of a default on the loan by Petitioner.

3. Prior to executing the promissory note and mortgage, Petitioner signed a Request for Single Family Housing Loan Guarantee, Form 1980-21 on November 7, 2009. RX-1.

4. Form 1980-21 establishes an agreement whereby Petitioner committed herself to repay USDA-RD for any losses incurred by the Lender due to Petitioner's default on the loan.

5. Petitioner defaulted on the loan and her account was accelerated. RX-3.

[1] References to Respondent's exhibits herein shall be denoted as "RX-#."

6. Lender was the highest bidder ($83,725.00) at a foreclosure sale held on December 16, 2010. RX-3.

7. The home was subsequently sold to a third party for $78,900.00. RX-5.

8. At the time of the sale, the amount due on the loan was $129,865.00, consisting of principal, interest, recoverable costs and late charges. RX-6: RX-7.

9. After application of the sale proceeds, USDA-RD paid to the Lender $48,759.83 as a loss claim. RX-6; RX-7.

10. USDA-RD offered to compromise the debt, but Petitioner could not comply with the terms of the offer and did not sign a compromise agreement. RX-9.

11. USDA-RD entered the outstanding balance on the account as a debt due from Petitioner, and referred to the United States Department of Treasury ("Treasury") for collection pursuant to law. RX-10.

12. Petitioner is currently working, but has had employment for only four (4) months.

Conclusions of Law

7. The Secretary has jurisdiction in this matter.

8. Petitioner is indebted to USDA Rural Development in the amount of $48,759.83 exclusive of potential Treasury fees for the mortgage loan extended to her and her co-borrower

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

10. The Petitioner has not been employed for the minimal amount of time necessary by statute to be subject to wage garnishment.

11. No wage garnishment may be implemented at this time.

12. Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, Petitioner shall NOT be subjected to administrative wage garnishment.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll-free number for Treasury's agent is 1-888-826-3127.

Petitioner is also encouraged to consult an attorney or debt collection expert regarding this debt.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of amounts due from the government.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

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ADMINISTRATIVE WAGE GARNISHMENT

In re: ANNA K. STEWART.
Docket No. 13-0127.
Decision and Order.
Filed February 2, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges upon the December 14, 2012 request of Anna K. Stewart, formerly known as Anna K. Fletcher ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"); and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On January 15, 2013, the parties were directed to exchange information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on January 31, 2013. The parties were further instructed to provide contact information for participation in the hearing.

USDA-RD filed a Narrative, together with supporting documentation, identified as RX-1 through RX-6. Petitioner did not file any documents, nor did Petitioner provide contact information as directed. However, Petitioner's phone number was included in her request for a hearing, and none of the notices or evidence sent to Petitioner was returned as undeliverable.

On the scheduled date for the hearing, telephone calls were placed to Petitioner and Petitioner did not answer the telephone. A message was left on an answering machine. At the end of the day, having received no response from Petitioner I held a hearing with the representative for USDA-RD, Michelle Tanner. Ms. Tanner testified and I admitted USDA-RD's exhibits to the record. Ms. Tanner credibly testified that information she had sent to the Petitioner was not returned.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On March 5, 2003, Petitioner obtained a loan from USDA-RD in the amount of $56,500.00 for the purchase of real property in Madison, Indiana. RX-1.

2. On that date, Petitioner also acquired a loan in the amount of $25,000.00 from Home Federal Bank, which represented qualified housing assistance from an entity other than USDA-RD. RX-1; Ms. Tanner's testimony.

3. Pursuant to USDA rules, USDA-RD subordinated its loan position to the Home Federal Bank.

4. Petitioner's loan fell into default and on November 10, 2011, the loan was accelerated for foreclosure. RX-2.

5. On December 6, 2011, USDA-RD was advised that a foreclosure sale initiated by the servicing company for Home Federal Bank was scheduled for January 26, 2012. RX-2.

6. USDA-RD bid on the property at the sale and purchased it for $42,405.00. RX-3.

7. The property was subsequently sold to a third party for $55,101.00. RX-3.

8. After paying the amount due to the other subsidizing entity, USDA-RD realized $30,557.55 as the result of the sale, which amount was credited to Petitioner's account on February 21, 2012. RX-3.

9. Prior to the sale, petitioner owed $53,615.42 on the account, consisting of principal, interest and fees. RX-3; RX-4.

10. USDA-RD offered to compromise the debt, but Petitioner did not complete and return the offer. RX-3.

11. Pursuant to law, USDA-RD referred the account balance of $23,057.87 to Treasury for collection on September 3, 2012. RX-3; RX-6.

Conclusions of Law

13. The Secretary has jurisdiction in this matter.

14. Petitioner is indebted to USDA Rural Development in the amount of $23,057.87 exclusive of potential Treasury fees.

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

16. Petitioner has provided no cause for why wage garnishment cannot be effected.

17. USDA-RD is entitled to administratively garnish the wages of the Petitioner at the statutory maximum rate of 15%.

18. Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of her disposable income.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll-free number for Treasury's agent is 1-888-826-3127.

Petitioner is also encouraged to consult an attorney or debt collection expert regarding this debt.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of amounts due from the government.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

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In re: ANDREA GARZA DUPRIEST.
Docket No. 13-0042.
Decision and Order.
Filed January 4, 2013.

AWG.

William Scazzero, Esq. for Petitioner.
Michelle Tanner for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

This matter is before me upon the request of Petitioner, Andrea Garza Dupriest, 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 administration of wage garnishment. On November 2, 2012, I issued a prehearing order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing. The Rural Development agency (RD), Respondent, complied with the discovery order with a Narrative filed, together with the supporting documentation RX-1 through RX-9 on November 18, 2012. At my request, RD updated RX-6 on February 1, 2013 which I now label as RX-6a. Petitioner filed her Narrative on January 14, 2013 and an updated financial statement on

January 17, 2010, which I now mark as PX-1 and PX-2, respectively. Michelle Tanner represented RD. William Scazzero, Esq. represented the Petitioner.

On January 16, 2013 at the appointed time, I conducted the oral hearing with the parties. The parties were sworn.

Findings of Facts

1. On October 31, 1994 Petitioner financed a home from USDA Rural Development in the amount of $54,880. RX-1.

2. On December 1, 2003, USDA Rural Development determined that Petitioner obtained an unauthorized loan. The records indicate that she used several Social Security numbers. (RX-2 @ page 7 of 18). The Agency adjusted the account as required under the regulation 7 C.F.R. part 3550 and accelerated the loan for foreclosure on January 22, 2004. RX-2 @ page 2 of 18 and RX 3.

3. Petitioner filed two Chapter 13 bankruptcy petitions which were both discharged for failure to comply with the Debtor's scheduled payments. RX-2 @ page 7 of 18.

4. A foreclosure sale was scheduled and held on May 4, 2004. RX-5, RX-8.

5. A third party purchased the home at the judicial sale for $53,997.40. RX-5 @ page 12 of 32, RX-8 @ page 3 of 4.

6. Prior to the sale, Petitioner owed $93,227.01, for principal, interest, and fees, plus additional foreclosure costs that were billed to the account in the amount of $319.75 and $31.88, for a total due of $93,578.64. RX-6a.

7. After the application of the sale proceeds, the amount left unpaid was $39,581.27. RX-6a.

8. The debt was referred to Treasury for collection on June 8, 2004. RX-5.

9. Subsequent collections by Treasury have reduced the amount now due to $33,419.05. RX-6a.

10. In addition, Petitioner owes as potential collection fees the amount of $9,357.33 for a total due of $42,776.38. RX-7.

11. A Financial Hardship Calculation was prepared.[1]

Conclusions of Law

1. Petitioner is indebted to the USDA Rural Development in the amount of $33,419.05 for the mortgage loan extended to her.

2. In addition, Petitioner is indebted for potential collection fees to the U.S. Treasury in the amount of $9,357.33 (28% of the current debt).

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

4. The Respondent is not entitled to administratively garnish the wages of Petitioner at this time.

5. After 12 months, the Respondent is entitled to review the Petitioners income and expenses and to make appropriate corrections to the garnished amount.

ORDER

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment at this time.

After 12 months, the Respondent may review the Petitioner's income and expenses and make appropriate corrections to the garnished amount.

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

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[1] The financial hardship calculation is not posted on the USDA website.

ADMINISTRATIVE WAGE GARNISHMENT

In re: KAREN L. WHITMIRE.
Docket No. 13-0103.
Decision and Order.
Filed February 6, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held as scheduled on February 5, 2013. Karen L. Whitmire, full name Karen Lee Whitmire, the Petitioner ("Petitioner Whitmire"), did not participate. [Petitioner Whitmire had no notice of the hearing; the Hearing Notice mailed to her on December 14, 2012 was returned by the U.S. Postal Service marked:

> "MOVED LEFT NO ADDRESS
> UNABLE TO FORWARD
> RETURN TO SENDER"]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Whitmire's Hearing Request, a letter over the signature of D. Ken Whitener, Certified Public Accountant, dated October 2, 2012; date-stamped November 7, 2012; is admitted into evidence, together with the accompanying court documents from the mortgage foreclosure action that he forwarded.

4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on January 7, 2013, and are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Whitmire bought a home in South Carolina in 2008, borrowing $92,820.00 to pay for it. RX 2. Petitioner Whitmire borrowed from JP Morgan Chase Bank, N.A. JP Morgan Chase Bank, N.A. is the parent company of Chase Home Finance LLC (the Servicing Lender). Frequently I refer to these entities as Chase, or the lender.

6. USDA Rural Development's position is that Petitioner Whitmire owes to USDA Rural Development $36,960.11 (as of December 18, 2012) (*see* RX 10, p. 3), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service Guarantee (*see* RX 1, esp. p. 2) for the loan made in 2008 ("the debt").

7. Potential Treasury collection fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on $36,960.11 would increase the current balance by $10,348.83, to $47,308.94. *See* RX 10, p. 3.

8. Petitioner Whitmire's position is that Petitioner Whitmire owes nothing to USDA Rural Development and is due a refund for amounts taken from her, because there is no valid debt. [Garnishment of Petitioner Whitmire's wages began in 2012; federal monies due to Petitioner Whitmire ($72.66) were also intercepted (offset). *See* RX 10, pp. 1-2.]

9. USDA Rural Development did pay a loss claim on the requested loan to the lender, $39,898.29, on January 20, 2011. RX 6, p. 7. This, the amount USDA Rural Development paid, is the amount USDA Rural Development seeks to recover from Petitioner Whitmire under the Guarantee (less the amounts already collected from Petitioner Whitmire, through garnishment and offset). *See* RX 10, especially pp. 1-2.

10.The Guarantee (RX 1) establishes an independent obligation of Petitioner Whitmire "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the

guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

11. Chase did not need to look to Petitioner Whitmire to pay the deficiency because it had the Guarantee. Chase looked to USDA Rural Development to be made whole under the Guarantee, and its claim was paid, $39,898.29, on January 20, 2011. RX 6, p. 7.

12. This case involves an administrative collection action brought by an agency of the United States government, USDA Rural Development. The rules that apply here, concerning a Guarantee by which Petitioner Whitmire promised to reimburse USDA Rural Development if it ("the Agency") paid a loss claim to Chase, are different from the rules that would have applied in South Carolina courts if Chase had sought to collect a deficiency. Administrative collections such as this do not require a valid judgment to support garnishment or offset.

13. USDA Rural Development is authorized to collect from Petitioner Whitmire as it has been doing here, administratively, pursuant to the Guarantee. This is in part because of the independent nature of the Guarantee; and in part because an agency of the United States government collecting administratively has rules that differ from those of the various jurisdictions in which the loans were made. USDA Rural Development did pay a loss claim on the requested loan to the lender: USDA Rural Development reimbursed the lender Chase $39,898.29, on January 20, 2011. RX 6, p. 7. That amount, $39,898.29, is what USDA Rural Development seeks to recover from Petitioner Whitmire under the Guarantee.

14. Here, though, I am troubled by the language in the court documents from the mortgage foreclosure action. Petitioner Whitmire, through her accountant, D. Ken Whitener, CPA, proved that Chase Home Finance, LLC, in court filings, waived the deficiency. The title of the Amended Complaint reads:

AMENDED
COMPLAINT
Foreclosure - Non-Jury

(Deficiency waived)

15. Paragraph 14 of the Amended Complaint reads:

"The Plaintiff [Chase Home Finance, LLC] demands no personal or deficiency judgment and any right to the same is specifically waived." (emphasis added).

16. While USDA Rural Development does not need a judgment in order to collect the loss claim, the waived language so dominates the Amended Complaint that further explanation was necessary to keep Petitioner Whitmire from being misled - - language to alert Petitioner Whitmire that she would be liable to repay the loss claim that would result if the sale of the property failed to pay the total debt plus attorneys' fees and other fees and costs.

17. Ironically, the Amended Complaint did mention that the loan "is guaranteed by the Rural Housing Service of the United States Department of Agriculture", in paragraph 3, but not to counteract the "Deficiency waived" language and not to warn Petitioner Whitmire that she remains liable to pay any shortfall. Rather, the language was used to explain that Petitioner Whitmire was denied an opportunity for modification under the Home Affordable Modification Program (HAMP). That language, too, is misleading; the lender could have given Petitioner Whitmire an opportunity for HAMP modification, by communicating with USDA.

18. I do not agree with Petitioner Whitmire's Accountant's assertion that the loan was canceled by the Order dated February 15, 2010; rather, the terms of the Order are quite clear that the mortgage lien is canceled. Nevertheless, I find that Chase's misleading language in the mortgage foreclosure action makes the Guarantee not enforceable.

19. I find that, instead of benefitting from the Guarantee, as it easily could have, Chase Home Finance, LLC failed to protect the Government's interest during foreclosure and thereby rendered the loan note Guarantee unenforceable. I find that because of the actions of the lender Chase Home Finance, LLC during foreclosure, waiving the deficiency, instead of maximizing recovery, Chase Home Finance, LLC

prevented USDA Rural Development from collecting from Petitioner Whitmire. *See also* 7 C.F.R. § 1980.301, et seq., especially 7 C.F.R. § 1980.308 and 7 C.F.R. § 1980.374.

20. Similarly, Chase Home Finance, LLC waived the deficiency in a case involving a Guarantee on a loan for a home in South Carolina in In re Ronald Haynes. In that case, my colleague, Judge Janice K. Bullard, found that USDA Rural Development had failed to establish the existence of a valid debt.

See http://www.dm.usda.gov/oaljdecisions/120516_12-0272_DO_RonaldHaynes.pdf.

Findings, Analysis and Conclusions

21. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Whitmire and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Whitmire owes a valid debt to USDA Rural Development).

22. Chase Home Finance, LLC misled Petitioner Whitmire in the mortgage foreclosure action: (a) the Deficiency waived language dominated the Amended Complaint; and (b) the Amended Complaint included no explanation to alert Petitioner Whitmire that she would be liable to reimburse any loss claim paid, because the loan was guaranteed by the Rural Housing Service of the United States Department of Agriculture.

23. In general, USDA Rural Development may collect administratively pursuant to a Guarantee, even where NO judgment has been entered against a borrower and NO personal deficiency has been established.

24. Here, however, the lender Chase, by misleading Petitioner Whitmire in the mortgage foreclosure action, prevented USDA Rural Development from collecting reimbursement from Petitioner Whitmire on the $39,898.29 loss claim USDA Rural Development paid the lender Chase.

25. Here, the lender Chase has prevented collection, even administratively. In my opinion, Chase Home Finance, LLC, having done so, should not have been paid $39,898.29, or anything, on its loss claim (RX 6, p. 7), and USDA Rural Development would do well to reclaim its money.

26. There is no valid debt owed by Petitioner Whitmire to USDA Rural Development.

27. Garnishment is not authorized. Offset of Petitioner Whitmire's income tax refunds or other Federal monies payable to the order of Ms. Whitmire is not authorized.

28. Any amounts collected from Petitioner Whitmire, including collections from Treasury (offset plus garnishment), shall be returned to Petitioner Whitmire.

ORDER

29. USDA Rural Development shall cancel the debt as to Petitioner Whitmire.

30. USDA Rural Development, and those collecting on its behalf, shall return to Petitioner Whitmire any amounts already collected through garnishment or offset.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, with a courtesy copy sent to Petitioner Whitmire's Accountant at the address shown below.

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In re: ZACKERY S. BROCKBANK, N/K/A ZACKERY S. HILL.
Docket No. 13-0131.
Decision and Order.
Filed February 7, 2013.

AWG.

ADMINISTRATIVE WAGE GARNISHMENT

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on February 7, 2013. Zackery S. Hill, formerly known as Zackery S. Brockbank, the Petitioner ("Petitioner Hill") participated, representing himself (appearing pro se).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Hill's Hearing Request dated November 29, 2012, timely FAXed on December 3, 2012 is admitted into evidence, together with the testimony of Petitioner Hill.

4. USDA Rural Development's Exhibits RX 1 through RX 7, plus Narrative, Witness & Exhibit List, filed on December 19, 2012, are admitted into evidence, together with the testimony of Michelle Tanner.

5. As of November 8, 2012, Petitioner Hill owed to USDA Rural Development a balance of $3,719.11 in repayment of the United States Department of Agriculture / Rural Housing Service loan dated in 2005 (and disbursed in increments), for a home in Utah. The loan balance ("the debt") is now unsecured.

6. Garnishment has apparently begun, so the balance Petitioner Hill owes to USDA Rural Development is repeatedly being reduced. As will be seen later in this Decision, the amounts garnished from Petitioner Zackery Hill's pay must be returned to him, so the balance may go back to $3,719.11.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on $3,719.11 would increase the current balance by $1,041.35, to $4,760.46. *See* RX 7.

8. The amount Petitioner Hill borrowed beginning in 2005 was $143,000.00. RX 1. When the home was sold in a short sale on April 24, 2012, the debt was $140,834.84:

$138,392.55	Principal Balance
$ 1,777.83	Interest Balance
$ 474.00	Recoverable costs (such as unpaid taxes, insurance, foreclosure costs)
$ 3.77	Interest on recoverable costs
$ 186.69	Late Charges
$140,834.84	Total Amount Due

RX 6, and the testimony of Michelle Tanner.

9. Proceeds from sale of the home reduced the Total Amount Due by $136,045.81. RX 6. The Escrow Balance reduced the Total Amount Due by another $1,069.92. RX 6. The debt was thereby reduced to $3,719.11 unpaid (as of November 8, 2012) (excluding the potential remaining collection fees). *See* RX 6, RX 7, and the testimony of Michelle Tanner.

10. Interest stopped accruing, either as of the date of the sale, or when the sale proceeds were applied on the loan in about May 2012. No additional interest will accrue, which makes repaying the debt more manageable.

11. Through offsets of income tax refunds, Petitioner Hill and his co-borrower pay a smaller amount toward collection fees than they will if they make payments (a $17.00 flat fee for the cost of collection through offset, compared to as much as 28% for the cost of collection for other payments), so I encourage Petitioner Hill and his co-borrower to allow offsets of income tax refunds to repay the debt. Petitioner Hill and his co-borrower paid a substantial portion of the debt through last year's income tax refunds, which were applied to reduce the loan in March 2012; prior to the short sale proceeds being applied to reduce the loan in

about May 2012. Petitioner Hill's income tax refund was $1,515.00 (*see* RX 4, p. 23); and her income tax refund was $6,407.00 (*see* RX 4, p. 20).

12. Petitioner Hill may have recourse against his co-borrower, his former wife, for sums he is required to pay that are her responsibility (and vice versa). Nevertheless, the debt remains his and his co-borrower's joint-and-several obligation. Petitioner Hill still owes the balance of $3,719.11 unpaid (as of November 8, 2012, excluding the potential remaining collection fees), and USDA Rural Development may collect that amount from him. Or, USDA Rural Development may collect that amount from her; or some from each of them. [Her case is also pending here in the USDA Office of Administrative Law Judges, Docket No. 13-0074.]

13. Garnishment of Petitioner Zackery Hill's pay should not have already begun, because his Hearing Request was not "Late." The "Notice of Intent to Initiate Administrative Wage Garnishment Proceedings," dated November 12, 2012, gave Petitioner Hill the following deadline to request a hearing:

REQUEST A HEARING. You may request a hearing from the Federal Agency by completing and mailing the enclosed Request for Hearing to the address listed below (U.S. Department of the Treasury, in Birmingham, Alabama). If we receive your written request for a hearing on or before **December 3, 2012** (emphasis added), Treasury will not issue a wage garnishment order on behalf of the Federal Agency until your hearing is held and a decision is reached.

It appears to me that Petitioner Hill's Hearing Request dated November 29, 2012 was FAXed on December 3, 2012, and was consequently not Late, even if Treasury had expected it to arrive by mail in a post office box in Birmingham, Alabama. Consequently, the amounts garnished from Petitioner Zackery Hill's pay will have to be returned to him.

Discussion

14. Garnishment of Petitioner Hill's disposable pay is not authorized through March 2014. Beginning April 2014, garnishment is authorized. Petitioner Hill, if you wish to contact Treasury's collection agency to

negotiate a compromise of the debt, you may telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is 1-888-826-3127. Petitioner Hill, you may want to request apportionment of debt between you and the co-borrower. Petitioner Hill, you may choose to offer to pay through solely offset of income tax refunds, perhaps with a specified amount for a specified number of years. Petitioner Hill, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Hill, you may wish to include someone else with you in the telephone call when you call.

Findings, Analysis and Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Hill and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

16. Petitioner Hill owes the debt described in paragraphs 5 through 12.

17. Garnishment of Petitioner Hill's disposable pay is not authorized through March 2014. Beginning April 2014, garnishment up to 15% of Petitioner Hill's disposable pay is authorized. 31 C.F.R. § 285.11.

18. Any amounts collected through garnishment of Petitioner Hill's pay prior to implementation of this Decision shall be returned to Petitioner Hill. [The balance can be expected to increase when amounts taken from Petitioner Hill's pay are returned to him.]

19. Repayment of the debt may occur through offset of Petitioner Hill's income tax refunds or other Federal monies payable to the order of Mr. Hill.

ORDER

20. Until the debt is repaid, Petitioner Hill shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

21. USDA Rural Development, and those collecting on its behalf, are not authorized to proceed with garnishment through March 2014. Beginning April 2014, garnishment up to 15% Petitioner Hill's disposable pay is authorized. 31 C.F.R. § 285.11.

22. Any amounts already collected prior to implementation of this Decision through garnishment of Petitioner Hill's pay shall be returned to Petitioner Hill.

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

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In re: JASON JOHNSON.
Docket No. 13-0093.
Decision and Order.
Filed February 8, 2013.

AWG.

Norma Wells, Esq. for Petitioner.
Michelle Tanner for RD (standing in for Giovanna Leopardi).
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On December 11, 2012, a prehearing order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for telephonic hearing. The hearing was reset by agreement to January 30, 2013.

On the date and time set for the hearing, both parties were present. Michelle Tanner (standing in for Giovanna Leopardi) represented Rural Development (RD) and Mr. Johnson was represented by Norma Wells,

Esq. Ms. Johnson was also present. The parties were sworn. Petitioner acknowledged receiving RD's narrative and exhibits RX (1-9) which were filed December 18, 2012. Petitioner submitted a Narrative via various e-mail attachments and submitted a Financial Statement (The final corrected version being dated January 30, 2013). In addition, during the oral testimony, Mr. Johnson added a $40 per month water bill. Ms. Johnson is not employed outside the home. There are three minor children as dependents. I prepared a Financial Hardship Calculation.[1] Mr. Johnson is a police officer in his city and has been employed for more than one year. He advises that the state of Alabama requires pension contributions of their employees.

Findings of Fact

1. On April 25, 2005, Petitioner obtained a home mortgage loan in the amount of $79,048.00, which was guaranteed by USDA for a property in Crossville, Alabama. RX-2.

2. Prior to the signing of the note, the borrower also signed RD form 1980 – 21, which is the housing loan guarantee form. RX-1.

3. The borrower defaulted on the mortgage on/about February 28, 2008. RX-2 @ p. 18 of 24.

4. At the time of the default, the unpaid balance was $75,463.23 as principal and $5,351.74 as interest for a total of $80,814.97. RX-7.

5. The property was sold in a judicial sale on October 14, 2008 with the contract price of $68,850.00. RX-3.

6. After consideration of the various expenses incurred, USDA RD paid a loss claim to JP Morgan Chase bank, the servicing lender, in the amount of $23,371.99. Narrative, RX-7.

7. On July 20, 2009, the borrower was sent a 60 day notification of the debt at the most at the most recent address on file. RX-8 @ p. 4. The debt was referred to treasury on November 7, 2011. RX-8.

[1] The Financial Hardship Calculation is not posted on the OALJ website.

8. Treasury has collected $4,495.00. RX-8.

9. The remaining debt of $13,759.07 of the borrower remains due. RX-9.

10. In addition, borrower owes potential collection fees of $4,127.72 for a total of $17,886.79.

11. Petitioner suggested a financial hardship.

Conclusions of Law

Petitioner is liable to USDA Rural Development in the amount of $13,759.07 for the mortgage loan extended to him.

In addition, Petitioner is liable to USDA Rural Development for potential collection fees in the amount of $4,127.72.

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

Rural Development is not entitled to the administratively garnish the wages of the Petitioner at this time.

ORDER

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment.

RD may review the financial situation of the Petitioner in 12 months. Petitioner is under an obligation to notify RD of substantial changes in his financial situation and to notify RD of any address changes.

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

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In re: ROBERT BELLAVANCE.
Docket No. 13-0041.
Decision and Order.
Filed February 14, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on January 22 and February 13, 2013. Robert J. Bellavance, the Petitioner ("Petitioner Bellavance") participated in February, representing himself (appearing pro se).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated both in January and in February, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Bellavance's Hearing Request dated October 1, 2012 is admitted into evidence, together his Consumer Debtor Financial Statement and Earnings Statements (filed February 12, 2013), together with the testimony of Petitioner Bellavance.

4. USDA Rural Development's Exhibits RX 1 through RX 7, plus Narrative, Witness & Exhibit List (filed on November 16, 2012), are admitted into evidence, together with RX 8 and RX 9 (filed on December 4, 2012), together with the testimony of Michelle Tanner.

5. As of November 2, 2012, Petitioner Bellavance owed to USDA Rural Development a balance of $52,411.75 (RX 7, p. 2) in repayment of the United States Department of Agriculture / Farmers Home Administration loan made in 1992 to Debra J. Tavernier and assumed in 1995 by Petitioner Bellavance and his then-wife and co-borrower, Jolynn

Bellavance, for a home in Maine. The loan balance ("the debt") is now unsecured.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on $52,411.75 would increase the current balance by $14,675.29, to $67,087.04. RX 7, p. 2.

7. Petitioner Bellavance and his then-wife and co-borrower, Jolynn Bellavance, borrowed an additional $2,480.00 in 1995 (RX 1, p. 3-4) to finance the home. Petitioner Bellavance has already single-handedly repaid that loan in full (RX 7, p. 7).

8. The amount borrowed (both loans) in 1995 was $81,280.00 [$78,800.00 on the Assumption (RX 8); and $2,480.00 on the second loan (RX 1, p. 3-4)]. The payments were not kept current, and in 1997, both loans were reamortized. RX 9. The loans had become delinquent, and reamortization made the loans current, by adding the delinquent amounts to the principal balances. The principal amounts due became $81,480.19 (RX 9, p. 1); and $2,452.05 (RX 9, p. 3). The reamortizations did not change the amounts owed.

9. Again, the loans became delinquent. Interest was not paid current for years. Taxes and insurance were not paid current for years. The "next payment due date" was October 12, 1998, meaning that more than 3 years of non-payments had added up by the time of the foreclosure sale. The home was sold for $60,000.00 in the foreclosure sale on January 15, 2002; the debt then totaled $115,405.06. RX 6.

$ 82,826.51	Principal Balance (both loans)
$ 22,441.40	Interest Balance (both loans)
$ 10,137.15	Recoverable costs (such as unpaid taxes, insurance, foreclosure costs)
$115,405.06	Total Amount Due
=========	

RX 6 shows the precise accounting; the summary shown here is a simplification.

10. Interest stopped accruing (either on the date of the foreclosure sale, or when the sale proceeds were applied on the loan), in about January 2002. No additional interest has accrued since then, and none will accrue, which makes repaying the debt more manageable.

11. Proceeds from sale of the home at the foreclosure sale ($60,000.00) paid all but $55,405.06 [$52,411.75 on the Assumption; and $2,993.31 on the second loan]. Both loans were referred to Treasury for collection in September 2005. Treasury chose to collect the second loan first; Petitioner Bellavance has paid-in-full the second loan. RX 7, pp. 4-7.

12. Treasury, which was ready to start collecting the $52,411.75 (the Assumption) in September 2012, wrote to Petitioner Bellavance. Treasury identifies the balance as $67,087.04, as it may require $67,087.04 to pay the $52,411.75. RX 7, p. 2. [The potential collection fees for the $52,411.75 to become paid-in-full, add another $14,675.29. See paragraph 6.]

13. As between Petitioner Bellavance and his then-wife and co-borrower, Jolynn Bellavance, there may be recourse for one against the other, depending on whether their divorce orders specified who would pay this debt or whether other legal principles apply to determine which of them is responsible for what portion of this debt. If either of them is required to pay sums that are the responsibility of the other, the one who pays may be entitled to reimbursement from the other. Either way, USDA Rural Development is not hindered from collecting in full from either of them. The debt remains Petitioner Bellavance's and his co-borrower's joint-and-several obligation.

14. Petitioner Bellavance owes the balance of $52,411.75 (as of November 2, 2012, excluding the potential remaining collection fees), and USDA Rural Development may collect that amount from him. Or, USDA Rural Development may collect that amount from the former Jolynn Bellavance; or some from each of them.

15. Petitioner Bellavance's Consumer Debtor Financial Statement and testimony show that he is heavily in debt. Petitioner Bellavance is negotiating the terms of a divorce from his current wife, and he may be

agreeing to terms he cannot afford. His attorney's fees are accumulating, more than $2,700.00 for the first year of work on the divorce. Petitioner Bellavance owes the Internal Revenue Service more than $10,000.00 in delinquent federal income taxes; he owes the State of Maine more than $1,000.00 in delinquent state income taxes. Petitioner Bellavance owes on motor vehicles more than they are worth; and he owes more than $3,000.00 on a personal loan. These obligations are in addition to the $52,411.75 he owes to USDA Rural Development, in addition to his reasonable and necessary living expenses.

16. Petitioner Bellavance is paid every week. Garnishment at 15% of Petitioner Bellavance's disposable pay would currently cause Petitioner Bellavance financial hardship. To ease the hardship, potential garnishment to repay the USDA Rural Development debt shall be limited to 0% of Petitioner Bellavance's disposable pay through August 2013; then up to 5% of Petitioner Bellavance's disposable pay beginning September 2013 through August 2015; then up to 10% of Petitioner Bellavance's disposable pay beginning September 2015 through August 2017; then up to 15% of Petitioner Bellavance's disposable pay thereafter. 31 C.F.R. § 285.11.

Discussion

17. Petitioner Bellavance, after you receive my decision, and Treasury has had time to receive a copy, you may want to call Treasury's collection agency to negotiate the repayment of the debt. Petitioner Bellavance, this will require you to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is 1-888-826-3127. Petitioner Bellavance, you may want to request apportionment of debt between you and the co-borrower. Petitioner Bellavance, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

18.The Secretary of Agriculture has jurisdiction over the parties, Petitioner Bellavance and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

19.Petitioner Bellavance owes the debt described in Paragraphs 5 through 14.

20.To prevent financial hardship, garnishment shall be limited as follows: through August 2013 garnishment is limited to 0% of Petitioner Bellavance's disposable pay; beginning September 2013 through August 2015 garnishment is limited to up to 5% of Petitioner Bellavance's disposable pay; beginning September 2015 through August 2017 garnishment is limited to up to 10% of Petitioner Bellavance's disposable pay; and thereafter, garnishment up to 15% of Petitioner Bellavance's disposable pay is authorized. 31 C.F.R. § 285.11.

21.I am not ordering any amounts already collected prior to implementation of this Decision, whether through offset or garnishment of Petitioner Bellavance's pay, to be returned to Petitioner Bellavance.

22.Repayment of the debt may occur through offset of Petitioner Bellavance's income tax refunds or other Federal monies payable to the order of Mr. Bellavance.

ORDER

23.Until the debt is repaid, Petitioner Bellavance shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

24.USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to 0% of Petitioner Bellavance's disposable pay through August 2013; then up to 5% of Petitioner Bellavance's disposable pay beginning September 2013 through August 2015; then up to 10% of Petitioner Bellavance's disposable pay beginning September 2015 through August 2017; then up

to 15% of Petitioner Bellavance's disposable pay thereafter. 31 C.F.R. § 285.11.

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

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In re: DEBORAH A. CREAGH.
Docket No. 13-0157.
Decision and Order.
Filed February 14, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on February 13, 2013. Deborah A. Creagh ("Petitioner Creagh"), participated, representing herself (appeared pro se).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), also participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Creagh's Exhibits PX 1 through PX 12 are admitted into evidence; together with her email memo to Treasury dated January 14, 2013; together with her Hearing Request (also an email memo to Treasury) dated December 7, 2012; together with the testimony of Petitioner Creagh and the testimony of her additional witness Jamie Kaye Bugg.

4. USDA Rural Development's Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List (filed on January 28, 2013), are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Creagh owed to USDA Rural Development $262.62 (as of February 8, 2013) in repayment of a USDA Farmers Home Administration loan borrowed in 1995 for a home in Texas, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Ex., esp. RX 1, RX 6, and Michelle Tanner's testimony.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on $262.62, would increase the current balance by $73.53, to $336.15. Michelle Tanner's testimony.

7. The amount Petitioner Creagh borrowed from USDA Farmers Home Administration in 1995 was $53,980.00. RX 1. The loan became delinquent and was reamortized in 1999. Reamortization made the loan current, by adding the delinquent amount to the principal balance. Reamortization did not change the total amount owed, which all became principal. Because of the reamortization, more principal was owed on January 7, 1999 than had been owed at the beginning: $59,726.52 principal owed. RX 1, pp. 4-5.

8. Payments were not kept current, and the loan was accelerated for foreclosure on October 21, 1999. RX 2. The Notice of Acceleration (and of Intent to Foreclose) shows $59,696.15 unpaid principal and $3,755.14 unpaid interest (as of October 21, 1999). RX 2, p. 1. This did not include other costs, such as unpaid insurance and unpaid real estate taxes that had to be advanced by USDA Rural Development.

9. A foreclosure sale was not held, because a short sale was successfully completed on February 18, 2000, yielding $48,043.94 to reduce the debt. RX 4.

10. Before the short sale proceeds were applied to reduce the debt, the debt amount was $62,006.59. RX 4.

$ 56,928.29	unpaid principal

$ 5,078.30	unpaid interest (to February 18, 2000)
$ 62,006.59	debt before short sale proceeds applied
=========	

RX 4.

11. The debt amount would have been even $4,162.35 higher, except that on February 7, 2000 (a week-and-a-half before the short sale), Petitioner Creagh's $4,162.35 income tax refund was intercepted and applied to reduce the debt. RX 4.

12. Proceeds from the short sale ($48,043.94) were applied to reduce the debt. RX 4. An escrow refund ($8.89) was applied to reduce the debt. RX 4. This left $13,953.76 still to be paid. Then a $35.00 foreclosure fee was paid. RX 4. This left $13,988.76 still be paid by Petitioner Creagh.

13. Interest stopped accruing when the short sale proceeds were applied to reduce the debt, in about February 2000. No additional interest has accrued since then, and none will accrue, which made repaying the debt more manageable.

14. Petitioner Creagh missed the opportunity for "debt settlement" with USDA Rural Development, even though USDA Rural Development tried 3 times - - 3 separate mailings - - to give her that opportunity. USDA Rural Development Narrative. RX 3, pp. 11, 13; RX 5. So, $15,086.86 was referred to Treasury for collection at the end of 2001 [$13,988.76, plus $1,244.75 additional interest erroneously added, minus Petitioner Creagh's $146.65 income tax refund, which had been intercepted and applied to reduce the debt]. RX 4.

15. When Michelle Tanner prepared the USDA Rural Development's Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List, she discovered and corrected the $1,244.75 mistake - - subtracting back out that interest that had been erroneously added. Thank you to Ms. Tanner for her work, and congratulations to Petitioner Creagh on being relieved of that portion of the debt. More importantly, congratulations to Petitioner Creagh on her many, many payments to complete repayment

of the debt. RX 6 shows how her pay has diligently reduced the balance, which was $262.62 (excluding potential collection fees) as of February 8, 2013.

16. When Petitioner Creagh missed the opportunity for "debt settlement," and the debt was referred to Treasury, potential collection costs were added to what Petitioner Creagh would have to pay. For example, in order for Treasury to collect enough to forward $13,842.11 to USDA Rural Development, it could cost Petitioner Creagh as much as $17,717.90. Treasury would identify the balance as $17,717.90, because, except for offsets, $1.28 may be required for every $1.00 that will go to USDA Rural Development. [The potential collection fees needed for $13,842.11 to become paid-in-full, may require another $3,875.79 (28%). *See* paragraph 6.]

Discussion

17. During the hearing Petitioner Creagh was concerned that she had had one other large (in the neighborhood of $4,000.00) income tax refund that had been intercepted in about 1999 or 2000? - - and she wanted to know that she had been given credit for it. Her records were incomplete because of an apartment fire. When Petitioner Creagh has received from the Internal Revenue Service the documentation showing her refund amounts and dates, she may, if she has further questions, forward that to USDA Rural Development, Michelle Tanner, with her specific inquiry.

Findings, Analysis and Conclusions

18. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Creagh and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

19. Petitioner Creagh owes the debt described in paragraphs 5 through 16.

20. Garnishment is authorized, up to 15% of Petitioner Creagh's disposable pay. 31 C.F.R. § 285.11.

21. I am not ordering any amounts already collected prior to implementation of this Decision, whether through offset or garnishment of Petitioner Creagh's pay, to be returned to Petitioner Creagh.

22. Repayment of the debt may occur through offset of Petitioner Creagh's income tax refunds or other Federal monies payable to the order of Ms. Creagh.

ORDER

23. Until the debt is repaid, Petitioner Creagh 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).

24. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment up to 15% of Petitioner Creagh's disposable pay. 31 C.F.R. § 285.11.

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

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In re: JOSEPH McVENE.
Docket No. 12-0510.
Decision and Order.
Filed February 20, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the July 3, 2012 request of Joseph McVene ("Petitioner") for a hearing to address the existence or amount of a debt

alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 2, 2012, the parties were directed to provide information and documentation concerning the existence of the debt and the matter was set for a telephonic hearing. Subsequently, Petitioner requested a continuance, which was granted by Order issued August 31, 2013. The hearing was rescheduled for October 3, 2012.

The Respondent filed a Narrative, together with supporting documentation[1]. Petitioner failed to supplement the record with documents regarding his loan. Considering the length of time that I the record was held open without supplemental evidence, I find it appropriate to close the record. Petitioner represented himself and Michelle Tanner represented USDA-RD.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

1. On December 15, 2009, the Petitioner received a home mortgage loan[2] in the amount of $47,780.00 to purchase residential real property located in Forest City, North Carolina. RX-2.

2. Petitioner signed an agreement to repay USDA-RD for any loss paid to the Lender pursuant to USDA-RD's guarantee loan program. RX-1.

3. The Petitioner experienced a loss of income due to his wife's illness and received a three-month forbearance on paying his loan. RX-2.

4. Petitioner and his wife eventually defaulted on the loan and Lender JP Morgan Chase Bank foreclosed on the property, acquiring it at a foreclosure sale held on July 15, 2009. RX-3.

5. The property was sold to a third party on May 14, 2010 for $17,000.00.

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[1] References to Respondent's exhibits herein shall be denoted as "RX-#."

[2] Petitioner obtained the loan with his wife, from whom he is now separated.

6. The amount due at the time of the foreclosure sale was $ 51,841.36, consisting of principal, interest, advances, and costs. RX-6.

7. After application of the value estimated by USDA-RD, the amount unpaid on the loan was $39,074.50. RX-6.

8. USDA-RD paid a loss claim to the Lender of $39,074.50 and referred the account to U.S. Department of Treasury ("Treasury") for collection. RX-6; RX-8.

9. Income tax refunds due to Petitioner and his wife have been intercepted by Treasury and applied to the balance of the account.

10. Petitioner's wages have been garnished and applied to his account.

Conclusions of Law

19. The Secretary has jurisdiction in this matter.

20. Petitioner is indebted to USDA Rural Development in the amount of $39,074.50, exclusive of potential Treasury fees for the mortgage loan extended to him and his wife.

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

22. The Petitioner's request for a hearing was not timely filed, and therefore, his wages were subjected to garnishment at the maximum statutory rate of 15%.

23. Petitioner's necessary and fixed expenses severely limit his disposable income, which cannot support wage garnishment at the maximum rate.

24. Petitioner's income can withstand garnishment at a reduced rate of 5%.

25. Treasury shall remain authorized to undertake all other appropriate collection action.

ORDER

For the foregoing reasons, Petitioner shall be subjected to administrative wage garnishment at this time, at the reduced rate of 5% of his disposable income.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

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

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ADMINISTRATIVE WAGE GARNISHMENT

In re: CORTNEY L. BARBER.
Docket No. 13-0107.
Decision and Order.
Filed February 21, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of debt alleged to be due, and if established, the terms of any repayment prior to the imposition of an administrative wage garnishment. On December 11, 2012, a prehearing order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of debt, and setting the matter for telephonic hearing on January 29, 2013.

At the time and place set for the hearing, both parties were present. Giovanna Leopardi representative Rural Development (RD) and Miss Barber was self-represented. The parties were sworn.

In her petition for rehearing, Miss Barber requested to be considered for a financial hardship calculation. She also alleged that prior to the loan, RD had a responsibility to notify her about deficient construction that allowed the slab floor to buckle and crack, thus causing the house to be condemned for occupation. Her house was determined to be in a Class "B" flood zone which FEMA defines as between 100 year and 500 year flood region. RX-3 @ p. 10 of 11. There was no flood evidence presented. An inspection report dated June 2010 stated that the house was structurally sound. RX 7 @ 3 of 3. Petitioner stated that her geographical area suffered an "extra-ordinary" drought in the summer of 2011. RX-8 @ 10 of 19. She stated that after damages became visible, persons inspecting her house pointed out that the slab had no reinforcing steel. RX-8 @ 10 of 19. There is no evidence submitted opining the cause and effect of the lack of integral strength of the foundation slab by

recognized experts. Publically available information suggests that extreme changes in moisture content within foundation soils can result in damaging settlement. http://www.sciencedirect.com/science/article/pii/S0020722502002380.

RD's exhibit follows its guidelines which state that "the borrower will be responsible for making inspections necessary to protect the borrower's interest. Agency inspections are not to assure the borrower that the house is built in accordance with the plans and specifications. The inspections create or imply no duty or obligation". RX-9 @ p. 1 of 3. RD's exhibits suggest that Ms. Barber owned the property as early as December 2, 2009. RX-6 @ p. 2 of 19. Ms. Barber has been employed more than one year as a Home Health Care worker. She has one outstanding personal loan. She has a Sallie Mae school loan and has prior medical expenses and no other garnishments. She lives modestly.

Findings of Fact

1. On August 10, 2010, petitioner Cortney Barber obtained a loan directly from USDA Rural Development in the amount of $95,701. RX-1.

2. The Petitioner became delinquent and on/before March 27, 2012, the loan was accelerated due to monetary default. RX-2 @ p. 11 of 32.

3. The property was determined to be non-inhabitable by RD (RX-3 @ p. 10 of 11) and the house and lot were sold at the price of an empty lot for $4,100 to a third-party purchaser in a short sale on/about March 27, 2012. RX-2 @ p. 11 of 33.

4. The Petitioner owed $94,127.34 prior to the short sale. RX-4 @ p. 10 of 23.

5. After the proceeds from the short sale were applied, the Petitioner owed $89,808.65. RX-4 @ p. 10 of 23.

6. A debt settlement application was completed by the Petitioner, but the settlement did not transpire. RX-4 @ p.22 of 23.

7. The debt was transferred to Treasury for further collection on July 9, 2012. The Petitioner currently owes $89,808.65. RX-5 @ p. 2 of 3.

8. In addition, the Petitioner owes $25,146.42 in potential collection fees. RX-5 @ p. 2 of 3.

9. The Petitioner submitted her financial statement and I prepared a Financial Hardship Calculation.[1] I also reviewed her debt settlement application financial statement.

Conclusions of Law

Petitioner is liable to the USDA Rural Development in the amount of $89,808.65 for the mortgage loan extended to her.

In addition, Petitioner is liable to the USDA Rural Development in the amount of $25,146.42 for potential collection fees.

All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. § 285.11 have been met. Pursuant to the Financial Hardship Calculation, Rural Development is not entitled to administratively garnish the wages of Petitioner at this time.

ORDER

For the foregoing reasons, the wages of petitioner shall be not subjected to administrative wage garnishment at this time. After one year, RD may reconsider the Petitioner's financial position.

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

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[1] The Financial Hardship Calculation is not posted on the OALJ website.

In re: PAULA HENDON.
Docket No. 13-0076.
Decision and Order.
Filed February 22, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on January 22, 2013. Paula Hendon, full name Paula Kay Hendon, the Petitioner ("Petitioner Hendon") participated, representing herself (appearing pro se).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Hendon's Hearing Request dated October 25, 2012 is admitted into evidence, together with the testimony of Petitioner Hendon. The record was held open through February 15 (Friday) 2013, for Petitioner Hendon to file with the Hearing Clerk and copy to Michelle Tanner, records from her current employer and her previous employer that document the amounts taken from her pay by garnishment, but Petitioner Hendon filed nothing.

4. USDA Rural Development's Exhibits RX 1 through RX 6 (filed on November 23, 2012 and on January 30, 2013), plus Narrative, Witness & Exhibit List, are admitted into evidence, together with the testimony of Michelle Tanner.

5. Judge Victor W. Palmer's Decision and Order filed October 20, 2010 (RX 4) determined Petitioner Hendon's indebtedness to USDA Rural

Development. Judge Palmer also determined that the maximum "that may be garnished from Petitioner's wages is $49.50 per month." RX 4, p. 2. Petitioner Hendon changed jobs, and the garnishment amounts increased.

6. Petitioner Hendon owes to USDA Rural Development $971.29 (as of January 29, 2013) in repayment of a USDA Rural Housing Service loan borrowed in 2003 for a home in Texas, the balance of which is now unsecured ("the debt"). See USDA Rural Development Ex. esp. RX 1 and RX 6.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on $971.29 would increase the balance by $271.97, to $1,243.26. RX 6, p. 3.

8. To prevent financial hardship, potential garnishment to repay "the debt" (*see* Paragraph 6) must be limited to up to 7% of Petitioner Hendon's disposable pay through September 2014; then, beginning October 2014, up to 10% of Petitioner Hendon's disposable pay. 31 C.F.R. § 285.11.

9. Petitioner Hendon has nearly paid the debt in full but may still want to negotiate the disposition of the remaining balance with Treasury's collection agency.

Discussion

10. Garnishment is authorized in limited amount. See paragraph 8. Petitioner Hendon, you may want to telephone Treasury's collection agency to negotiate the repayment of the remaining debt. Petitioner Hendon, this will require you to telephone the collection agency after you receive this Decision. The toll-free number for you to call is 1-888-826-3127. Petitioner Hendon, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Hendon, you may choose to offer to pay through solely offset of income tax refunds, perhaps with a specified amount for a specified number of years. Petitioner Hendon, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Hendon and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Garnishment up to 7% of Petitioner Hendon's disposable pay is authorized through September 2014; thereafter, garnishment up to 10% of Petitioner Hendon's disposable pay is authorized. 31 C.F.R. § 285.11.

13. I am not ordering any amounts already collected prior to implementation of this Decision, whether through offset or garnishment of Petitioner Hendon's pay, to be returned to Petitioner Hendon.

14. Repayment of the debt may occur through offset of Petitioner Hendon's income tax refunds or other Federal monies payable to the order of Ms. Hendon.

ORDER

15. Until the debt is repaid, Petitioner Hendon 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).

16. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment up to 7% of Petitioner Hendon's disposable pay through September 2014. Beginning October 2014, garnishment up to 10% of Petitioner Hendon's disposable pay is authorized. 31 C.F.R. § 285.11.

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

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ADMINISTRATIVE WAGE GARNISHMENT

In re: PAMELA F. BAILEY, N/K/A PAMELA KELLY.
Docket No. 13-0040.
Decision and Order.
Filed February 25, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on January 22, 2013. Pamela F. Kelly, formerly known as Pamela F. Bailey, the Petitioner (Petitioner Kelly), who represents herself (appears pro se), participated.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Kelly's Hearing Request (dated October 5, 2012), and her accompanying letter (both FAXed October 5, 2012), are admitted into evidence, together with the testimony of Petitioner Kelly.

4. USDA Rural Development's Exhibits RX 1 through RX 9 (filed on November 16, 2012 and January 28, 2013), plus Narrative, Witness & Exhibit Lists, are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Kelly owes to USDA Rural Development $208,437.67 (as of November 6, 2012) (*see* RX 6, pp. 1-2) in repayment of a USDA Rural Housing Service loan borrowed in 2006 for a home in Virginia, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development's Ex., esp. RX 1 and RX 6.

6. Potential costs of collection (Treasury fees) in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another

3%) on $208,437.67, would increase the current balance by $58,362.55, to $266,800.22. RX 6, p. 2, plus the Narrative.

7. The amount Petitioner Kelly borrowed in 2006 from USDA Rural Housing Service was $271,235.00. RX 1.

8. The "next due" date was September 26, 2007; that is, the loan was about 6 months past due, when, on March 19, 2008, the loan was accelerated for foreclosure. RX 2. The loan was accelerated for foreclosure due to "MONETARY DEFAULT." RX 2. The Notice of Acceleration (and of Intent to Foreclose) shows $267,480.85 unpaid principal and $8,979.82 unpaid interest (as of March 19, 2008). RX 2, p. 1. This would not include other costs, such as unpaid insurance and unpaid real estate taxes that may have had to be advanced by USDA Rural Development.

9. The foreclosure sale was held on September 29, 2009. USDA's bid (opening bid) was $100,700.00. RX 7, RX 9. Argent Development LLC bid $100.00 more, $100,800.00. RX 3, p. 50. After certain of the real estate taxes and foreclosures expenses were subtracted, sale proceeds of $97,323.48 were applied to reduce the debt on November 12, 2009. RX 3, p. 52. RX 4, p. 2.

10. Before the sale proceeds were applied, the balance was $304,911.15:

$267,480.85	unpaid principal
$ 32,235.10	unpaid interest through foreclosure sale (9/26/2007 - 09/29/2009)
$ 4,706.09	fees/costs (includes costs, insurance, taxes)
$ 489.11	interest on fees/costs plus late charges
$304,911.15	
=========	

RX 5 and Michelle Tanner's testimony.

11. After the $97,323.48 sale proceeds were applied, the remaining debt was $207,587.67. Additional costs of $552.50 and $297.50 were added

to the debt (RX 3, pp. 62-63), which brought the balance up to $208,437.67. *See* the detail summarized at RX 5.

12. Since the sale proceeds ($97,323.48) were generated from the foreclosure sale in September 2009, no additional interest has accrued. No additional interest will accrue, which makes repaying the debt more manageable.

13. The balance, $208,437.67, was referred to U.S. Treasury for collection in March 2010. RX 6, p. 1. That remained the balance, through November 6, 2012. RX 6, p. 2. Petitioner Kelly still (as of November 6, 2012) owes the balance of $208,437.67 (excluding potential collection fees), and USDA Rural Development may collect that amount from her.

Discussion

14. Petitioner Kelly, you may want to telephone Treasury's collection agency to negotiate the repayment of the debt. Petitioner Kelly, this will require you to telephone the collection agency after you receive this Decision. The toll-free number for you to call is 1-888-826-3127. Petitioner Kelly, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Kelly, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Kelly and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

16. Petitioner Kelly owes the debt described in paragraphs 5 through 13.

17. Garnishment up to 15% of Petitioner Kelly's disposable pay is authorized. 31 C.F.R. § 285.11.

18.I am not ordering any amounts already collected prior to implementation of this Decision, whether through offset or garnishment of Petitioner Kelly's pay, to be returned to Petitioner Kelly.

19.Repayment of the debt may also occur through offset of Petitioner Kelly's income tax refunds or other Federal monies payable to the order of Ms. Kelly.

ORDER

20.Until the debt is repaid, Petitioner Kelly 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).

21.USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment up to 15% of Petitioner Kelly's disposable pay. 31 C.F.R. § 285.11.

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

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In re: YOLANDA WATKINS.
Docket No. 12-0530.
Decision and Order.
Filed March 4, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of debt alleged to be due, and if established, the terms of any repayment prior to the imposition of an

administrative wage garnishment. On August 2, 2012, a prehearing order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of debt, and setting the matter for telephonic hearing. RD filed its Narrative and Exhibits RX-1 through RX-11 on August 8, 2012. After a series of miscommunications, the parties were finally available for the oral hearing on February 28, 2013.

At the time and place set for the hearing, both parties were present. Michelle Tanner represented Rural Development (RD), and Miss Watkins was self-represented. The parties were sworn.

In her petition for rehearing, Miss Watkins requested to be considered for a financial hardship calculation. She filed her Financial Statement on February 20, 2013. She did not directly challenge the amount of the debt.

Ms. Watkins has been employed more than one year, but has been officially informed that her job in a conveyor manufacturing company will be involuntarily terminated. She has one minor dependent. She has an outstanding orthodontist bill which she is retiring monthly. She has a monthly payment on her car. She contributes to her 20-year-old daughter's food bill. She lives modestly.

Findings of Fact

10. On August 4, 2004, Petitioner Yolanda Watkins obtained a home mortgage loan directly from Chase Manhattan Mortgage in the amount of $86,000. RX-2.

11. Prior to signing the mortgage agreement, Petitioner signed RD loan guarantee form 1980-21. RX-1.

12. The Petitioner became delinquent and on/before January 7, 2009, the loan was accelerated due to monetary default. RX-3.

13. At the foreclosure sale, the property sold for $59,500 to a third party. RX-3, RX-5 @ p. 2 of 6.

14. The Petitioner owed $110,909.15 prior to the foreclosure sale. RX-7.

15. After complying with the Loan Guarantee agreement, RD paid to the lender a loss claim amount of $47,086.83. RX-6 @ 6 of 16, RX-7.

16. After a search of credit agency databases, RD utilized the best address available to notify Petitioner of the remaining debt on September 9, 2009. RX-9.

17. The debt of $ 47,086.83 was transferred to Treasury for further collection on July 28, 2012. RX-10 @ p. 5 of 11.

18. Following the foreclosure, treasury has collected monies toward this account and Petitioner now owes $34,495.50. RX-10 @ p. 9 of 11.

19. In addition, the Petitioner owes $9,658.74 in potential collection fees. RX-10 @ p. 5 of 11.

Conclusions of Law

Petitioner is liable to the USDA Rural Development in the amount of $34,495.50 for the mortgage loan extended to her.

In addition, Petitioner is liable to the USDA Rural Development in the amount of $9,658.74 for potential collection fees.

All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. § 285.11 have been met. Petitioner has been involuntarily terminated from her employment. Rural Development is not entitled to administratively garnish the wages of Petitioner at this time.

ORDER

For the foregoing reasons, the wages of Petitioner shall be not subjected to administrative wage garnishment at this time. After one year, RD may reconsider the Petitioner's financial position.

Copies of this Decision and Order shall be served upon the parties by

the Hearing Clerk's Office.

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In re: GREGORY SNYDER.
Docket No. 13-0099.
Decision and Order.
Filed March 7, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The Hearing by telephone was held as scheduled on January 23 and March 7, 2013. Gregory Snyder, the Petitioner (Petitioner Snyder), who represents himself (appears pro se), participated on January 23, 2013 but failed to participate on March 7, 2013.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated during both segments of the Hearing by telephone, represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Admitted into evidence are Petitioner Snyder's Hearing Request dated November 8, 2012 and his accompanying letter. During the January segment of the Hearing by telephone, Petitioner Snyder said he had been away from home (out-of-state) for more than a week and was driving back home; his wife had gotten a lawyer for him. He requested rescheduling and stated that when he arrived home, he would have his wife call to give us her phone number as a back-up for him and to identify the lawyer; neither Petitioner Snyder nor his wife phoned. The notice that "Hearing Will Resume 7 March 2013" was mailed to Petitioner Snyder on February 12, 2013. Petitioner Snyder failed to file a completed "Consumer Debtor Financial Statement" or anything, and he

failed to testify. On March 7, 2013, there was no answer at the phone number on Petitioner Snyder's Hearing Request, which is the only phone number he provided. [The notice that "Hearing Will Resume . . ." instructed him to provide the number where he would be reached.]

4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on December 19, 2012, and are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. Petitioner Snyder bought a home in Tennessee in 2008, borrowing $141,286.00 to pay for it. The loan was made by JP Morgan Chase Bank, N.A., with the servicing lender being Chase Home Finance, LLC. RX 2; RX 6, pp. 4-5. Frequently I refer to the lender as "Chase."

6. USDA Rural Development's position is that Petitioner Snyder owes to USDA Rural Development $56,763.76 (as of December 18, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service Guarantee (*see* RX 1, esp. p. 2) for the loan made in 2008 ("the debt"). *See* USDA Rural Development's Ex. RX 1 through RX 10, plus Narrative.

7. The Guarantee (RX 1) establishes an independent obligation of Petitioner Snyder, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

8. USDA Rural Development paid a loss claim of $56,763.76 to the lender Chase on July 1, 2011 (RX 6, p. 11). RX 7 details the loss claim paid. After careful review of all of the evidence, I agree with USDA Rural Development's position.

9. The Due Date of the last payment made was April 1, 2009. RX 6, p. 6. The foreclosure sale date was May 26, 2010. RX 6, p. 6. RX 7 accurately shows that even after $105,000.00 proceeds from the sale of the home were applied to reduce the debt, Petitioner Snyder still owed $56,763.76.

10. The actions of the lender Chase were to buy the home at the foreclosure sale for $140,250.00 (*see* Trustee's Deed, RX 3) (the lender was not outbid); and thereafter, to market the home. Chase tried but failed to sell the REO (real estate owned) within six months. The original list price was $139,900.00 (RX 6, p. 7), and the final list price was $109,900.00 (RX 6, p. 7).

11. After the six months, USDA Rural Development obtained a liquidation appraisal, $105,000.00 as of March 9, 2011. RX 5. Based on the liquidation appraisal value, USDA Rural Development paid the loss claim to the lender Chase, $56,763.76. Chase eventually sold the home, for $85,000.00. See USDA Rural Development Narrative. That sale did not change anything with respect to Petitioner Snyder, because he had already been credited for more than that; he had been credited for $105,000.00.

12. No interest has accrued since March 9, 2011, the date of the liquidation appraisal. No additional interest will accrue, which makes repaying the debt more manageable.

13. The amount of interest that accrued between April 1, 2009 (the due date of the last payment made) and March 9, 2011 (the date of the liquidation appraisal), nearly 2 years, was $10,180.44. RX 7. Petitioner Snyder is responsible to repay that, as it is part of the loss claim. The amount of expenses incurred by the lender Chase to foreclose on, maintain, and market the home, was more than $15,000.00. RX 7. Petitioner Snyder is responsible to repay that, as it is part of the loss claim.

14. The loss claim total, $56,763.76, was referred to U.S. Treasury for collection in August 2012. RX 9, p. 1. That remained the balance, through December 18, 2012. RX 10. Petitioner Snyder still (as of December 18, 2012) owes the balance of $56,763.76 (excluding potential

collection fees), and USDA Rural Development may collect that amount from him under the Guarantee (RX 1).

Discussion

15. Petitioner Snyder, you may want to telephone Treasury's collection agency to negotiate the repayment of the debt. Petitioner Snyder, this will require you to telephone the collection agency after you receive this Decision. The toll-free number for you to call is 1-888-826-3127. Petitioner Snyder, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Snyder, you may wish to include someone else with you in the telephone call if you call to negotiate. Petitioner Snyder, you may want to consult with an attorney who has bankruptcy expertise.

Findings, Analysis and Conclusions

16. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Snyder and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Snyder owes a valid debt to USDA Rural Development).

17. Petitioner Snyder owes a valid debt to USDA Rural Development. USDA Rural Development paid a loss claim to the lender Chase, $56,763.76 on July 1, 2011 (RX 6, p. 11). RX 7 details the loss claim. That amount, $56,763.76, is what USDA Rural Development recovers from Petitioner Snyder under the Guarantee. RX 1, RX 7; USDA Rural Development Narrative; and testimony.

18. USDA Rural Development may collect administratively pursuant to a Guarantee, even where NO judgment has been entered against a borrower and NO personal deficiency has been established. Petitioner Snyder owes to USDA Rural Development $56,763.76 as of December 18, 2012 [plus potential Treasury collection fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%), which would increase the balance by $15,893.85, to $72,657.61.] *See* RX 10, p. 2.

19. Garnishment up to 15% of Petitioner Snyder's disposable pay is authorized. There is no evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

20. Repayment of the debt may also occur through offset of Petitioner Snyder's income tax refunds or other Federal monies payable to the order of Mr. Snyder.

21. I am not ordering any amounts already collected prior to implementation of this Decision, whether through offset or garnishment of Petitioner Snyder's pay, to be returned to Petitioner Snyder.

ORDER

22. Until the debt is repaid, Petitioner Snyder shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

23. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment up to 15% of Petitioner Snyder's disposable pay. 31 C.F.R. § 285.11.

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

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In re: SANDY CREASY.
Docket No. 13-0153.
Decision and Order.
Filed March 13, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

Sandy Creasy
72 Agric. Dec. 76

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the January 11, 2013 request of Sandy Creasy ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on January 23, 2013, the parties were directed to provide information and documentation concerning the existence of the debt and the matter was set for a telephonic hearing to commence on March 13, 2013.

Respondent filed a Narrative, together with supporting documentation[1] identified as RX-1 through RX-6. Petitioner filed a Consumer Debtor Financial Statement, identified as PX-1.

At the hearing, Petitioner represented herself and testified. Michelle Tanner represented USDA-RD and testified. I admitted the exhibits to the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

1. On March 27, 1990 the Petitioner received a home mortgage loan in the amount of $38,000.00 from USDA-RD to purchase residential real property located in Raymondville, Texas. RX-1.

2. Petitioner defaulted on the loan and her account was accelerated and scheduled for foreclosure. RX-2.

3. USDA-RD was the highest bidder ($24,587.25) at a foreclosure sale held on June 5, 2001. RX-3.

4. After application of the sale proceeds, the amount due on Petitioner's loan was $40,938.73, consisting of principal, interest and recoverable costs and fees. RX-4.

[1] References to Respondent's exhibits herein shall be denoted as "RX-#."

5. USDA-RD offered to compromise the debt, but no settlement was reached. RX-3.

6. USDA-RD entered the outstanding balance on the account as a debt due from Petitioner, and referred to the United States Department of Treasury ("Treasury") for collection pursuant to law. RX-4.

7. Pursuant to a previous notice of intent to implement administrative wage garnishment, Petitioner appeared before Administrative Law Judge Jill Clifton at a hearing commenced on December 9, 2010, but failed to appear when the hearing was resumed on March 4, 2011.

8. By Decision and Order issued March 11, 2011, Judge Clifton concluded that the debt was valid and that Petitioner could withstand wage garnishment at the statutory maximum amount of 15% of her disposable income.

9. Wage garnishment was not implemented until January, 2013, and Petitioner was given another opportunity to challenge the garnishment.

10. Petitioner is sole provider for a family that includes three dependent children and one adult child attending college.

Conclusions of Law

26. The Secretary has jurisdiction in this matter.

27. In concurrence with Judge Clifton's ruling, Petitioner is indebted to USDA Rural Development in the amount of $37,402.14 exclusive of potential Treasury fees for the mortgage loan extended to her.

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

29. The Petitioner's income and expenses cannot withstand the statutory maximum of wage garnishment.

30.Wage garnishment may be implemented at the rate of 5% of Petitioner's disposable income, EXCEPT THAT wage garnishment shall be stayed for a period of ninety (90) days to allow Petitioner to attempt to reach a settlement with Treasury or otherwise address the debt.

31.Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, Petitioner shall be subjected to administrative wage garnishment at a maximum rate of 5% of her income, beginning no sooner than ninety (90) days from the date of this Decision and Order.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll-free number for Treasury's agent is 1-888-826-3127.

Petitioner is also encouraged to consult an attorney or debt collection expert regarding this debt.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of amounts due from the government.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

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ADMINISTRATIVE WAGE GARNISHMENT

In re: AUDREY DAVIS.
Docket No. 13-0125.
Decision and Order.
Filed March 14, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the December 14, 2012 request of Audrey Davis ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on January 23, 2013, the parties were directed to provide information and documentation concerning the existence of the debt and the matter was set for a telephonic hearing to commence on March 14, 2013.

The Respondent filed a Narrative, together with supporting documentation identified as RX-1 through RX-10. Petitioner filed a Consumer Debtor Financial Statement and earnings statement, identified as PX-1.

At the hearing, Petitioner represented herself and Giovanna Leopardi represented USDA-RD. I admitted the parties' exhibits to the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

11. On September 2, 2008, the Petitioner received a home mortgage loan from Idaho Housing and Finance Association (Lender) in the amount of

$78,571.00[1] to purchase residential real property located in Blackfoot Idaho. RX-2.

12. Petitioner signed an agreement to repay USDA-RD for any loss paid to the Lender pursuant to USDA-RD's guarantee loan program. RX-1.

13. The loan fell into default and Lender foreclosed on the property, acquiring it for the sum of $66,300.00 at a foreclosure sale held on July 1, 2010. RX-3.

14. The property was not sold by the Lender during the six months allowed by law, and a loss claim was paid to Lender based upon the Liquidation value.

15. The property subsequently was sold to a third party for $47,000.00.

16. The amount due on Petitioner's account was $95,621.73, consisting of principal, interest, advances, and costs. RX-6.

17. USDA-RD paid a loss claim to the Lender of $46,934.15. RX-6; RX-7.

18. USDA-RD's offer to compromise the debt was not returned by Petitioner. RX-8.

19. Credits were applied, and Petitioner's account in the amount of $45,234.15 was referred to the U.S. Department of Treasury ("Treasury") for collection. RX-9.

Conclusions of Law

32. The Secretary has jurisdiction in this matter.

33. The Lender improperly charged to the Petitioner a fee for the guarantee that Petitioner gave to reimburse USDA-RD, and that fee in the amount of $1,571.41 is hereby credited against the account.

[1] This amount included a charge back of the Lender's guarantee fee due to USDA-RD in the amount of $1,571.41, which I have disallowed as improperly charged to Petitioner's account.

ADMINISTRATIVE WAGE GARNISHMENT

34. Petitioner is indebted to USDA Rural Development in the amount of $43,662.74, exclusive of potential Treasury fees.

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

36. Petitioner's necessary and fixed expenses severely limit her disposable income, which cannot support wage garnishment.

37. Petitioner's financial condition represents a hardship within the meaning of 31 § C.F.R. 285.11(k).

38. Treasury shall remain authorized to undertake all other appropriate collection action.

ORDER

For the foregoing reasons, Petitioner shall NOT be subjected to administrative wage garnishment at this time.

Petitioner's account must be adjusted to reflect credit for improperly charged fee of $1,571.41.

Petitioner is encouraged to consult counsel about this debt or negotiate repayment of the debt with the representatives of Treasury. The toll-free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

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

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In re: RITA CASTLE.
Docket No. 13-0139.
Decision and Order.
Filed March 20, 2013.

AWG.

Petitioner, pro se.
Gina Zahner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges upon the request of Rita Castle ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"), and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. By Order issued February 8, 2013, the parties were directed to exchange information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on March 19, 2013 and deadlines for filing documents with the Hearing Clerk's Office were established. The parties were further instructed to provide contact information for participation in the hearing.

USDA-RD filed a Narrative, together with supporting documentation identified as RX-1 through RX-9, on February 8, 2013. Petitioner did not file any documents, nor did Petitioner provide contact information as directed in my Order. However, Petitioner's phone number was included in her request for a hearing.

On the scheduled date of the hearing, Petitioner appeared by telephone, representing herself. USDA-RD's representative, Gina Zahner

also testified at the hearing. I admitted USDA-RD's exhibits to the record. Petitioner's request for a hearing is hereby identified and referenced as "PX-1."

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

20. On March 1, 2011, Petitioner Rita Castle reported annual income of $2,156.00, thereby qualifying for benefits under a rental subsidy/assistance program administered by USDA-RD. RX-1.

21. In November 2011, a review of records revealed that Petitioner had earned income in the second and third quarters of 2011 in excess of the amount she had reported. RX-2.

22. Petitioner's employer verified that she had earned $8.00 per hour and had worked a 40 hour work week, earning income of $16,640.00. RX-3.

23. The undisclosed income resulted in a reduction in Petitioner's rental subsidy and also resulted in an overpayment of benefits in the total of $2,534.00. RX-4.

24. Petitioner met with representatives of USDA-RD to confirm the reduction of her subsidy. RX-6.

25. Petitioner's hours of work and employment status have been erratic and she was unable to enter into a payment plan to reimburse USDA for the unauthorized rental assistance. RX-8; PX-1.

26. Petitioner no longer receives assistance as she lives with her daughter.

27. At the hearing, Petitioner credibly testified that she is not currently working, but expects to begin part-time work in the near future.

28. At the time this collection action was initiated, Petitioner was employed.

29. Petitioner reported that Treasury had offset her 2012 tax refund against this debt in late February, 2013.

Conclusions of Law

39. The Secretary has jurisdiction in this matter.

40. Petitioner is indebted to USDA Rural Development in the amount of $2,534.00 exclusive of potential Treasury fees, and credits for any amount offset from tax refunds.

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

42. USDA Rural Development has established that the Petitioner was given actual notice of the unauthorized assistance and an opportunity to cure any default.

43. The Petitioner acknowledged that the debt is valid.

44. As Petitioner is not employed, wage garnishment cannot be effected.

45. USDA-RD is NOT entitled to administratively garnish the wages of the Petitioner; however the debt shall remain at Treasury for any and all other appropriate collection action.

ORDER

For the foregoing reasons, these proceedings are terminated.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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ADMINISTRATIVE WAGE GARNISHMENT

In re: MARIA JUAREZ.
Docket No. 13-0072.
Decision and Order.
Filed March 22, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on January 3, January 23, and February 12, 2013. Maria Juarez, full name Maria Lisa Juarez, the Petitioner (Petitioner Juarez), participated, representing herself (appearing pro se).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Juarez's Hearing Request dated October 15, 2012, plus attachments including list of 6 offsets, are admitted into evidence, together with the testimony of Petitioner Juarez.

4. USDA Rural Development's Exhibits RX 1 through RX 11, plus the 3 documents that accompanied the Exhibits entitled Narrative, Witness & Exhibit List (filed December 26, 2012, January 22, 2013, and March 20, 2013), are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. The amount Petitioner Juarez borrowed from USDA Rural Housing Service (a part of USDA Rural Development) in July 1998 was $71,275.00. RX 1, RX 6, p. 1. Petitioner Juarez borrowed to buy a home in Texas. The balance is now unsecured ("the debt").

6. USDA Rural Development's position is that Petitioner Juarez owed to USDA Rural Development $66,423.75 (as of December 10, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service loan. RX 5, pp. 1-2. The amount was $71,758.92 (RX 3, p. 52; RX 4; and RX 7), and payments have reduced it. The $71,758.92 was referred to U.S. Treasury for collection in May 2012. RX 5, especially p. 1. Collections from Treasury (from Petitioner Juarez, through offset and garnishment), left $66,423.75 unpaid as of December 10, 2012 (excluding the potential remaining collection fees). RX 5, especially p. 2.

7. Petitioner Juarez's position is that she owes nothing to USDA Rural Development because the house was sold for $58,479.00, and her income tax refunds were applied to reduce the debt. Petitioner Juarez expected that she would owe nothing if she were properly credited with her income tax refunds that had been intercepted ($16,859.00 offset) and with the $58,479.00 sale proceeds. *See* Pet'r Juarez's Hr'g Rew. plus attachments. Another income tax refund was intercepted and applied in May 2012. *See* RX 5, p. 1. Garnishment of Petitioner Juarez's wages began in about October 2012.

8. What Petitioner Juarez overlooks is the massive accumulation of interest, property taxes, and insurance premiums that she did not pay during her Chapter 13 bankruptcy proceeding. Ms. Leopardi testified that the Chapter 13 bankruptcy was filed on July 3, 2003, and discharged on November 12, 2008 [in the U.S. Bankruptcy Court, Northern District of Texas (Dallas), Petition #: 03-36775]. Ultimately, Petitioner Juarez lost the home to foreclosure; the sale was August 2, 2011. The foreclosure costs and costs to resell the "REO" (real estate owned) were also significant in consuming the value from Petitioner Juarez's income tax refunds and the home.

9. Petitioner Juarez was credited with the bid amount at the foreclosure sale ($49,555.51). USDA Rural Development was not outbid; the home became a "REO". The $49,555.51 credit did not stretch far enough to pay any of the principal balance owed. The $49,555.51 credit did not stretch far enough to pay even all the accrued interest. More was owed than the principal and the accrued interest: through the more-than-5 years that the Chapter 13 bankruptcy case was pending, ongoing loan

requirements were not being paid current: interest that went unpaid continued to accrue, property taxes continued to come due that USDA Rural Development paid, and insurance premiums continued to come due that USDA Rural Development paid. If Petitioner Juarez complied with her bankruptcy plan, she would have paid only the arrearage owed to USDA Rural Development at the time she filed. Payments that came to USDA Rural Development through the bankruptcy did not pay the ongoing monthly payments. Petitioner Juarez was expected to pay the current payments on her own.

10. In December 1998 the loan payments were current and the principal balance was $71,078.19. RX 6, p. 1. Petitioner Juarez's payments, plus subsidy, are shown in the payment history. RX 6, pp. 1-4.

11. By December 1999 delinquency was noted and also Petitioner Juarez's phone call regarding an accident and the need to rent cars which had put her behind. The principal balance was $70,510.52. RX 6, p. 4.

12. In 2000 delinquency persisted and Petitioner Juarez communicated regarding payments she would send and that she had not been receiving child support, since April. RX 6, p. 8. When an income tax refund was intercepted in March 2001 ($3,365.25, after the collection fee had been subtracted), it wasn't enough to stop the foreclosure - - it wasn't enough to bring the account current. RX 6, pp. 10-11. Petitioner Juarez then sent more than a thousand dollars in April 2001 (western union) and more than a thousand dollars in May 2001 (western union), so that her account was paid current (through the June 28, 2001 due date). RX 6, p. 13.

13. Delinquency recurred, and Petitioner Juarez communicated that she was in-between jobs. By December 2001 the account was accelerated due to Monetary Default, and foreclosure was approved. RX 6, p. 14. By mid-January 2002, the account was again paid current (through the December 28, 2001 due date). RX 6, p. 16. The principal balance was $69,007.30.

14. Delinquency recurred, and Petitioner Juarez communicated about car repairs. RX 6, p. 18. During the summer of 2002, Petitioner Juarez was notified that the subsidy would expire on August 27, 2002. RX 6, p. 19.

By January 2003, the account was accelerated due to Monetary Default and foreclosure was approved. RX 6, p. 21. Petitioner Juarez's Chapter 13 bankruptcy filing during the summer of 2003 "voided" (Ms. Leopardi's term) the acceleration. *See* RX 6, p. 22; USDA Rural Development Narrative filed March 20, 2013, p. 2. An income tax refund intercepted in March 2003 ($1,333.80, after the collection fee had been subtracted) reduced the principal balance to $67,235.36 (RX 6, p. 21), and an income tax refund intercepted in July 2003 ($1,586.80, after the collection fee had been subtracted) was applied to the pre-bankruptcy filing arrearage (RX 6, p. 25), reducing the principal balance to $66, 873.77 as of the end of 2003. RX 6, pp. 26-27.

15. As of December 1, 2004, the principal balance was $66,577.10. RX 6, p. 29. The account was seriously delinquent; and interest, property taxes, and insurance premiums continued to come due and not be paid by Petitioner Juarez.

16. As of December 28, 2005, the principal balance was $66,350.19. RX 6, p. 33. The account remained seriously delinquent; and interest, property taxes, and insurance premiums continued to come due and not be paid by Petitioner Juarez.

17. As of December 8, 2006, the principal balance remained $66,350.19. RX 6, p. 34. The account remained seriously delinquent; and interest, property taxes, and insurance premiums continued to come due and not be paid by Petitioner Juarez.

18. As of December 12, 2007, the principal balance remained $66,350.19. RX 6, p. 36. The account remained seriously delinquent; and interest, property taxes, and insurance premiums continued to come due and not be paid by Petitioner Juarez.

19. During 2008, USDA Rural Development added a $1,071.15 escrow fee and following an audit, increased the principal balance to $67,570.29, after having reversed and reapplied some curtailments/payments. An entry states in part: "acct delinquency due to non payment of post petition payments by borrower during life of the bankruptcy" (entry dated September 16, 2008). As of December 9, 2008, the principal balance was $67,570.29. RX 6, p. 41; RX 9, p. 1. The account remained

seriously delinquent; and interest, property taxes, and insurance premiums continued to come due and not be paid by Petitioner Juarez.

20. As of December 14, 2009, the principal balance was $66,748.98. RX 9, p. 2. See also RX 6, p. 29. The account was seriously delinquent; and interest, property taxes, and insurance premiums continued to come due and not be paid by Petitioner Juarez.

21. As of December 22, 2010, the principal balance was $63,676.98. RX 9, p. 3. *See also* RX 6, p. 51.

22. The foreclosure sale was held on August 2, 2011. USDA Rural Development was the highest bidder, at $49,555.51. The principal balance (acquisition balance) was $63,676.98. RX 2, p. 7.

23. Here is the amount USDA Rural Development shows as due before the $49,555.51 foreclosure sale bid is credited (RX 7):

$ 63,676.98	unpaid principal
$ 7,806.94	uncollected interest
$ 25,306.66	recoverable cost
$ 24,129.21	administrative adjustment to principal (interest, see paragraph 25)
$ 119.64	interest on fees
$121,039.43	loan balance, before credited with foreclosure bid

24. What USDA Rural Development expects Petitioner Juarez to pay is summarized on RX 7 (minus the amounts already collected at U.S. Treasury). The $49,555.51 foreclosure sale bid was credited against the 3 categories at the bottom, as follows:

$ 25,306.66	recoverable cost
$ 24,129.21	administrative adjustment to principal (interest, *see* paragraph 25)
$ 119.64	interest on fees
$ 49,555.51	

25. The Notice of Acceleration and of Intent to Foreclose stated that $24,476.32 of unpaid interest was due as of May 6, 2009. RX 2, pp. 2-4. The "next due" date was March 28, 2004 (RX 2, p. 5); that is, the loan was more than 5 years past due when it was accelerated for foreclosure. Interest continued to accrue for an additional 2 years plus, through the date of the foreclosure sale August 2, 2011. The $24,129.21 entry that was made on October 3, 2011 that USDA Rural Development termed "administrative adjustment to principal" (*see* RX 8, p. 4) is that portion of accrued interest that was covered (as if "paid"), by the $49,555.51 foreclosure bid credit. There still remained $7,806.94 interest that was not covered by the $49,555.51 foreclosure bid credit (called "uncollected interest," *see* paragraph 22). RX 8, p. 4. No additional interest has accrued since August 2011 and none will accrue, which makes repaying the debt more manageable.

26. The loan history includes an addition of "fees of $25,306.66" charged by USDA Rural Development. The USDA Rural Development Narrative filed March 20, 2012 explains the $25,306.66:

After a thorough review of the case and the assistance obtained from a Financial Specialist, the Agency of Rural Development has determined that the fees of $25,306.66 is the total amount of all the costs involved with the Foreclosure/Acquisition. These fees include the costs related to the foreclosure process itself, fees billed for the escrow and the amount of Unauthorized Assistance found in 2004, just to name a few.

27. The $25,306.66 is categorized as "recoverable cost." *See* RX 4, p. 15. I find USDA Rural Development's explanation to be true and find that the amount is what would be expected after the more-than-5-years that the Chapter 13 bankruptcy case was pending, when ongoing loan requirements were not being paid current. The property taxes and insurance premiums that USDA Rural Development paid on Petitioner Juarez's behalf are a substantial portion of this $25,306.66. The detail is shown in RX 8. When the loan was accelerated for foreclosure, and the "next due" date was March 28, 2004, the fees due were already $18,101.62 (RX 2, p. 5), and that did not include the fees for the additional 2 years plus, through the date of the foreclosure sale August 2,

2011. The costs of foreclosing were also significant. The Unauthorized Assistance was only $2,778.48 of this $25,306.66. RX 4, p. 17.

28. When the foreclosure bid of $49,555.51 is subtracted from the $121,039.43 loan balance, a $71,483.92 balance remains. RX 7. When $275.00 is then added, a $71,758.92 balance remains. RX 7. This amount the same as was earlier calculated. *See* RX 4, p. 1, which shows the $71,758.92 that was "debt settled" in 2012. *See* Debt Settlement Action Memo dated February 2, 2012. RX 4, p. 18. Both RX 7 and RX 4 show $63,676.98 principal still owed after credit for the foreclosure bid reduced the debt; both show $7,806.94 added to that; and both show $275.00 added to that. This amount, $71,758.92, is what USDA Rural Development referred to the U.S. Treasury Department for collection in May 2012. RX 5, p. 1.

29. The balance remaining as of December 10, 2012, was $66,423.75, because of reductions to the balance from an offset and garnishments processed at U.S. Treasury. RX 5, p. 1. USDA Rural Development may collect this amount (as of December 10, 2012) from Petitioner Juarez. RX 5. This balance excludes potential collection fees. RX 5, p. 2.

30. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on $66,423.75, would increase the balance by $18,598.64, to $85,022.39. RX 5, p. 2.

31. When Petitioner Juarez did not respond to the opportunity for "debt settlement" with USDA Rural Development and the debt was referred to Treasury, potential collection costs were added to what Petitioner Juarez would have to pay. For example, in order for Treasury to collect enough to forward $66,423.75 to USDA Rural Development, it could cost Petitioner Juarez as much as $85,022.39. Treasury would identify the balance as $85,022.39, because, except for offsets, as much as $1.28 may be required for every $1.00 that will go to USDA Rural Development.

Discussion

32. Petitioner Juarez, you may choose to telephone Treasury's collection agency to negotiate the repayment of the remaining debt. Petitioner

Juarez, this will require you to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is 1-888-826-3127. Petitioner Juarez, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Juarez, you may choose to offer to pay through solely offset of income tax refunds, perhaps with a specified amount for a specified number of years. Petitioner Juarez, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

33. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Juarez and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

34. Petitioner Juarez owes the debt described in paragraphs 5 through 29.

35. There is no evidence that garnishment up to 15% of disposable pay will cause financial hardship. Garnishment is authorized, up to 15% of Petitioner Juarez's disposable pay. 31 C.F.R. § 285.11.

36. I am not ordering any amounts already collected prior to implementation of this Decision, whether through offset or garnishment of Petitioner Juarez's pay, to be returned to Petitioner Juarez.

37. Repayment of the debt may occur through offset of Petitioner Juarez's income tax refunds or other Federal monies payable to the order of Ms. Juarez.

ORDER

38. Until the debt is repaid, Petitioner Juarez 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).

39.USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment up to 15% of Petitioner Juarez's disposable pay. 31 C.F.R. § 285.11.

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

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In re: JAMIE C. BROCKBANK, F/K/A JAMIE HILL.
Docket No. 13-0074.
Decision and Order.
Filed March 22, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment.

The Respondent filed a Narrative in this action, together with supporting documentation on November 21, 2012. On December 5, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 8, 2013. The Petitioner failed to file any material, was not available when the teleconference was scheduled, and has provided no reasons for her non-availability. The Petitioner not having been available at the time the case was scheduled for hearing, I will find that she has waived her request for a hearing and the matter will be determined on the basis of the record before me.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

30. On August 5, 2005, the Petitioner and co-borrower Zachary Brockbank received a home mortgage loan in the amount of $143,000.00 from Rural Development (RD), United states Department of Agriculture (USDA) for property located in Saratoga Springs, Utah. RX-1.

31. The property was sold at a short sale to a third party on April 24, 2012 for $163,918.00, USDA received proceeds from that sale in the amount of $136,045.81, leaving a balance due of $3,719.11. RX-3, 6.

32. The remaining unpaid debt is in the amount of $3,719.11 exclusive of potential Treasury fees. RX-7.

Conclusions of Law

46. Petitioner is indebted to USDA Rural Development in the amount of $3,719.11 for the mortgage loan extended to her.

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

48. The Respondent is entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, the wages of Petitioner 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.

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ADMINISTRATIVE WAGE GARNISHMENT

In re: GENA R. WILSON (ROBBINS).
Docket No. 13-0002.
Decision and Order.
Filed March 25, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

In her Petition for Rehearing, Ms. Wilson requested to be considered for a financial hardship calculation. She did not furnish any exhibits concerning her income and expenses. I called her on December 17, 2012 and left a message on her answering service that we have not received any financial documentation. Upon checking with the OALJ hearing clerk's records on March 25, 2013, I find that no documentation has been received from Ms. Wilson as of this date.

Findings of Facts

1. On June 23, 1995, Petitioner Gena Wilson and co-borrower Marcus Wilson Jr. obtained a loan directly from USDA Rural Development in the amount of $51,780. RX-1.

2. On July 23, 1999, the loan was re-amortized due to delinquency and the new amount of existing principal was $65,366.04. RX-1 @ p 10 of 11, RX-3 @ p 16.

3. The borrowers again became delinquent and on February 18, 2000, the loan was accelerated due to monetary default. RX-2 @ p. 6 of 8, RX 3.

4. The property was sold to a third-party purchaser at a foreclosure sale held on September 5, 2000. The property was purchased for $36,571. RX-3 @ p. 18 of 33, RX-6.

5. On February 14, 2001, a debt settlement application was sent to the

borrowers. RX-3 @ p. 24 of 33.

6. Another debt settlement application was sent on February 20, 2002. RX-3 @ p. 27 of 33.

7. The loan was submitted to treasury for further collection on April 12, 2002. RX-3 @ p. 30 of 33.

8. Since March 31, 2006, several offsets to petitioner's income tax refund were received. RX-4, RX-5.

9. The balance on the loan as of October 29, 2012 is $21,815.84. RX-5 @ p. 2 of 5, p. 5 of 5.

10. In addition, the borrowers are liable for potential collection fees of $6,108.44. RX-5 @ p. 2 of 5.

11. The Petitioner has not provided any information with which I may prepare a Financial Hardship Calculation.

Conclusions of Law

Petitioner is jointly and severally liable to the USDA Rural Development in the amount of $21,815.84 for the mortgage loan extended to her.

In addition, Petitioner is jointly and severally liable to the USDA Rural Development in the amount of $6,108.44 for potential collection fees.

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

Rural Development is entitled to administratively garnish the wages of petitioner at the rate of 15% of her disposable pay.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected

to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as may be specified in 31 C.F.R. § 285.11(i).

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

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In re: KRISTEN L. HAMBY.
Docket No. 13-0100.
Decision and Order.
Filed April 1, 2013.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to the position of administrative wage garnishment.

On December 13, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 24, 2013.

RD filed its narrative and exhibits RX-1 through RX -5 on December 20, 2012. Upon preliminary review of the documentation, I requested that RD provide a copy of the trustee's deed for Buckingham County, Virginia. RD filed exhibits RX-6 and RX-7 on March 15, 2013 and RX-8 on March 28, 2013. A copy was mailed to Petitioner.

At the time of the place of the initial hearing date, all parties were present. At the request of the parties, the case was rescheduled to March

28, 2013.

Michelle Tanner represented Rural Development (RD) and Ms. Hamby was self-represented. The parties were sworn.

Petitioner acknowledged receipt of RD's narrative and exhibits RX-1 through RX-5. RD acknowledged receipt of Petitioner's hand-written narrative which denied the debt. Petitioner stated at the time of the January 24th hearing that she was unemployed, received child support, and was a food-stamp recipient. No financial statements have been received from the Petitioner.

On the date set for the continuation of the oral hearing, Petitioner could not be reached at any of the phone numbers that she had provided for contact. She also did not respond to either of the emails sent to the addresses she had provided. On the basis of the record before me the following Facts and Conclusions of Law and Order will be entered.

Findings of Fact

1. Petitioner Kristen Hamby and her husband, Russell Hamby, purchased and financed their home in Buckingham County, Virginia by borrowing money from Rural Development on August 23, 2005 in the amount of $118,200. RX-1.

2. The loan became in default and the loan was accelerated for foreclosure on April 7, 2011. RX-2 @ p. 5 of 27 and p. 15 of 27.

3. A foreclosure sale was scheduled and held on November 22, 2011. RX-3, RX-8.

4. At the foreclosure sale, the home was purchased for $55,870 by RD to avoid further losses. RX-3 @ p. 19 of 31 and p. 23 of 31, RX-8.

5. Prior to the judicial sale, the borrowers owed $113,043.86 for principal, interest, and fees. After application of the sale proceeds, the total amount due is $83,185.94. RX-4.

6. The remaining balance of funds due was submitted to treasury for

collection on December 19, 2012. RX-5 @ p. 2 of 5. The amount of $83,803.44 is at treasury for collection, plus an additional amount of remaining potential collection fees for $23,464.96 for a total due of $107,268.40. RX-5 @ p. 2 of 5.

7. Petitioner is jointly and severally liable on the debt along with Russell Hamby.

8. Petitioner was unemployed as of January 24, 2013.

Conclusions of Law

1. Petitioner is jointly and severally liable to the USDA Rural Development in the amount of $83,803.44 for the mortgage loans extended to her.

2. In addition, Petitioner is jointly and severally liable for $23,464.96 as potential collection fees to the U.S. Treasury.

3. All procedural requirements for Administrative Wage Offset set forth in 31 C.F.R. Paragraph 285.11 have been met.

4. Rural Development is not entitled to garnish the wages of Petitioner at this time. Rural Development may reassess Petitioner's financial position in nine (9) months.

ORDER

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment as might be specified in 31 C.F.R. § 285.11(i).

In ten (10) months, the financial position of Petitioner may be reevaluated.

A Copy of this Decision and Order shall be served upon the parties by the Hearing Clerk’s Office.

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In re: ANGELO CHITTO.
Docket No. 13-0169.
Decision and Order.
Filed April 16, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges upon the January 25, 2013 request of Angelo Chitto ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"); and if established, the terms of any repayment prior to imposition of an administrative wage garnishment.

By Order issued February 22, 2013 the parties were directed to exchange information and documentation and the matter was set for a telephonic hearing. Petitioner did not submit any documentation. USDA-RD filed a Narrative, together with supporting documentation.
On the scheduled date for the hearing, March 19, 2013, Petitioner did not answer at the telephone number that he provided. The Notice of hearing was not returned as undeliverable. I held the record open until the close of business on the date of the hearing, but Petitioner did not respond to a voice mail message left for him.

Consequently, I find it appropriate to decide this matter on the record before me, and I admit to the record USDA-RD's exhibits, RX-1 through RX-45. The following Findings of Fact, Conclusions of Law, and Order shall be entered.

Summary of the Facts

The record reflects that on July 13, 2007, an individual identified as "Angela K. Chitto" signed agreements to assume existing obligations to

USDA-RD in consideration for the purchase of real property in Philadelphia, Mississippi. However, the account established by USDA-RD for the indebtedness is in the name of "Angelo K. Chitto". All documents forward to the Department of Treasury for collection of the debt are in the name of "Angelo Chitto". The notice of intent to garnish wages is in the name of "Angelo Chitto". The petition for a hearing bears the name "Angelo Chitto", and though no one signed the petition, handwritten notations deny the validity of the debt.

There is nothing of record to reconcile the discrepancy in the identity of the signatory on the assumption agreement and associated documents ("Angela" K. Chitto) and every other document generated by the government ("Angelo" K. Chitto). Although a Social Security Number (SSN) is associated with the account established in the name of "Angelo" K. Chitto, there is no independent record of the SSN for "Angela" K. Chitto. Accordingly, I find that the preponderance of substantial evidence fails to establish that Angelo K. Chitto is actually Angela K. Chitto. Therefore I am unable to conclude that the debt is valid.

ORDER

The evidence fails to substantially establish the existence of a valid debt due from either Angela or Angelo K. Chitto, and this matter is hereby DISMISSED.

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In re: JENNIFER L. BENNETT.
Docket No. 13-0129.
Decision and Order.
Filed April 30, 2013.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on April 19, 2013. Jennifer L. Bennett, the Petitioner (Petitioner Bennett), participated, representing herself (appearing *pro se*). Accompanying Petitioner Bennett were her witnesses: her mother Faye Bennett and her sister Lisa Kleven.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Bennett's exhibits, documenting fiancé Zacharias (Zack) Thompson's disability since February 1, 2006; documenting Petitioner Bennett's physical impairments in 2009 including her right upper extremity, right chest and neck; and documenting the need for postponement of the telephone hearing so that she and her witnesses would not miss work (filed February 7, 2013); together with her Consumer Debtor Financial Statement, pay stub copies, and other financial information (filed February 5, 2013); together with her Hearing Request (dated November 28, 2012); are admitted into evidence, together with the testimony of Petitioner Bennett and Lisa Kleven.

4. USDA Rural Development's Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List, filed January 17, 2013, are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. The amount Petitioner Bennett borrowed from USDA Rural Housing Service (a part of USDA Rural Development) in December 2004 was $75,474.00. RX 1. Petitioner Bennett borrowed to buy a home in Michigan. The balance is now unsecured ("the debt").

6. USDA Rural Development's position is that Petitioner Bennett owed to USDA Rural Development **$83,752.47** (as of January 15, 2013), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service loan. RX 5, pp. 1-2. The **$83,752.47** was referred to U.S. Treasury for collection on September 3, 2012. RX 3, p. 1; RX 5, especially p. 1. The **$83,752.47** does not

include the potential remaining collection fees which Treasury and Treasury's collection agents would charge (RX 5, especially p. 2).

7. Petitioner Bennett's position is that she owes nothing to USDA Rural Development, which took and resold the house (Hearing Request). Petitioner Bennett testified that she vacated the house before Christmas 2009 because she was instructed by a USDA Rural Development employee to vacate the house because there was nothing more USDA Rural Development could do to assist her with her financial problems. Petitioner Bennett testified that she sent the keys back to USDA Rural Development. Petitioner Bennett testified that she was shocked when Treasury contacted her in the fall of 2012 to collect the debt, because she had heard nothing from USDA Rural Development about owing anything during the years in-between (nearly 3 years).

8. Not until February 2012 was the house sold. A reference in a computer-generated record shows that the foreclosure sale was completed on February 23, 2012, and that the property was sold to a third party for $13,000.00. RX 3, p. 9.

9. The evidence includes no appraisals. There is a reference in a computer-generated record to $75,000.00 being the Appraised Value. RX 2, p. 8. USDA Rural Development's bid at the foreclosure sale was $8,600.00. RX 2, p. 8.

10. USDA Rural Development accelerated the loan due to monetary default as a first step toward foreclosure on May 14, 2009. RX 2, pp. 1-5. At that time the unpaid principal was $72,394.63. The unpaid interest was $4,395.58. More was owed than the principal and the accrued interest: property taxes continued to come due; insurance premiums continued to come due. The computer-generated entries concerning "forceplace warning letters" sent to the borrower on February 15, 2010 and March 22, 2010 are not clear to me.

11. The lawyer began work in October 2011. RX 4, p. 9. The evidence does not explain the delays in proceeding to foreclosure after May 14, 2009 into late 2011.

12. The Notice of Mortgage Foreclosure Sale states that $96,159.67 was claimed due as of January 25, 2012. RX 2, p. 6. The foreclosure sale was held February 23, 2012. RX 2, p. 8. Another reference in a computer-generated record shows an entry dated 05/23/12 stating that the foreclosure sale funds were posted as of the sale date 02/23/12.

13. The evidence provides no documentation that Petitioner Bennett was given an adequate opportunity for "debt settlement" with USDA Rural Development. A computer-generated record shows an entry for 06/28/12 that the $83,752.47 balance had been charged off and debt settlement processed. RX 3, p. 2. Other entries, same date, 06/28/12, show that no debt settlement application had been received to date, and that notice of decision was sent (to the foreclosed house address). There is no record of an attempt to determine Petitioner Bennett's current address. The Debt Settlement Action Memo dated 06/28/12 (RX 4, p. 14) does not persuade me that USDA Rural Development gave Petitioner Bennett the opportunity to debt settle.

Findings, Analysis and Conclusions

14. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Bennett and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

15. Ordinarily, Petitioner Bennett would be responsible to pay foreclosure costs and costs to maintain and sell the house, in addition to principal, accrued interest, property taxes, and insurance premiums that had come due, and late charges, and the unpaid water/sewer bills. The total, $96,752.47, is broken down at RX 4, p. 1. Subtracting the $13,000.00 Proceeds from the Sale, the balance was **$83,752.47**.

16. Here, though, three factors cause me to conclude there is no valid debt:

(a) The $13,000.00 Proceeds from the Sale are not adequate, particularly with no appraisals in the evidence and a reference in a computer-generated record to $75,000.00 being the Appraised Value. RX 2, p. 8. USDA Rural Development's bid at the foreclosure sale was $8,600.00. RX 2, p. 8.

(b) USDA Rural Development took too long to liquidate the property after instructing Petitioner Bennett to vacate the house. Paragraphs 10 and 11.

(c) The evidence is inadequate that USDA Rural Development gave Petitioner Bennett the opportunity to debt settle. Paragraph 13.

17. Petitioner Bennett does **NOT** owe a valid debt to USDA Rural Development; the debt described in paragraphs 4 through 13 should and will be **canceled**.

18. Garnishment is **not** authorized. ***Offset*** of Petitioner Bennett's **income tax refunds** or other **Federal monies** payable to the order of Ms. Bennett is **not** authorized.

19. Any amounts collected from Petitioner Bennett, including any collections from Treasury **shall be returned to Petitioner Bennett**.

ORDER

20. USDA Rural Development shall cancel the debt as to Petitioner Bennett.

21. USDA Rural Development, and those collecting on its behalf, shall **return to Petitioner Bennett** any amounts already collected through garnishment or ***offset***.

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

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In re: JOHN F. FULLINGTON, II.
Docket No. 13-0089.
Decision and Order.
Filed May 29, 2013.

AWG.

Petitioner, pro se.
Richard Cardona and Mary Durkin for FSA.
Decision and Order entered by James P. Hurt, Hearing Officer.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to the imposition of administrative wage garnishment.

On April 15, 2013, a prehearing order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on May 7, 2013.

RD filed its Narrative and exhibits RX-1 thru RX -13 on April 24, 2013. Upon preliminary review of the documentation, I requested that the Farm Service Agency (FSA) provide a copy of the trustee's deed for Onondaga County, New York and a summary of the remaining balances. FSA filed exhibits RX-11-A (a)–(f) and RX-14 on May 16, 2013. A copy was mailed to Petitioner.

At the time and place of the initial hearing date, FSA was present. Phone calls placed to the phone number provided by Petitioner on his Request for Hearing were not answered.

Richard Cardona and Mary Durkin represented FSA. No testimony was taken however the written documentation provided by FSA remains unchallenged.

No financial statements have been received from the Petitioner.

Following the hearing and upon further review of FSA's documentation, I requested a further explanation of the extinguishment of loans 44-01 and 44-02 – the response by FSA is now part of the record.

On the basis of the record before me the following facts and

conclusions of law and order will be entered.

Findings of Fact

1. Petitioner John F. Fullington, II and his sister, Shannon L. Fullington, Beverly C. Fullington and John F. Fullington obtained three loans related to their Dairy farming operation in Onondaga County, New York by borrowing money from the Farm Service Agency on August 3, 2007 in the amount of $22,740 (Loan No. 44-03); and $174,792.94 (Loan No. 44-04); and $7,497.12 (Loan No. 44-05). RX-5, RX-4, and RX-2, respectively.

2. The real property of Beverly C. Fullington and John F. Fullington, which was in the same New York county from where the Dairy farming operation was conducted, already had a superior lien in favor of Citimortgage bank.

3. The three surviving FSA loans (44-03, 44-04, and 44-05) were junior to the Citimortgage loan on the Beverly and John Fullington property and also secured by personal property chattels related the farming operation of Petitioner and his sister, Shannon L. Fullington.

4. A series of operational tragedies befell the Dairy farming operation and farming income was greatly reduced.

5. The farming operation subsequently moved to Montgomery County, New York prior to the foreclosure.

6. The primary loan became in default and the Citimortgage loan was accelerated for foreclosure on May 8, 2008. RX-14.

7. The FSA loans were accelerated on September 20, 2010. RX-6.

8. The assets of the farming operation were liquated, but the proceeds were not sufficient to pay the FSA loans in full. RX-11-A.

9. The delinquent accounts were referred to Treasury for Cross-servicing on February 7, 2011. RX-8.

10. Treasury has collected payments through cross-servicing on the FSA loans. RX-11-A @ p. 1 of 15.

11. The balance due on loans 44-03, 44-04, and 44-05 remain as $18,795.94, $210,781.91, and $527.54, respectively, for a total of $230,105.39 . RX-11-A @ p. 1 of 15.

12. In addition, Petitioner is jointly and severally liable for potential treasury collection fees.

Conclusions of Law

1. Petitioner is jointly and severally liable to the USDA Rural Development in the amount of $230,105.39 for the FSA loans extended to him.

2. In addition, Petitioner is jointly and severally liable for potential collection fees to the U.S. Treasury.

3. All procedural requirements for Administrative Wage Offset set forth in 31 C.F.R. Paragraph 285.11 have been met.

4. Petitioner has not requested a financial hardship determination. Rural Development may garnish Petitioner's wages in the amount allowed by law.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment as might be specified in 31 C.F.R. § 285.11 (i).

A copy of this Decision and Order shall be served upon the parties by the Hearing Clerk’s Office.

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

HORNE v. USDA.
No. 12-123.
Court Decision.
Decided June 10, 2013.

AMAA—Defenses, handler, marketing order, producer, takings.

[Cite as: 133 S. Ct. 2053 (2013)].

Supreme Court of the United States

Court reversed and remanded the Ninth Circuit's decision, holding that the Ninth Circuit possessed jurisdiction to determine whether USDA had violated the Fifth Amendment by imposing fines and civil penalties upon petitioners as raisin handlers. Specifically, the Court ruled that: (1) the Ninth Circuit wrongly found that petitioners had presented their takings claim as producers and not handers; (2) the Agricultural Marketing Agreement Act (AMAA) bars Tucker Act jurisdiction over petitioners' takings claim and that the claim was ripe when petitioners raised it in the Ninth Circuit; and (3) because a handler may assert a takings-based defense within the context of a § 608c(14) enforcement proceeding brought by USDA, the Ninth Circuit erred in declining to adjudicate petitioners' takings defense.

OPINION OF THE COURT

Justice THOMAS delivered the opinion of the Court.

Under the Agricultural Marketing Agreement Act of 1937 (AMAA) and the California Raisin Marketing Order (Marketing Order or Order) promulgated by the Secretary of Agriculture, raisin growers are frequently required to turn over a percentage of their crop to the Federal Government. The AMAA and the Marketing Order were adopted to stabilize prices by limiting the supply of raisins on the market. Petitioners are California raisin growers who believe that this regulatory scheme violates the Fifth Amendment. After petitioners refused to surrender the requisite portion of their raisins, the United States Department of Agriculture (USDA) began administrative proceedings against petitioners that led to the imposition of more than $650,000 in

fines and civil penalties. Petitioners sought judicial review, claiming that the monetary sanctions were an unconstitutional taking of private property without just compensation. The Ninth Circuit held that petitioners were required to bring their takings claim in the Court of Federal Claims and that it therefore lacked jurisdiction to review petitioners' claim. We disagree. Petitioners' takings claim, raised as an affirmative defense to the agency's enforcement action, was properly before the court because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers. Accordingly, we reverse and remand to the Ninth Circuit.

I.

A.

Congress enacted the AMAA during the Great Depression in an effort to insulate farmers from competitive market forces that it believed caused "unreasonable fluctuations in supplies and prices." Ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 602(4). To achieve this goal, Congress declared a national policy of stabilizing prices for agricultural commodities. *Ibid.* The AMAA authorizes the Secretary of Agriculture to promulgate marketing orders that regulate the sale and delivery of agricultural goods. § 608c(1); see also *Block v. Community Nutrition Institute*, 467 U.S. 340, 346, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) ("The Act contemplates a cooperative venture among the Secretary, 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"). The Secretary may delegate to industry committees the authority to administer marketing orders. § 608c(7)(C).

The AMAA does not directly regulate the "producer[s]" who grow agricultural commodities, § 608c(13)(B); it only regulates "handlers," which the AMAA defines as "processors, associations of producers, and others engaged in the handling" of covered agricultural commodities. § 608c(1). Handlers who violate the Secretary's marketing orders may be subject to civil and criminal penalties. §§ 608a(5), 608a(6), and 608c(14).

The Secretary promulgated a marketing order for California raisins in 1949.[1] See 14 Fed. Reg. 5136 (codified, as amended, at 7 CFR pt. 989 (2013)). In particular, "[t]he Raisin Marketing Order, like other fruit and vegetable orders adopted under the AMAA, [sought] to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market." *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1359 (C.A.Fed.2005). The Marketing Order defines a raisin "handler" as "(a) [a]ny processor or packer; (b) [a]ny person who places ... raisins in the current of commerce from within [California] to any point outside thereof; (c) [a]ny person who delivers off-grade raisins ... into any eligible non-normal outlet; or (d) [a]ny person who blends raisins [subject to certain exceptions]." 7 CFR § 989.15.

The Marketing Order also established the Raisin Administrative Committee (RAC), which consists of 47 members, with 35 representing producers, ten representing handlers, one representing the cooperative bargaining associations, and one member of the public. See § 989.26. The Marketing Order authorizes the RAC to recommend setting up annual reserve pools of raisins that are not to be sold on the open domestic market. See 7 U.S.C. § 608c(6)(E); 7 CFR §§ 989.54(d) and 989.65. Each year, the RAC reviews crop yield, inventories, and shipments and makes recommendations to the Secretary whether or not there should be a reserve pool. § 989.54. If the RAC recommends a reserve pool, it also recommends what portion of that year's production should be included in the pool ("reserve-tonnage"). The rest of that year's production remains available for sale on the open market ("free-tonnage"). § 989.54(d), (a). The Secretary approves the recommendation if he determines that the recommendation would "effectuate the declared policy of the Act." § 989.55. The reserve-tonnage, calculated as a percentage of a producer's crop, varies from year to year.[2]

Under the Marketing Order's reserve requirements, a producer is only paid for the free-tonnage raisins. § 989.65. The reserve-tonnage raisins,

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[1] The AMAA also applies to a vast array of other agricultural products, including "[m]ilk, fruits (including filberts, almonds, pecans and walnuts …, pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, … tobacco, vegetables, … hops, [and] honeybees." § 608(c)(2).

[2] In 2002-2003 and 2003-2004, the crop years at issue here, the reserve percentages were set at 47 percent and 30 percent of a producer's crop, respectively. See RAC, Marketing Policy & Industry Statistics 2012, p. 28 (Table 12).

on the other hand, must be held by the handler in segregated bins "for the account" of the RAC. § 989.66(f). The RAC may then sell the reserve-tonnage raisins to handlers for resale in overseas markets, or may alternatively direct that they be sold or given at no cost to secondary, noncompetitive domestic markets, such as school lunch programs. § 989.67(b). The reserve pool sales proceeds are used to finance the RAC's administrative costs. § 989.53(a). In the event that there are any remaining funds, the producers receive a pro rata share. 7 U.S.C. § 608c(6)(E); 7 CFR § 989.66(h). As a result, even though producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited interest in the net proceeds of the RAC's disposition of the reserve pool.

Handlers have other duties beyond managing the RAC's reserve pool. The Marketing Order requires them to file certain reports with the RAC, such as reports concerning the quantity of raisins that they hold or acquire. § 989.73. They are also required to allow the RAC access to their premises, raisins, and business records to verify the accuracy of the handlers' reports, § 989.77, to obtain inspections of raisins acquired, § 989.58(d), and to pay certain assessments, § 989.80, which help cover the RAC's administrative costs. A handler who violates any provision of the Order or its implementing regulations is subject to a civil penalty of up to $1,100 per day. 7 U.S.C. § 608c(14)(B); 7 CFR § 3.91(b)(1)(vii). A handler who does not comply with the reserve requirement must "compensate the [RAC] for the amount of the loss resulting from his failure to ... deliver" the requisite raisins. § 989.166(c).

B.

Petitioners Marvin and Laura Horne have been producing raisins in two California counties (Fresno and Madera) since 1969. The Hornes do business as Raisin Valley Farms, a general partnership. For more than 30 years, the Hornes operated only as raisin producers. But, after becoming disillusioned with the AMAA regulatory scheme,[3] they began looking for

[3] The Hornes wrote the Secretary and to the RAC in 2002 setting out their grievances: "[W]e 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

ways to avoid the mandatory reserve program. Since the AMAA applies only to handlers, the Hornes devised a plan to bring their raisins to market without going through a traditional handler. To this end, the Hornes entered into a partnership with Mrs. Horne's parents called Lassen Vineyards. In addition to its grape-growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package the raisins from Raisin Valley Farms and Lassen Vineyards. It also contracted with more than 60 other raisin growers to clean, stem, sort, and, in some cases, box and stack their raisins for a fee. The Hornes' facilities processed more than 3 million pounds of raisins *in toto* during the 2002–2003 and 2003–2004 crop years. During these two crop years, the Hornes produced 27.4% and 12.3% of the raisins they processed, respectively.

Although the USDA informed the Hornes in 2001 that their proposed operations made them "handlers" under the AMAA, the Hornes paid no assessments to the RAC during the 2002–2003 and 2003–2004 crop years. Nor did they set aside reserve-tonnage raisins from those produced and owned by the more than 60 other farmers who contracted with Lassen Vineyards for packing services. They also declined to arrange for RAC inspection of the raisins they received for processing, denied the RAC access to their records, and held none of their own raisins in reserve.

On April 1, 2004, the Administrator of the Agriculture Marketing Service (Administrator) initiated an enforcement action against the Hornes, Raisin Valley Farms, and Lassen Vineyards (petitioners). The complaint alleged that petitioners were "handlers" of California raisins during the 2002–2003 and 2003–2004 crop years. It also alleged that petitioners violated the AMAA and the Marketing Order by submitting inaccurate forms to the RAC and failing to hold inspections of incoming raisins, retain raisins in reserve, pay assessments, and allow access to their records. Petitioners denied the allegations, countering that they were not "handlers" and asserting that they did not acquire physical possession of the other producers' raisins within the meaning of the regulations. Petitioners also raised several affirmative defenses, including a claim that the Marketing Order violated the Fifth

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grow it, not the Raisin Administrative Committee. This is America, not a communist state." App. to Pet. for Cert. 60a.

Amendment's prohibition against taking property without just compensation.

An Administrative Law Judge (ALJ) concluded in 2006 that petitioners were handlers of raisins and thus subject to the Marketing Order. The ALJ also concluded that petitioners violated the AMAA and the Marketing Order and rejected petitioners' takings defense based on its view that "handlers no longer have a property right that permits them to market their crop free of regulatory control." App. 39 (citing *Cal–Almond, Inc. v. United States*, 30 Fed.Cl. 244, 246–247 (1994)).

Petitioners appealed to a judicial officer who, like the ALJ, also found that petitioners were handlers and that they had violated the Marketing Order. The judicial officer imposed $202,600 in civil penalties under 7 U.S.C. § 608c(14)(B); $8,783.39 in assessments for the two crop years under 7 CFR § 989.80(a); and $483,843.53 for the value of the California raisins that petitioners failed to hold in reserve for the two crop years under § 989.166(c). The judicial officer believed that he lacked "authority to judge the constitutionality of the various statutes administered by the [USDA]," App. 73, and declined to adjudicate petitioners' takings claim.

Petitioners filed a complaint in Federal District Court seeking judicial review of the USDA's decision. See 7 U.S.C. § 608c(14)(B). The District Court granted summary judgment to the USDA. The court held that substantial evidence supported the agency's determination that petitioners were "handlers" subject to the Marketing Order, and rejected petitioners' argument that they were exempt from the Marketing Order due to their status as "producers" under § 608c(13)(B). No. CV–F–08–1549LJOSMS, 2009 WL 4895362, at *15 (E.D.Cal., Dec. 11, 2009). Petitioners renewed their Fifth Amendment argument, asserting that the reserve-tonnage requirement constituted a physical taking. Though the District Court found that the RAC takes title to a significant portion of a California raisin producer's crop through the reserve requirement, the court held that the transfer of title to the RAC did not constitute a physical taking. See *id.*, at *26 (" '[I]n essence, [petitioners] 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 admissions ticket' " (quoting *Evans v. United States*, 74 Fed.Cl. 554, 563–564 (2006))).

The Ninth Circuit affirmed. The court agreed that petitioners were "handlers" subject to the Marketing Order's provisions, and rejected petitioners' argument that they were producers, and, thus exempt from regulation. 673 F.3d 1071, 1078 (2012). The court did not resolve petitioners' takings claim, however, because it concluded that it lacked jurisdiction to do so. The court explained that "a takings claim against the federal government must be brought [in the Court of Federal Claims] in the first instance, 'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.' " *Id.*, at 1079 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (plurality opinion)). The court recognized that 7 U.S.C. § 608c(15) provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA, and it agreed that "when a handler, or a producer-handler in its capacity as a handler, challenges a marketing order on takings grounds, Court of Federal Claims Tucker Act jurisdiction gives way to section [60]8c(15)'s comprehensive procedural scheme and administrative exhaustion requirements." 673 F.3d, at 1079. But, the Ninth Circuit determined, petitioners brought the takings claim in their capacity as producers, not handlers. *Id.*, at 1080. Consequently, the court was of the view that "[n]othing in the AMAA precludes the Hornes from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers by subjecting them to a taking requiring compensation." *Ibid.* This availability of a Federal Claims Court action thus rendered petitioners' takings claim unripe for adjudication. *Ibid.*

We granted certiorari to determine whether the Ninth Circuit has jurisdiction to review petitioners' takings claim. 568 U.S. ——, 133 S. Ct. 638, 184 L.Ed.2d 452 (2012).

II.

A.

The Ninth Circuit's jurisdictional ruling flowed from its

determination that petitioners brought their takings claim as producers rather than handlers. This determination is not correct. Although petitioners argued that they were producers—and thus not subject to the AMAA or Marketing Order at all—both the USDA and the District Court concluded that petitioners were "handlers." Accordingly, the civil penalty, assessment, and reimbursement for failure to reserve raisins were all levied on petitioners in their capacity as "handlers." If petitioners' argument that they were producers had prevailed, they would not have been subject to *any* of the monetary sanctions imposed on them. See 7 U.S.C. § 608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capacity as a producer").

It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers. As a result, any defense raised against those duties is necessarily raised in that same capacity. Petitioners argue that it would be unconstitutional for the Government to come on their land and confiscate raisins, or to confiscate the proceeds of raisin sales, without paying just compensation; and, that it is therefore unconstitutional to fine petitioners for not complying with the unconstitutional requirement.[4] See Brief for Petitioners 54. Given that fines can only be levied on handlers, petitioners' takings claim makes sense only as a defense to penalties imposed upon them in their capacity *as handlers*. The Ninth Circuit confused petitioners' statutory argument (*i.e.*, "we are producers, not handlers") with their constitutional argument (*i.e.*, "assuming we are handlers, fining us for refusing to turn over reserve-tonnage raisins violates the Fifth Amendment").[5]

[4] The Ninth Circuit construed the takings argument quite differently, stating that petitioners believe the regulatory scheme "takes reserve-tonnage raisins belonging to producers." 673 F.3d 1071, 1080 (2012). When the agency brought its enforcement action against petitioners, however, it did not seek to recover reserve-tonnage raisins from the 2002-2003 and 2003-2004 crop years. Rather, it sought monetary penalties and reimbursement. Petitioners could not argue in the face of such agency action that the Secretary was attempting to take raisins that had already been harvested and sold. Instead, petitioners argued that they could not be compelled to pay fines for refusing to accede to an unconstitutional taking.

[5] The Government notes that petitioners did not own most of the raisins that they failed to reserve and argues that petitioners would have no takings claim based on those raisins. See Brief for Respondent 19. We take no position on the merits of petitioners' takings claim. We simply recognize insofar as the petitioners challenged the imposition of monetary sanctions under the Marketing Order, they raised their takings-based defense in their capacity as handlers. On remand, the Ninth Circuit can decide in the first instance

The relevant question, then, is whether a federal court has jurisdiction to adjudicate a takings defense raised by a handler seeking review of a final agency order.

B.

The Government argues that petitioners' takings-based defense was rightly dismissed on ripeness grounds. Brief for Respondent 21–22. According to the Government, because a takings claim can be pursued later in the Court of Federal Claims, the Ninth Circuit correctly refused to adjudicate petitioners' takings defense. In support of its position, the Government relies largely on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Brief for Respondent 21–22 ("Just compensation need not 'be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking' " (quoting *Williamson County*, 473 U.S., at 194, 105 S.Ct. 3108)). In that case, the plaintiff filed suit against the Regional Planning Commission, claiming that a zoning decision by the Commission effected a taking of property without just compensation. *Id.*, at 182, 105 S.Ct. 3108. We found that the plaintiff's claim was not "ripe" for two reasons, neither of which supports the Government's position.

First, we explained that the plaintiff's takings claim in *Williamson County* failed because the plaintiff could not show that it had been injured by the Government's action. Specifically, the plaintiff "ha[d] not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property." *Id.*, at 186, 105 S.Ct. 3108. Here, by contrast, petitioners were subject to a final agency order imposing concrete fines and penalties at the time they sought judicial review under § 608c(14)(B). This was clearly sufficient "injury" for federal jurisdiction.

Second, the *Williamson County* plaintiff's takings claim was not yet ripe because the plaintiff had not sought "compensation through the

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whether petitioners may raise the takings defense with respect to raisins they never owned.

procedures the State ha[d] provided for doing so." *Id.,* at 194, 105 S.Ct. 3108. We explained that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Id.,* at 194–195, 105 S.Ct. 3108 (internal quotation marks and alteration omitted). Stated differently, a Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation. Although we often refer to this consideration as "prudential 'ripeness,' " *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1013, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), we have recognized that it is not, strictly speaking, jurisdictional.[6] See *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection,* 560 U.S. 702, ——, and n. 10, 130 S.Ct. 2592, 2610, and n. 10, 177 L.Ed.2d 184 (2010).

Here, the Government argues that petitioners' takings claim is premature because the Tucker Act affords "the requisite reasonable, certain, and adequate provision for obtaining just compensation that a property owner must pursue." Brief for Respondent 22. In the Government's view, "[p]etitioners should have complied with the order, and, after a portion of their raisins were placed in reserve to be disposed of as directed by the RAC, ... sought compensation as producers in the Court of Federal Claims for the alleged taking." *Id.,* at 24–25. We disagree with the Government's argument, however, because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim. As a result, there is no alternative "reasonable, certain, and adequate" remedial scheme through which petitioners (as handlers) must proceed before obtaining review of their claim under the AMAA.[7]

The Court of Federal Claims has jurisdiction over Tucker Act claims

[6] A "Case" or "Controversy" exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court.

[7] That is not to say that a producer who turns over her reserve-tonnage raisins could not bring suit for just compensation in the Court of Claims. Whether a producer could bring such a claim, and what impact the availability of such a claim would have on petitioners' taking-based defense, are questions going to the merits of petitioners' defense, not a court's jurisdiction to entertain it. We therefore do not address those issues here.

"founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). "[A] claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enterprises*, 524 U.S., at 520, 118 S.Ct. 2131 (plurality opinion); see also *United States v. Bormes*, 568 U.S. ——, ——, 133 S.Ct. 12, 17, 184 L.Ed.2d 317 (2012) (where "a statute contains its own self-executing remedial scheme," a court "look[s] only to that statute"). To determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must "examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes." *United States v. Fausto*, 484 U.S. 439, 444, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988).

Under the AMAA's comprehensive remedial scheme, handlers may challenge the content, applicability, and enforcement of marketing orders. Pursuant to § 608c(15)(A)–(B), a handler may file with the Secretary a direct challenge to a marketing order and its applicability to him. We have held that "any handler" subject to a marketing order must raise any challenges to the order, including constitutional challenges, in administrative proceedings. See *United States v. Ruzicka*, 329 U.S. 287, 294, 67 S.Ct. 207, 91 L.Ed. 290 (1946). Once the Secretary issues a ruling, the federal district court where the "handler is an inhabitant, or has his principal place of business" is "vested with jurisdiction ... to review [the] ruling."[8] § 608c(15)(B). These statutory provisions afford handlers a ready avenue to bring takings claim against the USDA. We thus conclude that the AMAA withdraws Tucker Act jurisdiction over petitioners' takings claim. Petitioners (as handlers) have no alternative remedy, and their takings claim was not "premature" when presented to the Ninth Circuit.

C.

[8] Petitioners filed an administrative petition before the Secretary in March 2007 pursuant to § 608c(15)(A) challenging the Marketing Order and its application to them. The USDA argued that they had no standing to file the petition because they had not admitted that they were handlers. The judicial officer granted the USDA's motion to dismiss the petition for lack of jurisdiction. Petitioners filed a complaint in District Court, but the court dismissed it as untimely. The Ninth Circuit affirmed. See *Horne v. Dept. of Agriculture*, 395 Fed. Appx. 486 (2010).

Although petitioners' claim was not "premature" for Tucker Act purposes, the question remains whether a takings-based defense may be raised by a handler in the context of an enforcement proceeding initiated by the USDA under § 608c(14). We hold that it may. The AMAA provides that the handler may not be subjected to an adverse order until he has been given "notice and an opportunity for an agency hearing on the record." § 608c(14)(B). The text of § 608c(14)(B) does not bar handlers from raising constitutional defenses to the USDA's enforcement action. Allowing handlers to raise constitutional challenges in the course of enforcement proceedings would not diminish the incentive to file direct challenges to marketing orders under § 608c(15)(A) because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails.

In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding. See *Eastern Enterprises*, *supra*, at 520, 118 S.Ct. 2131. We see no indication that Congress intended this result for handlers subject to enforcement proceedings under the AMAA. Petitioners were therefore free to raise their takings-based defense before the USDA. And, because § 608c(14)(B) allows a handler to seek judicial review of an adverse order, the district court and Ninth Circuit were not precluded from reviewing petitioners' constitutional challenge. The grant of jurisdiction necessarily includes the power to review any constitutional challenges properly presented to and rejected by the agency. We are therefore satisfied that the petitioners raised a cognizable takings defense and that the Ninth Circuit erred in declining to adjudicate it.

III.

The Ninth Circuit has jurisdiction to decide whether the USDA's imposition of fines and civil penalties on petitioners, in their capacity as handlers, violated the Fifth Amendment. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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ANIMAL QUARANTINE

DEPARTMENTAL DECISIONS

In re: JOHN (JACK) HENNEN.
Docket No. 12-0092.
Decision and Order.
Filed June 7, 2013.

AQ – Adoption of ALJ decision – Transportation of horses.

Thomas N. Bolick, Esq. for Complainant.
David T. Johnson, Esq. for Respondent.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on November 30, 2011. The Administrator instituted the proceeding under sections 901-905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 1901 note) [hereinafter the Commercial Transportation of Equine for Slaughter Act]; the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges that: (1) on or about February 8, 2007, John (Jack) Hennen commercially transported 33 horses to Cavel International, in DeKalb, Illinois [hereinafter Cavel], for slaughter without a properly completed owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3)(v)-(vi) (Compl. at 1-2 ¶ II(a)); (2) on or about February 8, 2007, Mr. Hennen commercially transported 33 horses to

Cavel for slaughter and, during the transportation, unloaded and re-loaded the horses, but did not prepare a second owner-shipper certificate, in violation of 9 C.F.R. § 88.4(b)(4) (Compl. at 2 ¶ II(b)); (3) on or about February 8, 2007, Mr. Hennen commercially transported 33 horses to Cavel for slaughter, but at least seven horses in the shipment were missing United States Department of Agriculture backtags when they were unloaded at Cavel, in violation of 9 C.F.R. § 88.4(a)(2) (Compl. at 2 ¶ II(c)); (4) on or about February 8, 2007, Mr. Hennen commercially transported 33 horses to Cavel for slaughter and failed to obtain veterinary assistance for a downer horse from an equine veterinarian as soon as possible, in violation of 9 C.F.R. § 88.4(b)(2), and failed to handle the downer horse as expeditiously and carefully as possible in a manner that did not cause the horse unnecessary discomfort, stress, physical harm, or trauma, in violation of 9 C.F.R. § 88.4(c) (Compl. at 2 ¶ II(d)); (5) on or about March 6, 2007, Mr. Hennen commercially transported 26 horses to Cavel for slaughter and failed to maintain the animal cargo space of the conveyance used for the commercial transportation in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1), and failed to handle an injured horse as expeditiously and carefully as possible in a manner that did not cause the horse unnecessary discomfort, stress, physical harm, or trauma, in violation of 9 C.F.R. § 88.4(c) (Compl. at 2-3 ¶ III); and (6) on or about March 8, 2007, Mr. Hennen commercially transported 37 horses to Cavel for slaughter without a properly completed owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3)(vi) (Compl. at 3 ¶ IV). On December 27, 2011, Mr. Hennen filed an Answer in which he denied the material allegations of the Complaint.

On August 28, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing, wherein testimony was taken by appearance in Washington, DC, by audio-visual connection with Minneapolis, Minnesota, and by telephone. Thomas N. Bolick, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Mr. Hennen appeared pro se. At the hearing, the Administrator called four witnesses, and Mr. Hennen testified on his own behalf.[1] The Administrator introduced

[1] References to the transcript of the August 28, 2012, hearing are indicated as "Tr." and the page number.

22 exhibits identified as CX 1-CX 20 and CX 32-CX 33 which were received into evidence (Tr. at 9-11). Mr. Hennen did not introduce any exhibits at the hearing.

The Administrator withdrew the allegation in paragraph II(c) of the Complaint that on or about February 8, 2007, Mr. Hennen violated 9 C.F.R. § 88.4(a)(2) and the allegation in paragraph IV of the Complaint that on or about March 8, 2007, Mr. Hennen violated 9 C.F.R. § 88.4(a)(3)(vi) (Tr. at 9-10).

On December 6, 2012, the Administrator filed Complainant's Proposed Findings of Fact, Conclusions, and Brief and Order in Support Thereof, and on January 22, 2013, Mr. Hennen submitted correspondence which the ALJ identified as RX-1 and admitted to the record.

On February 21, 2013, the ALJ filed a Decision and Order in which she: (1) concluded that on February 8, 2007, Mr. Hennen commercially transported 32 horses to Cavel for slaughter without a properly completed owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3)(v)-(vi); (2) concluded that Mr. Hennen failed to instruct the driver of the February 8, 2007, shipment of horses to prepare an owner-shipper certificate, when the horses were unloaded and reloaded on February 8, 2007, in St. Paul, Minnesota, in violation of 9 C.F.R. § 88.4(b)(4); (3) concluded that Mr. Hennen failed to obtain veterinary assistance for downer horses during the February 8, 2007, trip to Cavel, in violation of 9 C.F.R. § 88.4(b); (4) concluded that on or about February 8, 2007, Mr. Hennen failed to handle horses as expeditiously and carefully as possible in a manner that did not cause the horses unnecessary discomfort, stress, physical harm, or trauma, in violation of 9 C.F.R. § 88.4(c); (5) concluded that on or about March 6, 2007, Mr. Hennen failed to maintain the animal cargo space of the conveyance used for the commercial transportation of horses to slaughter in a manner that at all times protected the health and well-being of the horses, in violation of 9 C.F.R. § 88.3(a)(1); (6) concluded that on or about March 6, 2007, Mr. Hennen failed to handle horses as expeditiously and carefully as possible in a manner that did not cause the horses unnecessary discomfort, stress, physical harm, or trauma, in violation of

9 C.F.R. § 88.4(c); (7) concluded that the imposition of sanctions is warranted; and (8) assessed Mr. Hennen a $17,375 civil penalty.[2]

On March 20, 2013, Mr. Hennen appealed the ALJ's Decision and Order to the Judicial Officer. On April 3, 2013, the Administrator filed Complainant's Response to Respondent's Appeal, and on April 8, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Except for a reference to Mr. Hennen's e-mail address, Mr. Hennen's appeal petition states in its entirety:

Docet [sic] # 12-0092
John Hennen vs USDA

I wish to appeal this decision on the grounds that were previously contended. I did not hire the truck. I did not pay the truck. I had nothing at all to do with the transportation of these animals once they left my farm were in the care and controll [sic] of the comercial [sic] trucking firm. Not me.

Jack Hennen

Mr. Hennen's appeal petition references the defenses he previously raised in this proceeding, all of which the ALJ considered and rejected. I have carefully reviewed the ALJ's Decision and Order particularly as it relates to the ALJ's rejection of Mr. Hennen's assertion that he was not responsible for the violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations alleged in paragraphs II(a), II(b), II(d), and III of the Complaint. I affirm the ALJ's Decision and Order, and, based upon my review of the record, I find no change or modification of the ALJ's Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision and order as the final order in a proceeding, as follows:

[2] ALJ's Decision and Order at 27-29.

§ 1.145 Appeal to Judicial Officer.

. . . .

(i) *Decision of the judicial officer on 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.

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's February 21, 2013, Decision and Order is adopted as the final order in this proceeding.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND, INC., A MARYLAND CORPORATION; AND ROBERT L. CANDY, AN INDIVIDUAL.
Docket No. 11-0222.
Decision and Order.
Filed March 22, 2013.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Respondents, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On May 11, 2011, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. 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 pursuant to 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 of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on or about May 17, 2006, September 7, 2006, November 29, 2006, May 23, 2007, September 26, 2007, June 2, 2008, September 3, 2008, August 3, 2009, September 30, 2009, November 20, 2009, May 19, 2010, and September 29, 2010, Tri-State Zoological Park of Western Maryland, Inc. [hereinafter Tri-State], and

Robert L. Candy violated the Regulations.[1] On June 3, 2011, Tri-State and Mr. Candy filed an answer denying the material allegations of the Complaint.

On February 8-9, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in Hagerstown, Maryland. Mr. Candy appeared pro se and on behalf of Tri-State. Buren Kidd and Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. At the hearing, the ALJ received in evidence the Administrator's exhibits identified as CX 1 through CX 16, with the exception of CX 3 at 4 and CX 10 at 9-12, which the Administrator withdrew (Tr. at 21-24).[2] The ALJ also excluded portions of CX 16 (Tr. at 434-35). The ALJ received in evidence Tri-State and Mr. Candy's exhibits identified as RX 1 through RX 23, with the exception of RX 12 and RX 14, which Tri-State and Mr. Candy withdrew, and RX 13, which the ALJ excluded (Tr. at 743-46). In addition, the parties entered into stipulations regarding the admissibility and authenticity of much of the documentary evidence, which the ALJ received in evidence as ALJX 1 (Tr. at 9).

On August 1, 2012, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order in which the ALJ: (1) concluded Tri-State and Mr. Candy willfully violated the Regulations as alleged in paragraphs 5a, 5b, 5d, 5e, 6, 7, 8a, 8d, 8e, 9a, 9b, 9c, 11, 12a (with respect to a lion enclosure), 12b, 13, 14, 16a, 18, 20b, 20c, 20d, 20e, 21b (with respect to a lion enclosure), 22, 23a, 24a, 24b, 25, 26a, and 26c of the Complaint; (2) concluded the Administrator failed to prove by a preponderance of the evidence that Tri-State and Mr. Candy violated the Regulations as alleged in paragraphs 4, 5c, 5f, 8b, 8c, 10, 12a (with respect to a cougar enclosure), 15, 16b, 16c, 16d, 16e, 17a, 17b, 19, 20a, 20f, 21a, 21b (with respect to cougar and bobcat enclosures), 21c, 23b, 23c, and 26b of the Complaint; (3) ordered Tri-State and Mr. Candy to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) suspended Tri-State's Animal Welfare Act license (Animal Welfare Act license number 51-C-0064) for a period of 45 days (ALJ's Decision and Order at 67-72).

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[1] Compl. at 2-9 ¶¶ 4-26.

[2] References to the transcript of the February 8-9, 2012, hearing are identified as "Tr."

On September 5, 2012, Tri-State and Mr. Candy appealed to the Judicial Officer. On October 26, 2012, the Administrator filed a response to Tri-State and Mr. Candy's appeal petition. On November 2, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's Decision and Order.

DECISION

A. Admissions

Tri-State and Mr. Candy admit Tri-State is a Maryland corporation whose registered agent for service of process is Mr. Candy, whose mailing address is in Cumberland, Maryland. Mr. Candy was the chief executive officer, director, principal, and registered agent for Tri-State at all times relevant to this proceeding.

Tri-State and Mr. Candy further admit Tri-State operates as an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations and held Animal Welfare Act license number 51-C-0064 at all times relevant to this proceeding.

B. Summary of Factual History

Mr. Candy started Tri-State in 2002 as a way to provide his children and other members of the community in Cumberland, Maryland, with an entertaining and educational activity (Tr. at 693-97). Before starting the zoo, Mr. Candy spent 30 years as a management operations consultant, specializing in the fields of sanitation, housekeeping, building management, and environmental services (Tr. at 693). Mr. Candy wrote housekeeping and maintenance manuals and provided training in those disciplines and is experienced in construction (Tr. at 693-95). Mr. Candy also has experience operating businesses, and he managed a horse farm in Pennsylvania at one time (Tr. at 761-62).

During his years working for corporations and as a consultant, Mr. Candy traveled extensively and visited zoos. Mr. Candy started gathering information on owning and operating a zoo in the 1980s. (Tr. at 695.)

Tri-State is located on a defunct campsite, which Mr. Candy modified to house and exhibit Tri-State's animals (Tr. at 695-96). The site included a large building destroyed in a fire in March 2006 (Tr. at 763). Most of Tri-State's post-fire structures were constructed by volunteers from recycled materials (Tr. at 696-97). Tri-State has no employees, but approximately 20 volunteers perform specific duties at Tri-State commensurate with their experience and abilities (Tr. at 696).

Tri-State is still being developed and approximately five acres of the sixteen-acre site are used for zoo related purposes. Mr. Candy estimated that when construction is completed, Tri-State will occupy eight acres of the property. (Tr. at 698.) Mr. Candy explained that Tri-State operates as an animal rescue facility as much as it does a zoo (Tr. at 698-99). He estimated that 3,000 people come to Tri-State each year to see approximately 50 animals (Tr. at 699, 721).

Mr. Candy testified he does his best to comply with the Regulations, but has been told by Animal and Plant Health Inspection Service personnel that they cannot give him specific guidance when he has asked for assistance (Tr. at 700-01). Mr. Candy's inability to obtain guidance has posed problems for Mr. Candy, as he has been found non-compliant with some of his fences and cages, despite his requests to consult with an Animal and Plant Health Inspection Service expert about the requirements for those structures (Tr. at 701-02). Tri-State and Mr. Candy have been responsive to criticism from the Animal and Plant Health Inspection Service and have immediately corrected some of the violations cited by the Animal and Plant Health Inspection Service (Tr. at 702-03).

Mr. Candy speculated that the biggest problem with the Tri-State facility is "aesthetics" (Tr. at 703-04). Mr. Candy stated that Tri-State does not always look pretty, especially in winter (Tr. at 704). Mr. Candy opens at 10:00 a.m. in the morning and closes in the winter at dusk (Tr. at 704-05). Volunteers follow a written schedule of tasks throughout

the day (Tr. at 704). Mr. Candy alone feeds and handles the large cats (Tr. at 705).

Mr. Candy keeps information regarding training sessions he or his volunteers attend and Tri-State's rules and regulations (Tr. at 714-18). His rules include instructions on cleaning areas occupied by the animals and rules for feeding the animals (Tr. at 718-20). Mr. Candy provides ongoing instruction to his volunteers during their tours of duty (Tr. at 719). Some volunteers live on the premise, which provides added security (Tr. at 727). Other than a "Big Cat Symposium" that he and volunteers attended in 2004 (Tr. at 714-15; RX 5), Mr. Candy and Tri-State volunteers have had no formal training in the care and keeping of exotic animals (Tr. at 710-12).

Tri-State gives educational tours to school and other groups, which Mr. Candy conducts on a daily basis (Tr. at 722). Mr. Candy encourages interaction with the animals, but does not allow direct contact with them (Tr. at 854-55). Mr. Candy explained that he conducts tours of Tri-State because the facility does not have many signs, and he is aware that it looks different from traditional zoos. Many of Tri-State's animals are rescued, and Mr. Candy wants visitors to understand Tri-State's mission and layout. (Tr. at 790.)

Dr. Gloria McFadden has been employed by the Animal Care Division, Animal and Plant Health Inspection Service, as a veterinary medical officer for approximately 8 years (Tr. at 31). Dr. McFadden's primary duties are to enforce the Animal Welfare Act and the Regulations at facilities she is assigned to inspect (Tr. at 33). Among her assigned facilities is the Tri-State facility, with which Dr. McFadden first became familiar in 2004 (Tr. at 34). During the period May 17, 2006, through September 29, 2010, Dr. McFadden conducted 12 inspections of the Tri-State facility and cited Tri-State and Mr. Candy for violations of the Animal Welfare Act and the Regulations during each inspection (CX 3-CX 14).

C. The Animal Welfare Act and the Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to ensure that the animals are provided humane care and

treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is authorized to promulgate regulations to govern the humane handling, care, treatment, and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Animal Welfare Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer, and transportation of regulated animals. 7 U.S.C. §§ 2133-34, 2140. Exhibitors must also allow inspection by Animal and Plant Health Inspection Service employees to assure the provisions of the Animal Welfare Act and the Regulations are being followed. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126.

Violations of the Animal Welfare Act or the Regulations by licensees may result in the assessment of civil penalties, the issuance of cease and desist orders, and the suspension or revocation of Animal Welfare Act licenses. 7 U.S.C. § 2149.

Exhibitors are liable for violations of the Animal Welfare Act by agents or employees of the exhibitor, as follows:

§ 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 . . . within the scope of his employment or office, shall be deemed the act, omission, or failure of such . . . exhibitor . . . as well as of such person.

7 U.S.C. § 2139.

The Regulations provide requirements for licensing, recordkeeping, and veterinary care, as well as standards for the humane handling, care, treatment, and transportation of covered animals. The Regulations set forth specific requirements regarding facilities where animals are housed, feeding and watering of animals, and sanitation.

D. Tri-State and Mr. Candy's Violations

1. Handling of Animals

The Regulations require exhibitors to handle animals during public exhibition, 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.

9 C.F.R. § 2.131(c)(1).

a. *Lion and Tigers*

During an inspection conducted on June 2, 2008, Dr. McFadden was accompanied by another Animal and Plant Health Inspection Service inspector, Robert Markmann (Tr. at 75, 361; CX 8). Volunteers for Tri-State were observed leading a group of people to see tigers and a lion in a "behind-the-scenes" tour (CX 8). Dr. McFadden noticed that the barrier between the public and the animals would have allowed people to touch the animals, though she did not observe anyone doing so (Tr. at 76-77). Dr. McFadden took pictures of two areas that showed people very close to the cats' enclosures (Tr. at 79-80; CX 8). No pictures show anyone touching the animals (Tr. at 249; CX 8). The lion was situated at a distance from the viewing public, with a wall-like structure between the animal and the tour participants (Tr. at 250).

Robert Markmann has been employed by the Animal and Plant Health Inspection Service since 1986 and has been an animal care inspector since 1988 (Tr. at 359). He observed members of the public viewing tigers and saw children touching the tigers by reaching through the bars of the tigers' cage (Tr. at 362). Mr. Markmann advised a Tri-State volunteer that the Animal and Plant Health Inspection Service did not allow the sort of exhibition that was underway and asked to speak to the owner (Tr. at 363). Dr. McFadden left to find Mr. Candy and bring him to the exhibition site. When Mr. Markmann told Mr. Candy that he could not allow the public to touch the tigers, Mr. Candy told

Mr. Markmann that he encouraged contact by the public with the tigers to keep them friendly (Tr. at 365).

Mark Deatelhauser works as a corrections officer, but has volunteered at Tri-State since 2004. He does a little of everything at the zoo, helping with exhibitions and tours, feeding the animals, and cleaning up after the animals. (Tr. at 509.) Mr. Deatelhauser described how he and volunteers would bring groups to see the large cats in their housing behind the cages that are open to general public viewing (Tr. at 516-17). Usually at least two people from Tri-State are with the public during these special exhibitions (Tr. at 518). People are allowed to get close to the animals to take pictures, but they are instructed not to touch the animals (Tr. at 519).

Mr. Deatelhauser was taking a group on a tour of the back of the tiger area on June 2, 2008, when Animal and Plant Health Inspection Service inspectors were present (Tr. at 510). He did not allow anyone on the tour to touch the tigers or to put their hands in tigers' cage. He was not involved with showing the lion to the group that day. (Tr. at 511.) Mr. Deatelhauser was the only barrier between the public and the cats in their cage (Tr. at 517). He estimated that between 15 and 20 people were in the group on June 2, 2008, but he could not recall the exact number (Tr. at 515).

Mr. Deatelhauser had worked at Tri-State for 4 years on the date the inspectors observed him. At that time, he worked at his regular job from 4:00 p.m. to 12:00 a.m., so he helped at the Tri-State facility every morning from Monday through Friday. Mr. Deatlehauser's training for his work at Tri-State was acquired on the job from Mr. Candy. (Tr. at 514, 520.) Mr. Candy taught him how to handle young animals, and he has worked with the tigers since they were born at the zoo (Tr. at 520-23). Mr. Deatelhauser no longer handles the cats, but he does direct them to a "catch area" for feeding and cleaning their cages (Tr. at 521). Mr. Deatelhauser was instructed that if an animal escapes, he should do "whatever you can to keep the animal from getting away" (Tr. at 522). Mr. Deatelhauser no longer conducts many tours because he now works at his regular job during the day (Tr. at 522).

Kimberly Nicole Cramer has volunteered at Tri-State for 10 years (Tr. at 527). Her primary duties include helping to keep internet records, helping with tours, and working in the gift shop and ticket office (Tr. at 528). She leads school groups on tours, including areas of the zoo from which the public is otherwise restricted. She often works with another volunteer to lead the tours, depending on the size of the group. The school tours generally include chaperones or parents of the children. (Tr. at 529-30.) Ms. Cramer received all her training about Tri-State's animals while working as a volunteer (Tr. at 538-39).

Ms. Cramer instructs all visitors to keep their hands away from the animals, but she believes that the area where she usually stands with groups is too far from the fence containing the lion to allow people to put their hands near the animal. She believes she is a sufficient barrier between the animals and the tour group. (Tr. at 532.) She instructs people to keep their backs against the wall opposite to the lion's enclosure and their arms at their sides (Tr. at 544-45). She is particularly vigilant when children are present (Tr. at 541-43). When Ms. Cramer thinks that the lion would not be receptive to a crowd, she does not bring people to the area behind the lion enclosure (Tr. at 533).

Ms. Cramer was one of the volunteers leading a tour group on June 2, 2008, when Animal and Plant Health Inspection Service inspectors were at the zoo (Tr. at 536). Ms. Cramer testified that no one touched the lion or put their hands near the fence, which she estimated was 12 feet in distance from the lion (Tr. at 535-37).

Mr. Candy denied inviting the public to touch the tigers. He explained that Mr. Markmann misunderstood his concept of contact with the animals, by which Mr. Candy meant closer interaction with them (Tr. at 854). Mr. Candy explained that the area where people entered to observe the tigers close up was about 20 feet long and that the number of people who could enter was controlled by the volunteer at the door, while another volunteer was inside the corridor with the tour (Tr. at 786-89).

Mr. Candy observed that, at the time of the inspection at issue, the tigers were young and had occupied their space for about 6 months. The tigers were housed in that area while their permanent enclosure was

being prepared. (Tr. at 790-91.) Mr. Candy believed his staff was familiar with the temperaments of Tri-State's tigers (Tr. at 788). No one at Tri-State moves a cat unless Mr. Candy is there, and he has trained his staff to handle an animal escape by using fire extinguishers located throughout the facility (Tr. at 791-92).

Mr. Markmann testified that he saw children reach into the spaces in the fencing to touch the tigers, but Dr. McFadden did not observe children touching the animals. The evidence regarding whether people touched the tigers is in equipoise. Nonetheless, I find the Administrator has met his burden of proving that Tri-State and Mr. Candy failed to provide a sufficient barrier between the tigers and the public. The photographs depict close quarters, with Mr. Deatelhauser in front of the group in a narrow corridor and Ms. Cramer outside of the entrance to the corridor (CX 8). It is unlikely that Ms. Cramer could have seen what people did while they observed the tigers, and she was tasked with crowd control in the area next to the lion enclosure.

The volunteers assigned to conduct tours did not have sufficient control over the participants to prevent them from reaching into the tigers' cage. The quarters were too cramped and the volunteers too far apart to provide an adequate barrier between the crowd and the animals. Neither volunteer had a good view of everyone on the tour once the tour entered the area behind the tiger cages. People were too far from Ms. Cramer once they were behind the tiger cage, and Mr. Deatelhauser did not stand between all of the tour participants and the cage. Mr. Deatelhauser could scarcely have seen, never mind have stopped, an impulsive child from reaching between the fencing and touching the tigers.

Further, the record does not establish that the volunteers were instructed on specific plans for capture or restraint of tigers or were prepared to respond to an animal attack. Ms. Cramer has significant experience in educating and handling crowds, but there is little evidence that she would know how to restrain the lion if he decided to jump the wall that separated him from the viewing public on these special tours. Ms. Cramer's reliance on her familiarity with the animals and their moods appears misplaced in these circumstances, given the inherently dangerous nature of lions and tigers.

The evidence demonstrates the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, I find, during the behind-the-scenes exhibitions, such as were observed on June 2, 2008, Tri-State and Mr. Candy violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals so there was minimal risk of harm to the animals and to the public.

b. *Squirrel Monkey*

Dr. McFadden conducted an inspection of Tri-State's facility on September 29, 2010, and found openings in the wire mesh entry door of a squirrel monkey's enclosure that permitted contact between the squirrel monkey and the public (Tr. at 132, 134; CX 14). Dr. McFadden was concerned that the gauge of the wire mesh was wide enough to allow people to put their fingers through it (Tr. at 136). On cross-examination, Dr. McFadden agreed that the squirrel monkey had occupied that enclosure for some time and she had never before issued a citation for the condition of the enclosure (Tr. at 311). Mr. Candy observed that the squirrel monkey had been in the same location with the same conditions for 5 years, and Tri-State and Mr. Candy were not cited for a problem with the construction before this inspection (Tr. at 820). Nevertheless, I find the Administrator proved this September 29, 2010, violation of 9 C.F.R. § 2.131(c)(1) by a preponderance of the evidence.

2. Housing Facilities

The Regulations require that animal housing facilities meet structural requirements and that exhibitors provide animals with shelter from inclement weather, as follows:

§ 3.125 Facilities, general.

(a) *Structural strength*. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

§ 3.127 Facilities, outdoor.

. . . .
(b) *Shelter from inclement weather*. Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

9 C.F.R. §§ 3.125(a), .127(b).

c. *Lion Enclosure*

Tri-State and Mr. Candy were repeatedly cited for failure to provide a structurally sound lion enclosure (CX 3, CX 7, CX 10-CX 14). Dr. McFadden testified that at her inspection on May 17, 2006, she observed that "the lion cage, the home panels at the bottom of the enclosure, they were not attached to the bottom in any way, and side posts weren't securely attached at that time, and there were some gaps as well that the animal could reach under or dig under." (Tr. at 39.) Dr. McFadden testified about photographs that she took, which depicted hog panels and different kinds of fencing held together by clips. In her opinion, the failure of one kind of fencing could cause a break in a section of fencing and the potential escape of the lion (Tr. at 49). Dr. McFadden testified that the gauge of the fence would not have prevented the lion from escaping if he attempted to get out (Tr. at 68). She also believed the use of railroad ties at the bottom of the hog panel fence created "[t]he potential for it to detach over time or [be] bothered or tampered with, I guess." (Tr. at 104.)

On September 26, 2007, Dr. McFadden found the entrance door of the lion enclosure, constructed of treated wood and small gauge wire, would not contain the lion (CX 7; Tr. at 67).

Dr. McFadden took pictures of the various kinds of fencing used to build the lion enclosure and included the pictures with her inspection report from September 30, 2009 (CX 11). She informed Mr. Candy of her concerns that the fencing was not "traditional" and did not "necessarily meet the industry standard that [she] generally would see. So it was making an assessment of whether it was appropriate difficult." (Tr. at 110.)

Dr. McFadden referred to photographs showing corner metal poles connected to corner wooden poles with clamps and other sections of fencing connected with wire clips (CX 11). She found the construction methods and materials "questionable" as she doubted their durability and strength (Tr. at 111-13). Dr. McFadden's report of her September 30, 2009, inspection detailed her concerns about the use of multiple kinds of materials fixed together with clamps and plastic ties (CX 11; Tr. at 111-12).

At her inspections on November 20, 2009, and May 19, 2010, Dr. McFadden again cited Tri-State and Mr. Candy with violations related to the soundness of the lion's enclosure because nothing had changed and the materials were the same (Tr. at 121, 127; CX 12-CX 13). At her inspection on September 29, 2010, Dr. McFadden observed that an overhang made of wood planks and high tensile wire had been added to the lion enclosure, but she still had concerns about the structure (Tr. at 138-41; CX 14).

In response to questioning by Mr. Candy, Dr. McFadden admitted she could not specifically state the exact nature of the defects in the lion enclosure, other than that she believed it potentially would be unable to contain the lion (Tr. at 171-72). Dr. McFadden testified that industry standards are considered when determining whether an exhibitor is in compliance with the Animal Welfare Act (Tr. at 171-72). In addition, the Animal and Plant Health Inspection Service's big cat expert was unfamiliar with the hog wire panels used by Tri-State and Mr. Candy (Tr.

at 174-75). Dr. McFadden acknowledged that the lion has occupied the enclosure space for 6 years without an escape (Tr. 172).

Dr. McFadden testified that the lion enclosure was "not the most pleasing exhibit" and one of her reasons for citing non-compliance was to "minimize complaints." (Tr. at 175.) Dr. McFadden admitted she had offered no alternative solution to Tri-State and Mr. Candy and further admitted that, over the years, Tri-State and Mr. Candy have added to the enclosure to increase its strength (Tr. at 172, 176). She had not observed breaks in the high tensile fence erected by Tri-State and Mr. Candy (Tr. at 177). The fence is built with metal poles buried in the ground and is attached to horizontal metal poles as well as vertical poles 11 feet high. The hog panels were added by Tri-State and Mr. Candy after discussions with Dr. McFadden regarding how to improve the fence (Tr. at 178).

Dr. McFadden reiterated her opinion that, when a fence is constructed of different materials, the potential for a break in one kind of material could decrease the overall strength of the fence (Tr. at 179). She recalled being able to move one of the panels, which she concluded showed that the fence was not structurally sound (Tr. at 180). Dr. McFadden referred to pictures that showed the fence was not consistently constructed (CX 11). Sometimes poles were erected between fencing, sometimes poles were inside the fence, and sometimes poles were outside the fence. The support posts appeared rusty and there were gaps in the fencing, as well as between the fencing and the ground (Tr. at 180).

In Dr. McFadden's opinion, the poles should be placed outside the fence because, if an animal would push on the fence, the poles would stop the fence from moving further (Tr. at 185). She conceded that the strength of a fence and placement of poles depended on the type of materials and manner of construction (Tr. at 186). Dr. McFadden agreed that changes made by Tri-State and Mr. Candy increased the strength of the lion enclosure, but, overall, Dr. McFadden had doubts about the structural integrity of the fence (Tr. at 186-88).

Dr. McFadden acknowledged that Mr. Candy had requested an opinion about the fence from the Animal and Plant Health Inspection Service's big cat expert, who did not offer one (Tr. at 188). Dr. McFadden would have appreciated a second opinion from the

specialist regarding whether the lion enclosure was in compliance with the Animal Welfare Act and the Regulations. She had discussed with Mr. Candy her desire for a resolution of the issue from another source. (Tr. 307-09.) Dr. McFadden further agreed that the basis for Tri-State and Mr. Candy's non-compliance with respect to the lion's enclosure was that the fence may not be structurally sound rather than an affirmative opinion that the fence is not structurally sound (Tr. at 190-91).

Dr. Ellen Magid has been a supervisory animal care specialist with the Animal and Plant Health Inspection Service since 1994 (Tr. at 389-90). In September 2009, Dr. Magid accompanied Dr. McFadden on an inspection of the Tri-State facility (Tr. at 391-92). She recalled inspecting the lion enclosure and finding an area of fencing that she could move back and forth. Dr. Magid talked about the "wobbly" fence with Mr. Candy, who advised her that he wanted the loose fence as he believed it would be harder for the lion to get out (Tr. at 392-93). She could not recall any specific reason for Mr. Candy's opinion, though she remembered discussing his rationale with him, as well as discussing the merits of different kinds of fencing (Tr. at 394).

Dr. Magid favors chain link fence over a hog panel fence because, in her opinion, with hog panel fencing, "the animals can reach out with paws and sometimes up to their shoulders." (Tr. at 395). Dr. Magid admitted that hog panel fencing met the regulatory minimum standards (Tr. at 408).

Dr. Magid had observed a gap in the bottom of the lion enclosure of about two and one half feet in one section. She also did not like the fence "waving" as the movement could cause metal fatigue. (Tr. at 396, 399-400.) Dr. Magid did not agree with Mr. Candy's theories about the flexibility of a fence adding to its safety and found the lion's enclosure was not structurally sound (Tr. at 401-03). Although Dr. Magid was aware that the lion had lived for a long time in that enclosure without escape, she remembered an incident when he almost escaped (Tr. at 403-04).

Dr. Magid's overall concern with the lion's enclosure was that it was constructed of many different materials that were joined together in

different fashions in a manner that made it difficult to assess its structural integrity (Tr. at 409). The various kinds of materials required maintenance to prevent rusting, fatigue, and breakage (Tr. at 410). Although the Animal and Plant Health Inspection Service's big cat specialist was not available to personally inspect Tri-State and Mr. Candy's facility, she looked at pictures of the fencing and reached conclusions similar to those of Dr. Magid (Tr. at 411). The big cat specialist did not give her opinion in written form (Tr. at 411; RX 11).

Timothy Squires is a police officer who volunteers at the Tri-State facility (Tr. at 590-93). Mr. Squires has also worked as a county code enforcement officer (Tr. at 592). He acquired construction experience by building his own home and other buildings (Tr. at 646). Mr. Squires does a little of everything at the Tri-State facility, but is primarily involved in building and maintaining enclosures (Tr. at 593).

Mr. Squires took pictures of the facility and referred to them during his testimony (RX 15-RX 22). He did not build the lion enclosure but was familiar with its construction and described it from a photograph (RX 17) as consisting of 8 foot by 20 foot panels made of four inch square six gauge fencing on the outside of metal posts, with high tensile wire above the post and chain link fence below the post (Tr. at 663). The wires are attached with hog-rings and clamped to the horizontal poles, but Mr. Squires could not say from the picture how they are attached at the corners (Tr. at 664-65). Railroad ties are at the base of the fencing and are attached to the fence (Tr. at 665). Another picture showed that, at the corners, fencing is held to the posts by clamps (Tr. at 666). Tension straps further stabilize the fence (Tr. at 666).

Tri-State and Mr. Candy have changed all perimeter fences and replaced three foot fences with eight foot fences (Tr. at 638-39). Mr. Squires confirmed that Tri-State and Mr. Candy planned to confine all large cats to one area of the facility located near the center of the premises and contained within a perimeter fence (Tr. at 640). Mr. Squires described the lion enclosure that was then under construction at the facility, using photographs that he took to illustrate his explanations (Tr. at 634; RX 21). He testified that metal poles that hold the fencing are sunk into the ground several inches and stand about 12 feet high (Tr. at 634-35). Mr. Squires stated that Mr. Candy was

debating the relative merits of using chain link fence, compared to wire gauge fence, which Mr. Squires prefers (Tr. at 640-42). Mr. Squires thinks chain link is flimsier and does not repair as well as panel fencing (Tr. at 641).

Mr. Squires described how he and Mr. Candy placed wire fencing over a wooden perimeter fence with a wooden platform when Dr. McFadden directed them to do so (Tr. at 643-44). Tri-State and Mr. Candy have attempted to address every concern that Dr. McFadden shared by adding fencing and strengthening existing fencing (Tr. at 647-51; RX 18, RX 22). Mr. Squires believes that the fences at Tri-State are structurally sound (Tr. at 647). Mr. Squires explained the integrity of the materials and the construction of the fencing by showing samples of the materials used (Tr. at 671-76).

Mr. Squires testified that the presence of rust does not present a threat to the strength of metal unless the rust corrodes the metal (Tr. at 675). He typically sands and paints rusted parts and replaces parts that have deteriorated (Tr. at 676-77). Mr. Candy pointed out that the fencing was secured to the railroad ties, which were secured to poles (Tr. at 753).

Dr. McFadden and Dr. Magid did not like certain aspects of the lion enclosure fencing, particularly the gaps in the fence and where the fence joined and appeared slack, which photographs corroborate. Although she did not provide a written opinion, the Animal and Plant Health Inspection Service's big cat specialist, Dr. Laurie Gage, agreed with the inspectors that the lion enclosure was not sound. Mr. Candy recalled discussing the fencing with both Dr. McFadden and Dr. Magid, and he testified he did not get an opinion about the fence's integrity from Dr. Gage (Tr. at 741).

Although Dr. Magid conceded that hog wire panels met the regulatory standards, her major concerns were with the construction methods used in the fencing and not the materials. The photographs depict a structure that looks cobbled together. I accord substantial weight to Mr. Squires' testimony regarding the strength of the fencing, the security of the panels and the railroad ties, and the difference between a layer of rust and corroded metal. Although Mr. Squires is not a construction expert, he has experience in building and his testimony credibly explained why the

structure had integrity. However, I equally credit the testimony of the Animal and Plant Health Inspection Service inspectors, who regularly assess the strength of animal enclosures. The inspectors were concerned about gaps in areas where fencing was joined and at the bottom of the fence. They were concerned about the variety of materials used to join the fencing in corners. The fence was pliable at places, which represented an additional concern.

Dr. McFadden admitted that she cited Tri-State and Mr. Candy for the failure to provide a structurally sound lion enclosure out of her concerns that the fence "may" not be structurally sound. Although Dr. McFadden provided no specific instructions to Tri-State and Mr. Candy on how to satisfy her concerns about the fence, she did repeatedly point out its flaws, and Dr. Magid shared her opinion. Dr. McFadden testified that the fence did not meet industry standards. The record does not describe those standards nor is reference made to a professional organization that issues such standards. Despite her allusion to "industry standards," Dr. McFadden's citations addressed specific conditions that Tri-State and Mr. Candy could have remedied.

Despite the somewhat speculative nature of Dr. McFadden's concerns about the fence, I find the preponderance of the evidence establishes that the fence did not meet the standards for structural integrity found in 9 C.F.R. § 3.125(a). Repeated inspections revealed different problems with the fencing that impinged upon its reliability.

Although Mr. Candy questioned what more he could do to come into compliance and asserted that the Animal and Plant Health Inspection Service failed to give him guidance, I find the inspection reports specifically identify deficits that should have been corrected. I find Dr. McFadden fully believed that the fence was unsound, but had no real and specific idea on how Tri-State and Mr. Candy could come into compliance with the structure as it existed. I note Dr. Goldentyer's suggestion that Tri-State and Mr. Candy would know how to come into compliance by comparing the lion's enclosure to structures that were not cited for violations of the Regulations (Tr. at 865-66).

Considering the record as a whole, I find the Administrator has established that the lion's enclosure was not structurally sound in violation of 9 C.F.R. § 3.125(a).

d. *Young Cat Enclosure*

On an inspection on September 26, 2007, Dr. McFadden cited Tri-State and Mr. Candy with failing to construct an enclosure for a large cat, referred to as a lion, in a manner sufficient to contain the animal (CX 7). On cross-examination, Dr. McFadden corrected the citation, acknowledging that the enclosure actually held Tri-State and Mr. Candy's young tiger (Tr. at 233). Dr. McFadden explained that there were "two doors, sort of a space in between a keeper area or a lock-out area." (Tr. at 235.) She believed that the small gauge of the wire door "would not withstand the strength of the animal" (Tr. at 235). Mr. Candy described how he had reinforced the door to this enclosure with another panel of six gauge wire (Tr. at 783), and Dr. McFadden acknowledged that Tri-State and Mr. Candy added hog-wire fence to the area (Tr. at 236).

Dr. McFadden again found a problem with the young tiger enclosure on May 19, 2010 (CX 13). At that time, Dr. McFadden observed that a tree had grown inside the enclosure, which the tiger could climb and escape (Tr. at 128). Mr. Candy explained how trees had been growing out of an old pool back in 2008, 2 years before he rebuilt the enclosure for the tiger (Tr. at 818-19). He stated the tree that Dr. McFadden had observed was small and was immediately removed (Tr. at 819; CX 13).

The Administrator has established these September 26, 2007, and May 19, 2010, violations of 9 C.F.R. § 3.125(a), but Tri-State and Mr. Candy have established that the violations were corrected.

e. *Llama and Goat Enclosure*

During inspections conducted on November 29, 2006, and May 23, 2007, Dr. McFadden observed that wire fencing around the llama and goat enclosure was detached from the ground, causing sharp wire to protrude into the enclosure (CX 5-CX 6). Dr. McFadden was concerned that the protruding wire could injure an animal or that an animal could

escape (Tr. at 56). Dr. McFadden had seen a miniature horse damaging the fence, and Mr. Candy had told her that the horse damaged the fence on a regular basis (Tr. at 57, 59, 222).

Dr. McFadden agreed that Tri-State and Mr. Candy fixed the problem whenever she pointed it out, but she was not sure that the problem was ever permanently corrected (Tr. at 218, 222). She had no pictures of the damage because she typically does not retain pictures of inspections for more than 3 years (Tr. at 217-18). Mr. Candy testified "that horse is no longer with us" (Tr. at 765).

The evidence establishes this continuing violation of 9 C.F.R. § 3.125(a). Tri-State and Mr. Candy are credited with making repairs, but the record clearly demonstrates that the problem remained so long as the horse was housed in that location.

f. *Arctic Fox*

At her inspection on November 29, 2006, Dr. McFadden observed a hole in the roof of the structure housing an arctic fox (CX 5; Tr. at 57). Tri-State and Mr. Candy corrected the defect on the date of the inspection (Tr. at 219). This violation of 9 C.F.R. § 3.127(b) is supported by the evidence.

3. Waste Disposal

The Regulations require exhibitors to dispose of waste, as follows:

§ 3.125 Facilities, general.

. . . .

(d) *Waste disposal*. Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State,

and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.125(d).

a. *Bedding and rodent feces in the fennec fox and agouti enclosures*

On May 17, 2006, Dr. McFadden observed an excessive amount of waste and bedding in an enclosure housing an agouti and a fennec fox (CX 3; Tr. at 41). Dr. McFadden described a two-tiered enclosure occupied by the fox on the top and the agouti on the bottom (Tr. at 41-43). Mr. Candy testified that the agouti was not housed directly beneath the fox, but rather that the area described by Dr. McFadden allows for air ventilation, heat distribution, and drainage (Tr. at 756). He agreed that excess bedding could have been removed, but disagreed that feces had accumulated in the area next to the agouti enclosure (Tr. 756). Mr. Candy admitted an excess of feces was in areas near animal habitats. It is immaterial that the agouti was not directly in contact with the waste. I find the Administrator proved this violation of 9 C.F.R. § 3.125(d) by a preponderance of the evidence.

b. *Excessive waste and excreta in pools*

On June 2, 2008, Dr. McFadden found an excessive amount of excreta in a small pool where two adult tigers defecated and urinated and cited Tri-State and Mr. Candy for a violation of 9 C.F.R. § 3.125(d) (CX 8; Tr. at 91). The water was murky, and Dr. McFadden believed that the pool needed to be cleaned more often (Tr. at 90-91). Dr. McFadden cited Tri-State and Mr. Candy with repeated violations of 9 C.F.R. § 3.125(d) on August 3, 2009 (CX 10; Tr. at 105), on September 30, 2009 (CX 11; Tr. at 114-15), and on November 20, 2009 (CX 12; Tr. at 122).

Mr. Candy explained that the pool referenced in the June 2, 2008, and August 3, 2009, inspection reports served solely as the "tiger toilet" (Tr. at 794). Dr. McFadden generally conducts inspections on Wednesdays and is present when the enclosures are being cleaned (Tr. at 726). The pool was cleaned on Wednesdays and Sundays (Tr. at 794-95).

Mr. Candy speculated that Dr. McFadden observed what she considered excess waste in the "tiger toilet" because the pool had not yet been cleaned that day (Tr. at 794). Tri-State and Mr. Candy's schedule was interrupted when Dr. McFadden arrived, and the area was cleaned after she concluded her inspection (Tr. at 795). The tigers no longer occupy that space, but are in a new exhibit (Tr. at 830). Mr. Candy believed citations for conditions that were temporary and were scheduled to be corrected was somewhat arbitrary (Tr. at 771).

On September 30, 2009, and November 20, 2009, Dr. McFadden cited Tri-State and Mr. Candy for the condition of the swimming pool in the area housing the large Siberian tiger and the area where the tiger cubs were housed (Tr. at 810). That pool is made of dark green concrete and Mr. Candy believed the pool looked murkier to Dr. McFadden than it really was because of the color of the paint on the pool and the mulch in the pool (Tr. at 811). Mr. Candy observed that Dr. McFadden was 100 feet away from the pool, and the distance was far enough to make the water appear dark (Tr. at 831). Tri-State and Mr. Candy have resolved the problem with mulch in the tiger pool by removing the mulch; the pool is now surrounded only by concrete (Tr. at 831-32).

I fully credit Mr. Candy's testimony that the areas in question were cleaned twice a week, on Wednesdays and Sundays. However, the fact that Dr. McFadden repeatedly cited Tri-State and Mr. Candy with violations of 9 C.F.R. § 3.125(d) is supported by Mr. Candy's cleaning schedule. I conclude that Mr. Candy is mistakenly convinced that his methods are sound, and I find the Administrator proved by a preponderance of the evidence that Tri-State and Mr. Candy violated 9 C.F.R. § 3.125(d) on June 2, 2008, and August 3, 2009.

However, the evidence regarding the murky pool that was impinged by mulch and painted a color that enhances the murk is vague. I credit the testimony that Tri-State and Mr. Candy changed the sanitation methods regarding this water source in an effort to avoid future citations, but I also find that nothing of record establishes that this pool was excessively unclean or posed a risk to the health and welfare of the animals. I credit the testimony that the distance between the pool and observer would make it difficult to determine how clean the water was. I further credit the testimony that the water is filtered and sump pumped

routinely. These violations of 9 C.F.R. § 3.125(d) that are alleged to have occurred on September 30, 2009, and November 20, 2009, are dismissed.

4. Perimeter Fence

The Regulations require exhibitors to enclose outdoor facilities with a perimeter fence, as follows:

§ 3.127 Facilities, outdoor.

. . . .

(d) *Perimeter fence*. . . . [A]ll outdoor housing facilities . . . must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (e.g., lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fence less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator.

9 C.F.R. § 3.127(d).

On September 7, 2006, Dr. McFadden found that Tri-State and Mr. Candy had failed to a enclose facility for servals with a perimeter fence (CX 4). The servals were in a temporary enclosure that did not have a perimeter fence three feet from the enclosure fence in the back (Tr. at 54). Dr. McFadden explained that, although there was a perimeter fence generally around the facility, there was a break in the wall in this particular area, which represents a failure to create a secondary

containment system that would keep an animal from escaping the premises (Tr. at 54-56, 216).

During Dr. McFadden's inspection on September 26, 2007, the serval was no longer in that enclosure, but the problem persisted. No complete perimeter fence had been erected, and a tiger was housed in the enclosure (CX 7A; Tr. at 68-69). Dr. McFadden cited Tri-State and Mr. Candy because the back wall of the tiger enclosure was not within a perimeter fence (CX 7A; Tr. at 72-74).

Mr. Candy believed that a solid wall around the young tiger enclosure was sufficient to serve as a perimeter fence but nevertheless put up another fence when Dr. McFadden expressed reservations about the existing wall (Tr. at 786). Dr. McFadden acknowledged that a solid wall could serve as a perimeter fence, since the Regulations do not require a particular fencing material (Tr. at 217). Dr. McFadden conceded that there was a wall present in the area, but it was not three feet from the enclosure as required by 9 C.F.R. § 3.127(d) (Tr. at 237).

On September 26, 2007, and on August 3, 2009, Dr. McFadden noted that the perimeter fence near the lion's enclosure was leaning inward, and, therefore, did not provide an adequate barrier (CX 7, CX 10; Tr. at 105). The fence was "[s]lightly, but noticeab[ly]" leaning inward (Tr. at 289). The fence was leaning at the top of its eight foot height, and Dr. McFadden could not recall whether it was braced on either side (Tr. at 289). Pictures that Dr. McFadden took at both inspections show the fence leaning, and it appeared to be leaning more in 2009 (CX 7, CX 10; Tr. at 292). Dr. McFadden and Mr. Candy discussed the issue, and Mr. Candy understood that the fence needed to be made sturdier, and he straightened it out (Tr. at 812). The Administrator's concern about the structural integrity of the perimeter fence near the lion's enclosure is supported by the fact that the August 3, 2009, inspection revealed that fence was leaning more than it had been leaning during the September 26, 2007, inspection.

I find the Administrator proved the September 7, 2006, September 26, 2007, and August 3, 2009, violations of 9 C.F.R. § 3.127(d) by a preponderance of the evidence.

5. Animal Health and Husbandry Standards

The Regulations require sanitation, as follows:

§ 3.131 Sanitation.

(a) *Cleaning of enclosures*. Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

. . . .

(d) *Pest control*. A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

9 C.F.R. § 3.131(a), (d).

On November 29, 2006, Dr. McFadden observed an excessive amount of feces in several enclosures (CX 5; Tr. at 59). Mr. Candy advised that enclosures were cleaned once a week, which Dr. McFadden considered to be inadequate to prevent contamination and health hazards (Tr. at 59-60). On her inspection conducted on May 23, 2007, Dr. McFadden observed accumulated excreta, dirt, and hair in the tiger enclosure (CX 6; Tr. at 60-61). She cited Tri-State and Mr. Candy with a repeated violation for not cleaning enclosures frequently enough (Tr. at 61-62).

During her inspection on August 3, 2009, Dr. McFadden found an excessive amount of excreta in the enclosures for cougars, servals, bobcats, pigs, and goats. Dr. McFadden believed the problem would be resolved with more frequent cleaning. (Tr. at 106; CX 10.) Mr. Candy had worked in the field of environmental services and has written policies regarding proper cleaning and building maintenance for companies such as Sodexho and Marriott (Tr. at 693-94). Mr. Candy is certified in cleaning and sanitation and feels qualified to determine how

to maintain facilities so they are properly cleaned and sanitized (Tr. at 694). He and his volunteers follow a schedule for cleaning the facility (Tr. at 705). Mr. Candy has developed checklists that volunteers must use to record completion of assigned tasks. He trains volunteers in the best way to clean the facility and uses industry-recognized cleaning agents. Vinegar is used inside, near the animals, and outside facilities are cleaned with a water and bleach mixture. (Tr. at 714-17.)

The animal areas are cleaned daily and power-washed every two weeks (Tr. at 718). Mr. Candy asserted that Dr. McFadden is aware of the schedule and approved of his power-washing schedule. According to Mr. Candy, Dr. McFadden had never suggested a different schedule for removing feces or other routine maintenance (Tr. at 719, 725). Mr. Candy cleans large cat cages, and he cannot be cleaning on inspection days when he is required to tour the premises with the inspector (Tr. at 771). The areas of fencing that tigers previously rubbed against and that accumulated hair have been changed and are no longer attractive to the cats for that purpose (Tr. at 772).

Mr. Candy's insistence on adhering to his pre-established cleaning schedule demonstrates that he fails to comprehend Dr. McFadden's concerns. He has been repeatedly and frequently cited for deficiencies of cleanliness standards, yet maintains that Dr. McFadden has not suggested adjusting his cleaning practices. I find Tri-State and Mr. Candy have made little effort to accommodate Dr. McFadden's concerns. Although Mr. Candy deems himself an expert in sanitation, the businesses in which he worked prior to his current enterprise do not replicate conditions at a zoo.

I find the Administrator proved the November 29, 2006, May 23, 2007, and August 3, 2009, violations of 9 C.F.R. § 3.131(a) by a preponderance of the evidence.

During the inspection on May 17, 2006, Dr. McFadden saw a mouse in the binturong enclosure (CX 3). It was obvious to Dr. McFadden that the mouse was staying in the enclosure, and she opined that the presence of one rodent generally signified additional mice and an inadequate pest control system (Tr. at 46).

On May 23, 2007, Dr. McFadden noted numerous flies in the reptile house and concluded that Tri-State and Mr. Candy had not taken effective measures to reduce their numbers (CX 6; Tr. at 62-63). She observed a number of fly strips and knew of no other pest control measure used by Tri-State and Mr. Candy (Tr. at 63).

On June 2, 2008, Dr. McFadden saw the decomposed carcass of a mouse in a trap near the young tiger's enclosure (CX 8; Tr. at 95). Although she could not say whether the picture she viewed depicted the mouse trap inside the enclosure (CX 8 at 15), she nevertheless concluded that Tri-State and Mr. Candy did not have effective pest control measures that included frequent checking of traps to remove dead rodents (Tr. at 95-96).

Mr. Candy has a written pest control program, but acknowledged that sometimes conditions require adjustments, such as in May 2007, when an excessive number of flies were on site. An individual who previously had an animal exhibition now runs a pest control company and Tri-State uses his services. (Tr. at 773.)

I find the evidence supports that better pest control was necessary at the Tri-State facility. The allegations that Tri-State and Mr. Candy violated 9 C.F.R. § 3.131(d) on May 17, 2006, May 23, 2007, and June 2, 2008, are supported by the evidence.

6. Employees

The Regulations require that exhibitors utilize a sufficient number of trained employees, as follows:

§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. § 3.132.

During her inspection on May 17, 2006, Dr. McFadden cited Tri-State and Mr. Candy for failure to have adequate numbers of sufficiently trained employees on site (CX 3). It was evident to Dr. McFadden that Tri-State and Mr. Candy did not have enough properly trained staff due to the number of problems she had observed (Tr. at 46-47). She believed that Tri-State's volunteers needed guidance from someone with expertise in animal husbandry (Tr. at 47).

In 2004, Mr. Candy and two volunteers attended a "Big Cat Symposium" (Tr. at 714-15). Tri-State and Mr. Candy have not provided any other formal training to the Tri-State volunteers, but Mr. Candy stated he has established strict rules about maintenance and care of the animals and closely supervises his volunteers (Tr. at 715). Tri-State's rules include health and safety policies, and volunteers are required to note and sign a list of tasks that they complete during their tours of duty (Tr. at 716). The checklist requires observations about the condition of the animals and facility, and volunteers are expected to make entries when they arrive for their shifts and again when they leave. Mr. Candy is always available to answer questions. (Tr. at 717.) Mr. Candy expects volunteers to record weather conditions, any changes they notice in the animals, maintenance issues, and any thing else they consider important (Tr. at 724-25).

Volunteers are trained on an on-going basis, and the zoo uses the specific talents and expertise of its volunteers (Tr. at 719). Tri-State does not provide manuals to volunteers, other than the check list and rules. Mr. Candy is in charge of the zoo, and Mr. Candy expects the volunteers to heed his instructions. (Tr. at 722.) The checklists are kept in the reptile house (Tr. at 723-25; RX 23). One volunteer is designated as the "main volunteer" daily (Tr. at 726). The main volunteer works the same day each week and is generally responsible for feeding the animals (Tr. at 726-27). In addition, people live on the premises and provide security on a consistent basis (Tr. at 727).

Mr. Candy testified that Dr. McFadden has told him that four people should be on duty at a time (Tr. at 759). Mr. Candy believed that he had sufficient workers (Tr. at 759-60). Mr. Candy asserted he had adequate experience in animal care, expertise in facility maintenance, and knowledge of animal husbandry (Tr. at 761). Mr. Candy has managed a

horse farm in Pennsylvania and was responsible for cleaning and sanitizing universities, hospitals, and veterinary clinics (Tr. at 761-62). Mr. Candy developed procedures with the consultation of an individual with zoo experience (Tr. at 762). That individual is now working for another zoo, and another individual that Mr. Candy hired as an animal consultant is no longer with Tri-State (Tr. at 762-63).

I credit Mr. Candy's years of experience working with animals and conferring with veterinarians and other animal experts and conclude he has adequate experience to operate Tri-State. However, the preponderance of the evidence demonstrates that Tri-State is not adequately staffed. Tri-State and Mr. Candy have been repeatedly cited for violations that could have been avoided if people were tasked to make routine maintenance inspections to correct such problems as breaches in fencing, pest control, and unsanitary conditions. Although Tri-State and Mr. Candy's use of a check list for volunteers is laudatory, it is inadequate to prevent those types of infractions that were routinely observed by Dr. McFadden on her inspections.

The size of the Tri-State facility, both in area and number of animals, and the repeated problems observed by inspectors, support Dr. McFadden's contention that at least four people should be on site while Tri-State is open for operation. The Administrator has established the May 17, 2006, violation of 9 C.F.R. § 3.132 by a preponderance of the evidence.

7. Handling, Care, and Treatment of Nonhuman Primates

The Regulations require exhibitors to control pests affecting nonhuman primates, as follows:

§ 3.84 Cleaning, sanitization, housekeeping, and pest control.

. . . .

(d) *Pest control*. An effective program for control of insects, external parasites affecting nonhuman primates, and birds and mammals that are pests, must be established and maintained so as to promote the health and

well-being of the animals and reduce contamination by pests in animal areas.

9 C.F.R. § 3.84(d).

On her inspection conducted on September 29, 2010, Dr. McFadden noticed rodent holes in the lemur house (CX 14; Tr. at 153). As discussed in this Decision and Order, *supra*, the Administrator has established that Tri-State's pest control plan is not consistently effective; therefore, I find the Administrator proved by a preponderance of the evidence that Tri-State and Mr. Candy violated 9 C.F.R. § 3.84(d) on September 29, 2010.

8. Attending Veterinarian and Adequate Veterinary Care

The Regulations require that each exhibitor have an attending veterinarian who provides adequate veterinary care, as follows:

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further,* That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40.

On June 2, 2008, and September 3, 2008, Tri-State and Mr. Candy failed to provide Dr. McFadden with a copy of a written program of veterinary care (CX 8-CX 9; Tr. at 75-76, 97-98). As a result, Dr. McFadden was unable to determine whether Tri-State and Mr. Candy had a veterinarian on call or had developed a plan for care (Tr. at 75). Mr. Candy testified that he has no place to keep his records on site since Tri-State lost a building in a fire (Tr. at 706). He is reluctant to keep records in the gift shop or any other building open to the public (Tr. at 707). However, he is aware that Dr. McFadden generally spends two days inspecting the Tri-State facility, and he consistently provides her with all the records, including plans of veterinary care and enrichment for nonhuman primates, on the morning of the second day of Dr. McFadden's inspection (Tr. at 707).

When pressed to explain why he could not maintain the records in the place where he keeps check lists, Mr. Candy testified that he did not think it was appropriate to keep the records in that location, which is a kitchen that stores animal feed (Tr. 730). He distinguished those records from the logs, which are used daily (Tr. at 731). Despite being cited for repeated violations, he had never failed to provide the records (Tr. at 731-32). He maintains that so long as he "cures" defects, he should be considered compliant with the Animal Welfare Act and the Regulations.

The records are always made available to Dr. McFadden; however, the Animal and Plant Health Inspection Service has the right to see records at an unannounced inspection to assure itself that the records have not been changed to conform with the Regulations. *See S.S. Farms Linn County, Inc.*, No. 89-03, 50 Agric. Dec. 476, 489, 1991 WL 290584, at *10 (U.S.D.A. Feb. 8, 1991).

Mr. Candy's resistance to keeping the records on-site demonstrates a lack of cooperation and commitment to full compliance with the Animal Welfare Act and the Regulations. Tri-State and Mr. Candy's violations of 9 C.F.R. § 2.40(a) on June 2, 2008, and September 3, 2008, are supported by the evidence.

On September 7, 2006, Dr. McFadden noticed that one of Tri-State and Mr. Candy's goats needed to have its hooves trimmed (Tr. at 53-54). The goat has a genetic deformity on its hooves, but the hooves also were overgrown (CX 4; Tr. at 54). On August 3, 2009, Dr. McFadden noticed two limping goats and documented their gait to make sure they received veterinary attention (CX 10; Tr. at 102). On November 20, 2009, Dr. McFadden again noted a violation of 9 C.F.R. § 2.40 even though the goats' hooves had been trimmed (CX 12). Dr. McFadden explained that Tri-State and Mr. Candy had failed to provide a record from a veterinarian acknowledging the condition of the goats' hooves and establishing a schedule for trimming them. Tri-State and Mr. Candy had no documentation from a veterinarian diagnosing the chronic condition. (Tr. at 121.)

Mr. Candy explained that some of the goats at Tri-State had a genetic defect that creates a consistent problem with their hooves, which was

known to their veterinarian (Tr. at 757). Mr. Candy does not consider the genetic malformation a medical condition that requires a schedule of care, but he is aware that the condition affects the goats and he tries to tend to their needs (Tr. at 757-58).

The evidence regarding veterinary care for goats with a genetic condition is substantiated. The existence of a genetic condition may not warrant a schedule of medical treatment for the condition. However, goats were observed limping due to overgrown hooves that needed medical attention. Tri-State and Mr. Candy did not have a plan for routine hoof care, and Mr. Candy admitted that the condition needed attention, as he called Tri-State's veterinarian, who treated the goats (Tr. at 281). The September 7, 2006, August 3, 2009, and November 20, 2009, failures to follow a plan of veterinary care constitute violations of 9 C.F.R. § 2.40.

9. Failure to Retain Records

The Regulations require exhibitors to make, keep, and maintain records, as follows:

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that . . . exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and State, and the driver's license number (or photographic identification card for nondrivers issued by a State) and State of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

(2) Record of Animals on Hand (other than dogs and cats) (APHIS Form 7019) and Record of Acquisition, Disposition, or Transport of Animals (other than dogs and cats) (APHIS Form 7020) are forms which may be used by . . . exhibitors to keep and maintain the information required by paragraph (b)(1) of this section concerning animals other than dogs and cats except as provided in § 2.79.

(3) One copy of the record containing the information required by paragraph (b)(1) of this section shall accompany each shipment of any animal(s) other than a dog or cat purchased or otherwise acquired by a[n] . . . exhibitor. One copy of the record containing the information required by paragraph (b)(1) of this section shall accompany each shipment of any animal other than a dog or cat sold or otherwise disposed of by a[n] . . . exhibitor; *Provided, however*, That information which indicates the source and date of acquisition of any animal other than a dog or cat need not appear on the copy of the record accompanying the shipment. The . . . exhibitor shall retain one copy of the record containing the information required by paragraph (b)(1) of this section.

9 C.F.R. § 2.75(b).

Dr. McFadden charged Tri-State and Mr. Candy with failure to maintain records relating to the acquisition and disposal of animals in violation of 9 C.F.R. § 2.75(b) during her September 26, 2007, inspection (CX 7; Tr. at 64). Mr. Candy testified that he now keeps records of all animals (Tr. at 775). The record establishes that on September 26, 2007, Tri-State and Mr. Candy failed to keep complete records relating to the acquisition and disposal of animals in violation of 9 C.F.R. § 2.75(b).

E. Personal Liability of Mr. Candy

Pursuant to the Animal Welfare Act, Mr. Candy, as sole corporate officer and director of Tri-State, is personally liable for his acts, omissions, or failures to act within the scope of his employment or office, and Mr. Candy's acts, omissions, or failures to act are deemed the acts, omissions, or failures of Tri-State. 7 U.S.C. § 2139. *See Coastal Bend Zoological Ass'n.*, No. 04-0015, 67 Agric. Dec. 154, 169-71, 2008 WL 8120999 at *12-13 (U.S.D.A. Jan. 24, 2008) (Decision as to Robert Brock and Michelle Brock). A corporation and the individual who exercised sole control over corporate activities may be jointly sanctioned for violations of the Animal Welfare Act or the Regulations under 7 U.S.C. § 2149 pursuant to the operation of 7 U.S.C. § 2139. *Wilson v. U.S. Dep't of Agric*., 61 F.3d 907 (7th Cir. 1995).

F. Remedies

The purpose of assessing penalties is not to punish violators, but to deter violators and others from similar behavior. *Zimmerman*, No. 94-0015, 56 Agric. Dec. 433, 461, 1997 WL 327152, at *22 (U.S.D.A. June 26, 1997). In assessing a civil penalty, the Secretary of Agriculture must give due consideration to the size of the business, the gravity of the violation, the person's good faith, and the history of previous violations (7 U.S.C. § 2149(b)). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less than, or different from, that recommended. *Shepherd*, No. 96-0084, 57 Agric. Dec. 242, 283, 1998 WL 385884, at *29 (U.S.D.A. June 26, 1998).

As Eastern Regional Director of the Animal Care Program for the Animal and Plant Health Inspection Service, Dr. Goldentyer is familiar with the Animal Welfare Act licensees within her jurisdiction (Tr. at 858-60). When considering whether a civil penalty is appropriate, she considers factors such as the size of the business of the licensee, the history of compliance, and the good faith of the enterprise (Tr. at 860-62). Tri-State and Mr. Candy's operation is relatively small. Tri-State and Mr. Candy consented to the payment of a civil penalty in a previous Animal Welfare Act enforcement action (Tr. at 860-61). Dr. Goldentyer could not say that Tri-State and Mr. Candy acted entirely in good faith because they repeatedly violated the Regulations (Tr. at 861-62).

Dr. Goldentyer agreed that some of the violations were not egregious, but she pointed to the accumulation of violations, which she inferentially attributed to poor management (Tr. at 863). She believed that a period of suspension was appropriate to allow the facility to come into compliance (Tr. at 863-64). She also believed that a civil money penalty would send an appropriate deterrent message (Tr. at 870-71).

Tri-State and Mr. Candy handled animals in a manner that posed a risk of harm to the animals and the public. Tri-State and Mr. Candy do not employ an adequate number of trained personnel to ensure compliance with the Animal Welfare Act and the Regulations, leading to repeated violations pertaining to the maintenance of the facility. Tri-State and Mr. Candy failed to develop and follow a plan for veterinary care of their goats' hooves. Tri-State and Mr. Candy's lion enclosure did not meet standards for structural soundness. Tri-State and Mr. Candy repeatedly violated recordkeeping requirements. Although Tri-State and Mr. Candy corrected many of the conditions for which they were cited, conditions remained unaltered when Mr. Candy disagreed with the Animal and Plant Health Inspection Service's findings. Tri-State and Mr. Candy's response to repeatedly being cited for certain conditions suggests lack of good faith and demonstrates willful violation of the Animal Welfare Act and the Regulations.

The Animal and Plant Health Inspection Service has recommended that Tri-State's Animal Welfare Act license be suspended for a period of 6 months. I find that recommendation overly harsh, considering that many of the conditions on which violations were based have been

corrected by Tri-State and Mr. Candy. Considering the remedial nature of the Animal Welfare Act and the fact that no violations resulted in harm to the animals or to the public, I find a 45-day suspension of Tri-State's Animal Welfare Act license and a cease and desist order should be sufficient to deter Tri-State, Mr. Candy, and others from future violations of the Animal Welfare Act and the Regulations.

G. Findings of Fact

1. Tri-State Zoological Park of Western Maryland, Inc., is a Maryland corporation.

2. At all times relevant to this proceeding, Robert L. Candy was the registered agent for Tri-State and the chief executive officer, director, and principal of Tri-State.

3. At all times relevant to this proceeding, Tri-State and Mr. Candy operated a zoo and exhibited approximately 65 wild and exotic animals at a facility in Cumberland, Maryland, under Animal Welfare Act license number 51-C-0064.

4. The Animal and Plant Health Inspection Service conducted inspections of Tri-State and Mr. Candy's facility, records, and animals on May 17, 2006, September 7, 2006, November 29, 2006, May 23, 2007, September 26, 2007, June 2, 2008, September 3, 2008, August 3, 2009, September 30, 2009, November 20, 2009, May 19, 2010, and September 29, 2010.

5. During each of the inspections identified in Finding of Fact number 4, Animal and Plant Health Inspection Service inspectors cited Tri-State and Mr. Candy for violations of the Regulations.

6. On or about May 17, 2006, Tri-State and Mr. Candy's lion enclosure had rusty support posts and wire twists and had unattached panels that allowed gaps between the ground and the enclosure.

7. On or about May 17, 2006, Tri-State and Mr. Candy's fennec fox and agouti enclosures contained an accumulation of bedding and rodent feces.

8. On or about May 17, 2006, Tri-State and Mr. Candy's binturong enclosure contained visible evidence of rodents.

9. On or about May 17, 2006, Tri-State and Mr. Candy failed to have a sufficient number of adequately trained employees.

10. On or about September 7, 2006, Tri-State and Mr. Candy failed to have an attending veterinarian provide adequate veterinary care to their animals and failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Tri-State and Mr. Candy failed to have a goat's hooves trimmed and failed to establish and maintain a regular schedule for trimming the goat's hooves in order to ensure the goat's health and well-being and to prevent disease and injury to the goat.

11. On or about September 7, 2006, Tri-State and Mr. Candy failed to enclose a facility for servals with a perimeter fence.

12. On or about November 29, 2006, Tri-State and Mr. Candy's llama and goat enclosure was in disrepair with wire fencing detached from the ground and sharp wire protruding into the enclosure.

13. On or about November 29, 2006, Tri-State and Mr. Candy failed to provide adequate shelter from inclement weather for an arctic fox.

14. On or about November 29, 2006, Tri-State and Mr. Candy's bobcat, lion, tiger, and llama enclosures contained excessive accumulations of feces and food waste and Tri-State and Mr. Candy's standard practice of removal of waste one time per week was inadequate to prevent contamination, minimize disease hazards, and reduce odors.

15. On or about May 23, 2007, Tri-State and Mr. Candy's llama and goat enclosure was in disrepair with wire fencing that was detached from the ground and sharp wire protruding into the enclosure.

16. On or about May 23, 2007, Tri-State and Mr. Candy's tiger enclosure contained an accumulation of excreta, dirt, and hair.

17. On or about May 23, 2007, Tri-State and Mr. Candy failed to establish and maintain an effective pest control program.

18. On or about September 26, 2007, Tri-State and Mr. Candy failed to keep, make, and maintain records regarding the acquisition of a ferret and a chinchilla and failed to keep, make, and maintain records regarding the disposition of a squirrel monkey and a goat.

19. On or about September 26, 2007, Tri-State and Mr. Candy's tiger enclosure was in disrepair. Specifically, the entrance door of the tiger enclosure was constructed of treated wood and small gauge wire and not of sufficient strength to contain the tiger in the enclosure.

20. On or about September 26, 2007, Tri-State and Mr. Candy failed to enclose the housing facility for a tiger with an adequate perimeter fence.

21. On or about June 2, 2008, Tri-State and Mr. Candy failed to have a written program of veterinary care.

22. On or about June 2, 2008, Tri-State and Mr. Candy failed to handle tigers and a lion during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the felids and the general viewing public so as to assure the safety of the animals and the public.

23. On or about June 2, 2008, Tri-State and Mr. Candy's enclosure housing two adult tigers contained a small pool containing excessive urine and feces which attracted pests.

24. On or about September 3, 2008, Tri-State and Mr. Candy failed to have a written program of veterinary care.

25. On or about August 3, 2009, Tri-State and Mr. Candy failed to have an attending veterinarian provide adequate veterinary care to their animals and failed to establish and maintain programs of adequate veterinary care that included daily observation and communication with an attending veterinarian. Specifically, Tri-State and Mr. Candy failed to have two goats with visible gait deficits seen by their attending

veterinarian and failed to observe and record animal health problems and to communicate those problems to an attending veterinarian.

26. On or about August 3, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair. Specifically, the fence was not constructed in a manner that would contain the lion in the enclosure.

27. On or about August 3, 2009, Tri-State and Mr. Candy's enclosure housing two adult tigers contained a small pool containing excessive urine and feces.

28. On or about August 3, 2009, Tri-State and Mr. Candy failed to enclose the housing facility for a lion with an adequate perimeter fence.

29. On or about August 3, 2009, Tri-State and Mr. Candy's enclosures for cougars, servals, bobcats, pigs, and goats contained an excessive amount of feces.

30. On or about September 30, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair.

31. On or about November 20, 2009, Tri-State and Mr. Candy failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Tri-State and Mr. Candy failed to keep records of hoof care for goats and could not confirm either a schedule for, or the frequency of, hoof trimming.

32. On or about November 20, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair.

33. On or about May 19, 2010, Tri-State and Mr. Candy's lion enclosure was in disrepair.

34. On or about May 19, 2010, Tri-State and Mr. Candy's enclosure for a young tiger was not constructed in a manner sufficient to contain the tiger.

35. On or about September 29, 2010, Tri-State and Mr. Candy failed to handle a squirrel monkey during public exhibition so there was minimal risk of harm to the squirrel monkey and to the public, with sufficient distance and/or barriers between the squirrel monkey and the general viewing public so as to assure the safety of the squirrel monkey and the public. Specifically, openings in the entry door of the squirrel monkey's enclosure permitted contact between the squirrel monkey and the public.

36. On or about September 29, 2010, Tri-State and Mr. Candy's lion enclosure was in disrepair.

37. On or about September 29, 2010, Tri-State and Mr. Candy failed to establish and maintain an effective pest control program. Specifically, evidence of rodents was observed in the lemur enclosure.

H. Conclusions of Law

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

2. At all times relevant to this proceeding, Tri-State was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

3. At all times relevant to this proceeding, in his capacity as corporate officer and director of Tri-State, Mr. Candy operated as an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

4. Pursuant to 7 U.S.C. § 2139, Mr. Candy's acts, omissions, or failures in his capacity as corporate officer and director of Tri-State are deemed to be his own as well as those of the corporate entity, Tri-State.

5. The following violations alleged in the Complaint to have been committed by Tri-State and Mr. Candy are dismissed for lack of proof by a preponderance of the evidence:

a. A violation of 9 C.F.R. § 2.40(b)(1)-(2), alleged to have occurred on or about September 26, 2007;

b. Violations of 9 C.F.R. § 2.131(c), alleged to have occurred on or about May 17, 2006, on or about June 2, 2008, and on or about August 3, 2009;

c. A violation of 9 C.F.R. § 3.75(a), alleged to have occurred on or about November 29, 2006;

d. A violation of 9 C.F.R. § 3.77(d), alleged to have occurred on or about November 29, 2006;

e. Violations of 9 C.F.R. § 3.81(b) and (c)(4), alleged to have occurred on or about May 17, 2006, on or about August 3, 2009, and on or about September 30, 2009;

f. Violations of 9 C.F.R. § 3.125(a), alleged to have occurred with respect to a cougar enclosure on or about September 26, 2007, with respect to the cougar and bobcat enclosures on or about September 30, 2009, and with respect to the Siberian tiger and white tiger enclosures on or about September 29, 2010;

g. A violation of 9 C.F.R. § 3.125(c), alleged to have occurred on or about September 3, 2008;

h. Violations of 9 C.F.R. § 3.125(d), alleged to have occurred on or about September 30, 2009, and on or about November 20, 2009;

i A violation of 9 C.F.R. §§ 3.125(d) and 3.129, alleged to have occurred on or about June 2, 2008;

j. A violation of 9 C.F.R. § 3.127(a) and (b), alleged to have occurred on or about June 2, 2008;

k. A violation of 9 C.F.R. § 3.127(c), alleged to have occurred on or about May 17, 2006;

l. A violation of 9 C.F.R. § 3.129(a), alleged to have occurred on or about September 3, 2008;

m. A violation of 9 C.F.R. § 3.130, alleged to have occurred on or about November 20, 2009;

n. Violations of 9 C.F.R. § 3.131(c), alleged to have occurred on or about June 2, 2008, and on or about August 3, 2009; and

o. A violation of 9 C.F.R. § 3.131(d), alleged to have occurred on or about June 2, 2008.

6. The following violations alleged in the Complaint to have been committed by Tri-State and Mr. Candy are established by a preponderance of the evidence:

a. On or about May 17, 2006, Tri-State and Mr. Candy's lion enclosure had rusty support posts and wire twists and had unattached panels that allowed gaps between the ground and the enclosure, in willful violation of 9 C.F.R. § 3.125(a);

b. On or about May 17, 2006, Tri-State and Mr. Candy's fennec fox and agouti enclosures contained an accumulation of bedding and rodent feces, in willful violation of 9 C.F.R. § 3.125(d);

c. On or about May 17, 2006, Tri-State and Mr. Candy failed to maintain a safe and effective pest control program for the control of mammalian pests, in willful violation of 9 C.F.R. § 3.131(d);

d. On or about May 17, 2006, Tri-State and Mr. Candy failed to have a sufficient number of adequately trained employees, in willful violation of 9 C.F.R. § 3.132;

e. On or about September 7, 2006, Tri-State and Mr. Candy failed to have an attending veterinarian provide adequate veterinary care to their animals and failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, in willful violation of 9 C.F.R. § 2.40(a) and (b)(2);

f. On or about September 7, 2006, Tri-State and Mr. Candy failed to enclose a facility for servals with a perimeter fence, in willful violation of 9 C.F.R. § 3.127(d);

g. On or about November 29, 2006, Tri-State and Mr. Candy's llama and goat enclosure was in disrepair with wire fencing detached from the ground and sharp wire protruding into the enclosure, in willful violation of 9 C.F.R. § 3.125(a);

h. On or about November 29, 2006, Tri-State and Mr. Candy failed to provide adequate shelter from inclement weather for an arctic fox, in willful violation of 9 C.F.R. § 3.127(b);

i. On or about November 29, 2006, Tri-State and Mr. Candy's bobcat, lion, tiger, and llama enclosures contained excessive accumulations of feces and food waste and Tri-State and Mr. Candy's standard practice of removal of waste one time per week was inadequate to prevent contamination, minimize disease hazards, and reduce odors, in willful violation of 9 C.F.R. § 3.131(a);

j. On or about May 23, 2007, Tri-State and Mr. Candy's llama and goat enclosure was in disrepair with wire fencing that was detached from the ground and sharp wire protruding into the enclosure, in willful violation of 9 C.F.R. § 3.125(a);

k. On or about May 23, 2007, Tri-State and Mr. Candy's tiger enclosure contained an accumulation of excreta, dirt, and hair, in willful violation of 9 C.F.R. § 3.131(a) and (c);

l. On or about May 23, 2007, Tri-State and Mr. Candy failed to establish and maintain an effective pest control program, in willful violation of 9 C.F.R. § 3.131(d);

m. On or about September 26, 2007, Tri-State and Mr. Candy failed to keep, make, and maintain records regarding the acquisition of a ferret and a chinchilla and failed to keep, make, and maintain records regarding the disposition of a squirrel monkey and a goat, in willful violation of 9 C.F.R. § 2.75(b);

n. On or about September 26, 2007, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

o. On or about September 26, 2007, Tri-State and Mr. Candy failed to enclose the housing facility for a tiger with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.127(d);

p. On or about June 2, 2008, Tri-State and Mr. Candy failed to have a written program of veterinary care, in willful violation of 9 C.F.R. § 2.40(a);

q. On or about June 2, 2008, Tri-State and Mr. Candy failed to handle tigers and a lion during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the felids and the general viewing public so as to assure the safety of the animals and the public, in willful violation of 9 C.F.R. § 2.131(c)(1);

r. On or about June 2, 2008, Tri-State and Mr. Candy's enclosure housing two adult tigers contained a small pool containing excessive urine and feces which attracted pests, in willful violation of 9 C.F.R. § 3.125(d);

s. On or about September 3, 2008, Tri-State and Mr. Candy failed to have a written program of veterinary care, in willful violation of 9 C.F.R. § 2.40(a);

t. On or about August 3, 2009, Tri-State and Mr. Candy failed to have an attending veterinarian provide adequate veterinary care to their animals and failed to establish a program of adequate veterinary care that included daily observation and communication with an attending veterinarian, in willful violation of 9 C.F.R. § 2.40(a) and (b)(3);

u. On or about August 3, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

v. On or about August 3, 2009, Tri-State and Mr. Candy's enclosure housing two adult tigers contained a small pool containing excessive urine and feces, in willful violation of 9 C.F.R. § 3.125(d);

w. On or about August 3, 2009, Tri-State and Mr. Candy failed to enclose the housing facility for a lion with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.127(d);

x. On or about August 3, 2009, Tri-State and Mr. Candy's enclosures for cougars, servals, bobcats, pigs, and goats contained an excessive amount of feces, in willful violation of 9 C.F.R. § 3.131(a);

y. On or about September 30, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

z. On or about November 20, 2009, Tri-State and Mr. Candy failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, in willful violation of 9 C.F.R. § 2.40(b)(2);

aa. On or about November 20, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

bb. On or about May 19, 2010, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

cc. On or about May 19, 2010, Tri-State and Mr. Candy's enclosure for a young tiger was not constructed in a manner sufficient to contain the tiger, in willful violation of 9 C.F.R. § 3.125(a);

dd. On or about September 29, 2010, Tri-State and Mr. Candy failed to handle a squirrel monkey during public exhibition so there was minimal risk of harm to the squirrel monkey and to the public, with sufficient distance and/or barriers between the squirrel monkey and the general viewing public so as to assure the safety of the squirrel monkey and the public, in willful violation of 9 C.F.R. § 2.131(c);

ee. On or about September 29, 2010, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a); and

ff. On or about September 29, 2010, Tri-State and Mr. Candy failed to establish and maintain an effective pest control program, in willful violation of 9 C.F.R. § 3.84(d).

7. The suspension of Tri-State's Animal Welfare Act license for a period of 45 days is appropriate.

8. An order instructing Tri-State and Mr. Candy to cease and desist from violations of the Animal Welfare Act and the Regulations is appropriate.

I. Tri-State and Mr. Candy's Request for Oral Argument

Tri-State and Mr. Candy's request for oral argument, which the Judicial Officer may grant, refuse, or limit,[3] is refused because the issues are not complex and oral argument would serve no useful purpose.

J. Tri-State and Mr. Candy's Appeal Petition

Tri-State and Mr. Candy raise seven issues in their Appeal to Judicial Officer. First, Tri-State and Mr. Candy assert the Administrator failed to meet his burden of proof that Tri-State and Mr. Candy willfully violated the Regulations.

As the proponent of an order, the Administrator has the burden of proof in this proceeding,[4] and the standard of proof by which the burden of persuasion is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.[5] After a thorough

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[3] 7 C.F.R. § 1.145(d).

[4] 5 U.S.C. § 556(d).

[5] Herman & MacLean v. Huddleston, 459 U.S. 375, 387-92 (1983); Steadman v. SEC, 450 U.S. 91, 92-104 (1981); Pearson, No. 02-0020, 68 Agric. Dec. 685, 727-28, 2009 WL 8382858, at *28 (U.S.D.A. July 13, 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Schmidt, No. 05-0019, 66 Agric. Dec. 159, 178, 2007 WL 959715, at *9 (U.S.D.A. Mar. 26, 2007); Int'l Siberian Tiger Found., No. 01-0017, 61 Agric. Dec. 53, 79 n.3, 2002 WL 234001, at *19, n.3 (U.S.D.A. Feb. 15, 2002) (Decision and Order as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger

review of the record, I affirm the ALJ's conclusions regarding the allegations in the Complaint which the Administrator proved by a preponderance of the evidence, and I adopt the ALJ's findings of fact and conclusions of law with only minor modifications. Tri-State and Mr. Candy's contentions that the ALJ's conclusions of law are error, have no merit.

Second, Tri-State and Mr. Candy assert they corrected their violations of the Regulations thereby barring the Administrator from instituting this proceeding.

Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations. While Tri-State and Mr. Candy's corrections of their Animal Welfare Act violations are commendable and can be taken into account when determining the sanction to be imposed, Tri-State and Mr. Candy's corrections of their violations do not eliminate the fact that the violations occurred,[6] and the Administrator is not barred from instituting a proceeding for violations of the Animal Welfare Act and the Regulations after the violations have been corrected.

Third, Tri-State and Mr. Candy contend the Administrator filed the Complaint in violation of rules, regulations, and procedural mandates

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Lady); Parr, No. 99-0022, 59 Agric. Dec. 629, 643-44 n.8, 2000 WL 1634306, at *9-10 n.8 (U.S.D.A. Oct. 17, 2000) (Order Den. Resp't's Pet. for Recons.), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); Zimmerman, No. 96-0021, 56 Agric. Dec. 1419, 1455-56 n.7, 1997 WL 730380, at *23 n.7 (U.S.D.A. Nov. 6, 1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), *printed in* 57 Agric. Dec. 869 (U.S.D.A. 1998); Zimmerman, No. 94-0015, 56 Agric. Dec. 433, 461, 1997 WL 327152, at *22 (U.S.D.A. June 6, 1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), *printed in* 57 Agric. Dec. 46 (U.S.D.A. 1998); Zoological Consortium of Md, Inc., No. 401, 47 Agric. Dec. 1276, 1283-84, 1988 WL 242939, at *6-7 (U.S.D.A. Aug. 16, 1988).

[6] Pearson, No. 02-0020, 68 Agric. Dec. 685, 727-28, 2009 WL 8382858, at *28 (U.S.D.A. July 13, 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Bond, No. 04-0024, 65 Agric. Dec. 92, 109, 2006 WL 1430148, at *12 (U.S.D.A. May 19, 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Drogosch, No. 04-0014, 63 Agric. Dec. 623, 643, 2004 WL 2619832, at *14 (U.S.D.A. Oct. 28, 2004); Parr, No. 99-0022, 59 Agric. Dec. 601, 644, 2000 WL 1230146, at *15 (U.S.D.A. Aug. 30, 2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); DeFrancesco, No. 99-0036, 59 Agric. Dec. 97, 112 n.12 ,2000 WL 523166, at *12 n.12 (U.S.D.A. May 1, 2000); Huchital, No. 97-0020, 58 Agric. Dec. 763, 805 n.6, 1999 WL 3314045, at *28 n.6 (U.S.D.A. Nov. 4, 1999); Stephens, 58 Agric. Dec. 149, 184-85, 1999 WL 288586, at *25 (U.S.D.A. May 5, 1999).

dictated by the "USDA guide book." Specifically, Tri-State and Mr. Candy assert the United States Department of Agriculture inspector did not first recommend that the Administrator institute this proceeding and the Administrator did not conduct an investigation prior to filing the Complaint.

The Rules of Practice provide that the Administrator may file a complaint alleging a violation of the Animal Welfare Act or the Regulations based upon reason to believe that a person has violated the Animal Welfare Act or the Regulations, as follows:

§ 1.133 Institution of proceedings.

. . . .

(b) *Filing of complaint or petition for review*. (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or of any regulation, standard, instruction or order issued pursuant thereto, whether based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

7 C.F.R. § 1.133(b)(1). The Rules of Practice do not require that the Administrator receive a recommendation that he institute a proceeding from a United States Department of Agriculture inspector prior to filing a complaint alleging violations of the Animal Welfare Act or the Regulations, and the Administrator is not required to conduct an investigation prior to filing a complaint pursuant to 7 C.F.R. § 1.133(b)(1).[7]

Fourth, Tri-State and Mr. Candy assert the Regulations are void for vagueness.

A regulation is unconstitutionally vague if the regulation is so unclear that ordinary people cannot understand what conduct is prohibited or

[7] Bauck, No. D-09-0139, 68 Agric. Dec. 853, 859, 2009 WL 8382865, at *4 (U.S.D.A. Dec. 2, 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

required or that it encourages arbitrary and discriminatory enforcement.[8] A review of each of the Regulations which Tri-State and Mr. Candy are alleged to have violated reveals none which is unconstitutionally vague. The difficulty arises in defining certain regulatory terms, such as "adequate veterinary care" found in 9 C.F.R. § 2.40(a) and applying those terms to the facts of a given situation. However, regulations are not unconstitutionally vague merely because they are ambiguous or difficulty is found in determining whether marginal cases fall within their language.[9]

Fifth, Tri-State and Mr. Candy contend the Administrator failed to provide them with adequate notice and an opportunity to correct in accordance with 5 U.S.C. § 558(c).

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

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

. . . .

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful

[8] Thomas v. Hinson, 74 F.3d 888, 889 (8th Cir. 1996); Ga. Pac. 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).

[9] Great Am. Houseboat Co. v. United States, 780 F.2d 741, 747 (9th Cir. 1986); United States v. Sun & Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984).

only if, before the institution of agency proceedings therefor, the licensee has been given–

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c). Tri-State and Mr. Candy's violations of the Regulations were willful;[10] therefore, suspension of Tri-State's Animal Welfare Act license falls within the Administrative Procedure Act's "willfulness" exception to the notice and opportunity to demonstrate or achieve compliance requirement.

Sixth, Tri-State and Mr. Candy contend Dr. McFadden did not retain documents beyond 3 years, but the Complaint alleges violations beginning in 2006.

The ALJ's conclusions that Tri-State and Mr. Candy violated the Regulations are fully supported by witness testimony and documentary evidence introduced by the Administrator. Therefore, I find Dr. McFadden's failure to retain a copy of documents which she prepared for more than 3 years (Tr. at 218) is not relevant to this proceeding.

Seventh, Tri-State and Mr. Candy contend Dr. McFadden did not note corrections of violations on her inspection reports.

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[10] 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. Ash, No. 11-0380, 71 Agric. Dec. ___, slip op. at 16-17 (U.S.D.A. Sept. 14, 2012); Bauck, No. D-09-0139, 68 Agric. Dec. 853, 860-61, 2009 WL 8382865, at *4-5 (U.S.D.A. Dec. 2, 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); D&H Pet Farms, Inc., No. 07-0083, 68 Agric. Dec. 798, 812-13, 2009 WL 8382862, at *9-10 (U.S.D.A. Oct. 19, 2009); Bond, No. 04-0024, 65 Agric. Dec. 92, 107, 2006 WL 1430148, at *11 (U.S.D.A. May 19, 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Stephens, No. 98-0019, 58 Agric. Dec. 149, 180, 1999 WL 288586, at *22 (U.S.D.A. May 5, 1999); Arab Stock Yard, Inc., 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

Dr. McFadden testified that, when she finds that an Animal Welfare Act licensee has corrected a previously cited violation, she does not note the correction on her inspection report (Tr. at 223). Dr. McFadden testified, if a previously cited violation does not appear on the next subsequent inspection report, a person reviewing that subsequent inspection report can assume that the previous violation has been corrected "because each report represents what [she is] observing at that time." (Tr. at 224). The ALJ's conclusions that Tri-State and Mr. Candy violated the Regulations are all based upon violations cited on inspection reports. The ALJ did not assume that a violation cited on one inspection report continued until an inspector noted on a subsequent inspection report that the previously cited violation had been corrected. Therefore, I find that Dr. McFadden's failure to note corrections on inspection reports is not relevant to this proceeding.

For the foregoing reasons, the following Order is issued.

ORDER

1. Tri-State Zoological Park of Western Maryland, Inc., and its agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, including, but not limited to, Robert L. Candy, are ordered to cease and desist from violations of the Animal Welfare Act and the Regulations. Paragraph 1 of this Order shall become effective upon service of this Order on Tri-State and Mr. Candy.

2. Animal Welfare Act license number 51-C-0064 is suspended for a period of 45 days. Paragraph 2 of this Order shall become effective 60 days after service of this Order on Tri-State and Mr. Candy.

RIGHT TO JUDICIAL REVIEW

Tri-State and Mr. Candy have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Tri-State and Mr. Candy must seek judicial review within 60 days after entry of the Order in this Decision and Order.[11] The date of entry of the Order in this Decision and Order is March 22, 2013.

[11] 7 U.S.C. § 2149(c).

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In re: LANZIE CARROLL HORTON, JR., AN INDIVIDUAL, A/K/A JUNIOR HORTON, D/B/A HORTON'S PUPS.
Docket No. 12-0052.
Decision and Order.
Filed April 5, 2013.

AWA – Civil penalty – Operation as dealer – Sanctions – Willful.

Colleen A. Carroll, Esq. for Complainant.
Thomas D. White, Esq. for Respondent.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On November 7, 2011, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. 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 pursuant to 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 of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, during the period November 9, 2006, through September 30, 2009, Lanzie Carroll Horton, Jr., operated as a "dealer," as that term is defined in the Regulations, without having obtained an Animal Welfare Act license, in willful violation of 9 C.F.R. § 2.1(a)(1).[1] On November 28, 2011, Mr. Horton filed an answer denying the material allegations of the Complaint.

[1] Compl. at 2-8 ¶ 3.

On June 4, 2012, the Administrator filed Complainant's Motion for Summary Judgment; Declaration of Dr. Elizabeth Goldentyer [hereinafter Motion for Summary Judgment]. On July 24, 2012, Mr. Horton filed Respondent's Memorandum in Opposition to Complainant's Motion for Summary Judgment in which Mr. Horton asserted the Administrator's Motion for Summary Judgment must be denied because two genuine issues of material fact remain in this proceeding: (1) the issue of whether Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1), during the period November 9, 2006, through June 8, 2008, were willful violations; and (2) the issue of whether Mr. Horton operated as a dealer during the period December 27, 2008, through September 30, 2009.

On January 2, 2013, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order in which the ALJ: (1) concluded Mr. Horton violated 9 C.F.R. § 2.1(a)(1), during the period November 9, 2006, through September 30, 2009; (2) reached no determination regarding the willfulness of Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1); (3) accepted as true Mr. Horton's assertion that, since November 2008, he ceased any actions violative of the Animal Welfare Act;[2] (4) ordered Mr. Horton to cease and desist from operating as a dealer without an Animal Welfare Act license; and (5) assessed Mr. Horton a $14,430 civil penalty.[3]

On February 28, 2013, the Administrator filed Complainant's Petition for Appeal. On March 1, 2013, Mr. Horton filed an Appeal Petition, and on March 14, 2013, the Administrator filed Complainant's Response to Respondent's Appeal Petition. On March 20, 2013, Mr. Horton filed a response to Complainant's Petition for Appeal, and on March 25, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

[2] Despite accepting as true, Mr. Horton's assertion that, since November 2008, he ceased actions violative of the Animal Welfare Act (ALJ's Decision and Order at 5 ¶ 12), the ALJ concluded that Mr. Horton violated 9 C.F.R. § 2.1(a)(1) on or about December 27, 2008, through January 17, 2009, and on or about September 30, 2009 (ALJ's Decision and Order at 3 ¶¶ 8-9).

[3] ALJ's Decision and Order at 2-6 ¶¶ 6-10, 12, 14-16.

DECISION

Based upon a careful consideration of the record, I adopt the ALJ's Decision and Order, except I increase the civil penalty assessed by the ALJ from $14,430 to $191,200 and I do not conclude that Mr. Horton violated 9 C.F.R. § 2.1(a)(1) on or about December 27, 2008, through January 17, 2009, and on or about September 30, 2009.

Findings of Fact and Conclusions of Law

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

2. Lanzie Carroll Horton, Jr., a/k/a Junior Horton, d/b/a Horton's Pups, is an individual whose business is in Millersburg, Ohio, and was previously in Hillsville, Virginia.

3. On or about November 9, 2006, through September 27, 2007, Mr. Horton, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in commerce, for compensation or profit, delivered for transportation, transported, sold, or negotiated the sale of 914 dogs for use as pets to a retail pet store, Pauley's Pups, in violation of 9 C.F.R. § 2.1(a)(1).

4. On or about June 8, 2008, Mr. Horton, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in commerce, for compensation or profit, delivered for transportation, transported, sold, or negotiated the sale of 42 dogs for use as pets to a licensed dealer, Ervin Raber, in violation of 9 C.F.R. § 2.1(a)(1).

5. Mr. Horton operates a large business.

6. The gravity of Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1) is great.

7. Mr. Horton demonstrated a lack of good faith.

8. Mr. Horton has a history of previous violations.

9. An order instructing Mr. Horton to cease and desist from operating as a dealer without having obtained an Animal Welfare Act license is appropriate.

10. Assessment of a $191,200 civil penalty against Mr. Horton is warranted in law and justified by the facts.

The Administrator's Petition for Appeal

The Administrator raises three issues in Complainant's Petition for Appeal. First, the Administrator contends the ALJ's failure to identify Mr. Horton's violations as willful, is error (Complainant's Pet. for Appeal at 5).

The Administrator does not indicate how a finding that Mr. Horton's violations were willful would affect the disposition of this proceeding. The Administrator seeks issuance of a cease and desist order and assessment of a civil penalty. Under the Animal Welfare Act, willfulness is not relevant either to the issuance of a cease and desist order or to the assessment of a civil penalty. Therefore, the disposition of this proceeding would not be affected by a finding that Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1) were willful. I find the ALJ's failure to determine whether Mr. Horton's violations were willful, is not error, and I decline to remand this proceeding to the ALJ to determine whether Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1) were willful.

Second, the Administrator contends the ALJ's assessment of a $14,430 civil penalty against Mr. Horton, is error and recommends assessment of a civil penalty of at least $1,792,500 against Mr. Horton (Complainant's Pet. for Appeal at 5-9).

Administrative law judges and the Judicial Officer have significant discretion when imposing a civil penalty under the Animal Welfare Act. During the period when I find Mr. Horton violated the Animal Welfare Act, the Secretary of Agriculture was authorized to assess a civil penalty of not more than $3,750 for each violation of the Regulations (7 U.S.C. § 2149(b)).[4] The United States Department of Agriculture's sanction

[4] 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,

policy provides that 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.

S.S. Farms Linn County, Inc., No. 89-03, 50 Agric. Dec. 476, 497, 1991 WL 290584 (U.S.D.A. Feb. 8, 1991) (Decision as to James Joseph Hickey and Shannon Hansen). The Administrator recommends assessment of a civil penalty of at least $1,792,500 against Mr. Horton.[5] 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.[6]

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

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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)).

[5] Complainant's Pet. for Appeal at 4; Mot. for Summ. J. at 22-23.

[6] Mazzola, No. 06-0010, 68 Agric. Dec. 822, 849, 2009 WL 8382864 (U.S.D.A. Nov. 24, 2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, No. 02-0020, 68 Agric. Dec. 685, 731, 2009 WL 8382858 (U.S.D.A. Jul. 13, 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Amarillo Wildlife Refuge, Inc., No. 07-0077, 68 Agric. Dec. 77, 89, 2009 WL 248415 (U.S.D.A. Jan. 6, 2009); 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).

previous violations when determining the amount of the civil penalty to be assessed.[7]

During the period November 9, 2006, through June 8, 2008, Mr. Horton sold 956 dogs. Based on the number of dogs sold by Mr. Horton during this 19-month period, I find Mr. Horton operates a large business.

The identification of persons who operate as dealers under the Animal Welfare Act is vital to the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations. Identification of persons who operate as dealers is most easily accomplished if each person who intends to operate as a dealer applies for and obtains an Animal Welfare Act license. Mr. Horton's failure to apply for and obtain an Animal Welfare Act license before operating as a dealer thwarted the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations; therefore, I find the gravity of Mr. Horton's violations is great.

Moreover, an ongoing pattern of violations over a period of time establishes a violator's history of previous violations even if the violator has not been previously found to have violated the Animal Welfare Act.[8] Mr. Horton's multiple violations of 9 C.F.R. § 2.1(a)(1) during a 19-month period constitutes an ongoing pattern of violations that establishes a history of previous violations for purposes of 7 U.S.C. § 2149(b).

Mr. Horton's lack of good faith is demonstrated by his pattern of violations over a 19-month period and particularly by his sale of 42 dogs without an Animal Welfare Act license after he was notified by Dr. Elizabeth Goldentyer in November 2007 that operating as a dealer without an Animal Welfare Act license is a violation of the Animal Welfare Act and the Regulations.[9]

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[7] 7 U.S.C. § 2149(b).

[8] *In re Sam Mazzola*, 68 Agric. Dec. 822, 827 (2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); *In re William Richardson*, 66 Agric. Dec. 69, 88-89 (2007); *In re Jerome Schmidt*, 66 Agric. Dec. 159, 207 (2007); *In re Karen Schmidt*, 65 Agric. Dec. 971, 984 (2006); *In re For The Birds, Inc.*, 64 Agric. Dec. 306, 359 (2005).

[9] Mot. for Summ. J. CX 6, CX 16; Decl. of Elizabeth Goldentyer, D.V.M., at 2 ¶ 6.

After examining all the relevant circumstances in this proceeding, 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), I agree with the Administrator that the $14,430 civil penalty assessed by the ALJ, which equates to approximately $15 for each dog that Mr. Horton sold in violation of 9 C.F.R. § 2.1(a)(1), would not be a sufficient civil penalty to deter future violations of the Animal Welfare Act and the Regulations by Mr. Horton and other potential violators. Instead, Mr. Horton and other potential violators may view a civil penalty of approximately $15 for each dog sold in violation of 9 C.F.R. § 2.1(a)(1) as merely a cost of doing business. I conclude a cease and desist order and assessment of a $191,200 civil penalty ($200 for each dog that Mr. Horton sold in violation of 9 C.F.R. § 2.1(a)(1)) are appropriate and necessary to ensure Mr. Horton'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.

Third, the Administrator contends the ALJ's exclusion of four of the Administrator's exhibits, identified as CX 2-CX 5, is error (Complainant's Pet. for Appeal at 10).

The ALJ, without explanation, granted Mr. Horton's June 25, 2012, motion to exclude four exhibits listed on the Administrator's May 7, 2012, list of witnesses and exhibits (ALJ's Decision and Order at 5 ¶ 12). I infer the ALJ agreed with Mr. Horton's contention that these exhibits, which concern Mr. Horton's violations of the Code of Virginia, are not relevant to this proceeding. Based on the very limited record before me, I agree with the ALJ that CX 2-CX 5 are not relevant to this proceeding, and I reject the Administrator's contention that the ALJ's exclusion of CX 2-CX 5, is error.

Mr. Horton's Appeal Petition

Mr. Horton contends the ALJ improperly granted the Administrator's Motion for Summary Judgment as genuine issues of material fact remain in this proceeding. Mr. Horton asserts he identified those genuine issues of material fact in Respondent's Memorandum in Opposition to

Complainant's Motion for Summary Judgment. (Mr. Horton's Appeal Pet. at 7-8.)

On July 24, 2012, Mr. Horton filed Respondent's Memorandum in Opposition to Complainant's Motion for Summary Judgment in which Mr. Horton asserted the Administrator's Motion for Summary Judgment must be denied because two genuine issues of material fact remain in this proceeding: (1) the issue of whether Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1), during the period November 9, 2006, through June 8, 2008, were willful violations; and (2) the issue of whether Mr. Horton operated as a dealer during the period December 27, 2008, through September 30, 2009.

As discussed in this Decision and Order, *supra*, willfulness is not relevant to this proceeding, and I do not conclude that Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1) were willful. Therefore, I reject Mr. Horton's contention that the willfulness of his violations of 9 C.F.R. § 2.1(a)(1) is a genuine issue of material fact remaining in this proceeding. Moreover, I do not conclude that Mr. Horton operated as a dealer during the period December 27, 2008, through September 30, 2009. Therefore, I reject Mr. Horton's contention that the nature of his operations during the period December 27, 2008, through September 30, 2009, is a genuine issue of material fact remaining in this proceeding.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lanzie Carroll Horton, Jr., and his agents, employees, successors, and assigns, directly or indirectly through any corporate or other device or person, shall cease and desist from operating as a dealer without having obtained an Animal Welfare Act license. Paragraph 1 of this Order shall become effective upon service of this Order on Mr. Horton.

2. Lanzie Carroll Horton, Jr., is assessed a $191,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety 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 Mr. Horton. Mr. Horton shall state on the certified check or money order that payment is in reference to AWA Docket No. 12-0052.

RIGHT TO JUDICIAL REVIEW

Lanzie Carroll Horton, Jr., 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. Horton must seek judicial review within 60 days after entry of the Order in this Decision and Order.[10] The date of entry of the Order in this Decision and Order is April 5, 2013.

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[10] 7 U.S.C. § 2149(c).

In re: BODIE S. KNAPP, AN INDIVIDIUAL, D/B/A THE WILD SIDE.
Docket No. 09-0175.
Decision and Order.
Filed June 3, 2013.

AWA – Animal welfare – Attorney fees – Civil penalty – Exemptions – Exhibitor – License revocation – Operation as dealer – Sanction policy – Stipulation of facts – Willful.

Colleen A. Carroll, Esq. for Complainant.
Philip Westergren, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 19, 2009, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. 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 pursuant to 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 of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator filed an Amended Complaint, and on November 17, 2010, the Administrator filed a Second Amended Complaint, which is the operative pleading in this proceeding. The Administrator alleges: (1) during the period November 2005 through September 25, 2010, Bodie S. Knapp operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and

9 C.F.R. §§ 2.1(a) and 2.10(c);[1] and (2) by virtue of Mr. Knapp's operation as a dealer without an Animal Welfare Act license, Mr. Knapp knowingly failed to obey cease and desist orders issued by the Secretary of Agriculture in *Knapp*, No. 04-0029, 64 Agric. Dec. 1668, 2005 WL 1649009 (U.S.D.A. July 5, 2005) (Order Den. Mot. For Recons.), and *Coastal Bend Zoological Ass'n*, No. 04-0015, 65 Agric. Dec. 993, 2006 WL 6161816 (U.S.D.A. Aug. 31, 2006).[2] On December 8, 2010, Mr. Knapp filed Respondent's Answer to Complainant's Second Amended Complaint in which Mr. Knapp denied the material allegations of the Second Amended Complaint.

On June 21, 2011, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a hearing in Corpus Christi, Texas. Phillip Westergren represented Mr. Knapp. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. At the hearing, the Administrator called six witnesses and Mr. Knapp called three witnesses.[3] The Administrator introduced 25 exhibits which were received into evidence,[4] and Mr. Knapp introduced 10 exhibits which were received into evidence.[5]

On September 27, 2011, after the parties submitted post-hearing briefs, the Chief ALJ filed a Decision and Order in which the Chief ALJ: (1) concluded Mr. Knapp sold 15 animals without an Animal Welfare Act license in violation of the Animal Welfare Act and the Regulations; (2) ordered Mr. Knapp to cease and desist from further violations of the Animal Welfare Act and the Regulations; (3) assessed Mr. Knapp a $15,000 civil penalty for Mr. Knapp's violations of the Animal Welfare Act and the Regulations; and (4) ordered counsel for Mr. Knapp to submit a petition for award of attorney fees and expenses pursuant to the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in

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[1] The Administrator alleges specific dates on which Mr. Knapp offered for sale, delivered for transportation, transported, sold, bought, or negotiated the purchase or sale of 428 animals, during the period November 2005 through September 25, 2010 (Second Am. Compl. at 4-9 ¶ 7).

[2] Second Am. Compl. at 1-3 ¶¶ 2-6.

[3] References to the transcript are indicated as "Tr." and the page number.

[4] The Administrator's exhibits are identified as "CX" and the exhibit number.

[5] Mr. Knapp's exhibits are identified as "RX" and the exhibit number.

Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice].[6]

On December 5, 2011, the Administrator filed Complainant's Petition for Appeal of Initial Decision as to Respondent Bodie S. Knapp [hereinafter the Administrator's Appeal Petition]. On February 28, 2012, Mr. Knapp filed Respondent's Response to Complainant's Appeal Petition Respondent's Appeal Petition (Cross Points) [hereinafter Mr. Knapp's Response and Appeal Petition]. On March 27, 2012, the Administrator filed Complainant's Response to Cross-Appeal by Respondent Bodie S. Knapp, and on April 9, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Statutory and Regulatory Framework

The Animal Welfare Act is a comprehensive statutory scheme, the purpose of which is to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using animals for research or experimental purposes or for exhibition purposes or holding animals for sale as pets or for any such purpose or use (7 U.S.C. § 2131). Specifically, Congress intended the Animal Welfare Act:

§ 2131. Congressional statement of policy

. . . .

(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

[6] Chief ALJ's Decision and Order at 21-23.

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

7 U.S.C. § 2131. The Animal Welfare Act requires all dealers to obtain an Animal Welfare Act license, as follows:

§ 2134. Valid license for dealers and exhibitors required

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

7 U.S.C. § 2134. The Animal Welfare Act defines the term "dealer," as follows:

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

7 U.S.C. § 2132(f). The Regulations require any person operating or intending to operate as a dealer to have an Animal Welfare Act license, but exempt any person who buys animals solely for his or her own use or enjoyment, as follows:

§ 2.1 Requirements and application.

(a)(1) Any person operating or intending to operate as a dealer, . . . except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license.

. . . .

(3) The following persons are exempt from the licensing requirements under section 2 or section 3 of the Act:

. . . .

(viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license[.]

9 C.F.R. § 2.1(a)(1), (a)(3)(viii).

The Regulations further prohibit any person whose Animal Welfare Act license has been revoked from buying, selling, transporting, exhibiting, or delivering for transportation any animal during the period of revocation (9 C.F.R. § 2.10(c)).

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).

The Regulations define the terms "animal," "exotic animal," "farm animal," and "wild animal," as follows:

§ 1.1 Definitions.

For purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meaning assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words unidentified in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Animal means any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other warmblooded animal, which is being used, or is intended for use for research, teaching, testing, experimentation, or exhibition purposes, or as a pet. This term excludes birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research; horses not used for research purposes; and 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.

. . . .

Exotic animal means any animal not identified in the definition of "animal" provided in this part that is native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad. This term specifically includes animals such as, but not limited to, lions, tigers, leopards, elephants, camels, antelope, anteaters, kangaroos, and water buffalo, and species of foreign domestic cattle, such as Ankole, Gayal, and Yak.

Farm animal means any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States, and used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. The term also includes animals such as rabbits, mink, and chinchilla, when they are used solely for purposes of meat or fur, and animals such as horses and llamas when used solely as work and pack animals.

. . . .

Wild animal means any animal which is now or historically has been found in the wild, or in the wild state, within the boundaries of the United States, its territories, or possessions. This term includes, but is not limited to, animals such as: Deer, skunk, opossum, raccoon, mink, armadillo, coyote, squirrel, fox, wolf.

9 C.F.R. § 1.1.

Discussion

Mr. Knapp is a former holder of Animal Welfare Act license number 74-C-0533 with a history of previous violations of the Animal Welfare Act. A complaint was first filed against Mr. Knapp by the Administrator on March 17, 2004, in *Coastal Bend Zoological Ass'n*, AWA Docket No.

04-0015. During the pendency of that proceeding, the Administrator filed a second complaint against Mr. Knapp in *Knapp*, AWA Docket No. 04-0029. Mr. Knapp failed to answer that complaint in a timely manner and, pursuant to the Rules of Practice, by such failure was deemed to have admitted willfully committing 84 violations of the Animal Welfare Act and the Regulations. I ordered Mr. Knapp to cease and desist from future violations of the Animal Welfare Act and the Regulations and revoked Mr. Knapp's Animal Welfare Act license[7] and, subsequently, denied Mr. Knapp's motion for reconsideration.[8] On September 10, 2005, following denial of Mr. Knapp's motion for reconsideration, revocation of Mr. Knapp's Animal Welfare Act license became effective.

Administrative Law Judge Victor W. Palmer [hereinafter ALJ Palmer] presided over the hearing in *Coastal Bend Zoological Ass'n*, and entered his decision on August 31, 2006.[9] Although ALJ Palmer found Mr. Knapp's violations, which resulted in the overdosing and subsequent death of two lions and two tigers, particularly egregious, he only assessed Mr. Knapp a $5,000 civil penalty.

The Second Amended Complaint filed in this proceeding alleges that, in 30 transactions, Mr. Knapp, without the required Animal Welfare Act license, sold, purchased, offered for sale or purchase, delivered for transportation, transported, or negotiated for sale or purchase 428 animals during the period November 2005 through September 25, 2010.

Four of the alleged violations involve Mr. Knapp's October 14, 2006, April 1, 2007, August 15, 2007, and August 27, 2007, transactions with Christian Bayne Gray.[10] Mr. Gray failed to appear as a witness. The documentary evidence proffered by the Administrator was recanted and subjected to question in a subsequent affidavit obtained from Mr. Gray by Mr. Knapp.[11] The Chief ALJ found the documentary evidence

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[7] Knapp, No. 04-0029, 64 Agric. Dec. 253, 2005 WL 1283510 (U.S.D.A. May 31, 2005).

[8] Knapp, No. 04-0029, 64 Agric. Dec. 1668, 2005 WL 1649009 (U.S.D.A. July 5, 2005) (Order Den. Mot. for Recons.).

[9] Coastal Bend Zoological Ass'n, No. 04-0015, 65 Agric. Dec. 993, 2006 WL 6161816 (U.S.D.A. Aug. 31, 2006).

[10] Second Am. Compl. at 5 ¶¶ 7h-7k.

[11] RX 5.

irreconcilable and inadequate to support findings that Mr. Knapp violated the Animal Welfare Act and the Regulations as alleged in paragraphs 7h, 7i, 7j, and 7k of the Second Amended Complaint. On appeal, the Administrator contends the Chief ALJ's dismissal of the violations alleged in paragraphs 7h, 7i, 7j, and 7k of the Second Amended Complaint, is error (Administrator's Appeal Pet. at 24-26 ¶ IIA4).

After a careful review of the record, I agree with the Chief ALJ's findings that the documentary evidence introduced by the Administrator was recanted and subjected to question in a subsequent affidavit obtained from Mr. Gray (RX 5) and that the evidence is inadequate to support findings that Mr. Knapp violated the Regulations as alleged in paragraphs 7h, 7i, 7j, and 7k of the Second Amended Complaint.

Mr. Knapp asserts no violations occurred as to the remaining allegations on the grounds that no Animal Welfare Act license was required for the transactions because: (a) Mr. Knapp had a right to sell a camel to Kimberly G. Finley to close out his exhibitor's business; (b) the transaction with the Texas Zoo was not a sale, but rather a gift; (c) a number of the animals involved were farm animals specifically excluded from regulation under the Animal Welfare Act; (d) the animals purchased by Mr. Knapp were intended for his own enjoyment as permitted by 9 C.F.R. § 2.1(a)(3)(viii); (e) an Animal Welfare Act license is not required for any person who sells 10 or fewer exotic hoofstock in any 12-month period; and (f) an Animal Welfare Act license is not required for sales of animals through auctions where the intended use of the animals sold is unknown.

The Chief ALJ rejected Mr. Knapp's claim that he had a right to sell a camel to Kimberly G. Finley, as alleged in paragraph 7e of the Second Amended Complaint, to close out his exhibitor's business. The Chief ALJ stated, while Mr. Knapp could have sold the camel before revocation of his Animal Welfare Act license became effective or with the permission of the Animal and Plant Health Inspection Service after the date the revocation of his Animal Welfare Act license became effective, the sale was a regulated transaction requiring an Animal Welfare Act license and was effected in November 2005 more than a month after the September 10, 2005, effective date of the revocation of Mr. Knapp's Animal Welfare Act license.

On appeal, Mr. Knapp contends the Chief ALJ erroneously concluded that Mr. Knapp's November 2005 sale of a camel to Ms. Finley without an Animal Welfare Act license violated the Animal Welfare Act and the Regulations, as alleged in paragraph 7e of the Second Amended Complaint, because there is no evidence that Ms. Finley is an exhibitor who used, or intended to use, the camel for a regulated purpose (Mr. Knapp's Response and Appeal Pet. at 17 ¶ 12).

Ms. Finley states in her affidavit: "I am an exhibitor of Exotic Animals. I operate a petting zoo, with pony and camel rides." (CX 7 at 1.) Moreover, Ms. Finley's spouse was an Animal Welfare Act licensee who predictably would exhibit the animal.[12] Therefore, I reject Mr. Knapp's contention that there is no evidence that Ms. Finley is an exhibitor who used, or intended to use, the camel purchased from Mr. Knapp for a regulated purpose, and I reject Mr. Knapp's contention that the Chief ALJ's conclusion that Mr. Knapp sold a camel to Kimberly G. Finley without an Animal Welfare Act license, in violation of Animal Welfare Act and the Regulations, is error.

Mr. Knapp claims no violation of the Animal Welfare Act occurred as a result of the September 10, 2006, transaction with the Texas Zoo as he gave the two lemurs to the Texas Zoo and the Texas Zoo, on a later date without consideration, gave him two zebras (Tr. 202-06). Mr. Knapp's claim of donating the lemurs is refuted by the APHIS Form 7020 which is signed by Mr. Knapp identifying him as the "owner" and the disposition is described as an exchange or transfer (CX 1). Therefore, I find Mr. Knapp violated the Animal Welfare Act and the Regulations as alleged in paragraph 7a of the Second Amended Complaint.

Mr. Knapp asserts many of the violations alleged in the Second Amended Complaint relate to his sale of farm animals, which are not regulated under the Animal Welfare Act.[13] The Chief ALJ agreed with Mr. Knapp and found that 41 animals which Mr. Knapp sold were farm

[12] The camel in question had been gelded and accordingly could not be used for breeding purposes and had been used in the past as a "ride" camel. Mr. Knapp and his wife, Jennifer Knapp, acknowledged that they expected the camel to continue to be used to give rides (Tr. 185-86, 216).

[13] 7 U.S.C. § 2132(g).

animals and not regulated under the Animal Welfare Act. Consequently, the Chief ALJ dismissed the violations alleged in paragraph 7l; 7o, as it relates to Mr. Knapp's sale of 1 alpaca, 1 aoudad, 3 ibex, and 3 pygmy goats; 7q, as it relates to Mr. Knapp's sale of 6 pigs; 7s, as it relates to Mr. Knapp's sale of 1 zebu and 15 sheep; 7u, as it relates to Mr. Knapp's sale of 2 bearded pigs, 2 goats, and 1 llama; 7w; and 7y, as it relates to Mr. Knapp's sale of 2 watusi. The Administrator contends the Chief ALJ's finding that Mr. Knapp sold farm animals that are not covered by the Animal Welfare Act, is error (Administrator's Appeal Pet. at 14-20 ¶ IIA1).

The Administrator correctly points out that domestic species of cattle, sheep, swine, goats, and llamas are not per se exempt from regulation under the Animal Welfare Act as farm animals. Instead, the term "farm animal" only applies to domestic species of cattle, sheep, swine, goats, and llamas that are used, or intended for use, for certain specified purposes and are normally and have historically been kept on farms in the United States. However, the Chief ALJ did not conclude, as the Administrator indicates, that domestic species of cattle, sheep, swine, goats, and llamas are per se farm animals.

I find the record is not clear regarding the issue of whether the species of cattle, sheep, swine, goats, and llamas which Mr. Knapp purchased and sold were farm animals and exempt from regulation under the Animal Welfare Act. Therefore, I give Mr. Knapp the benefit of the doubt and dismiss all the alleged violations regarding his purchases and sales of cattle, sheep, swine, goats, and llamas. Specifically, I dismiss the violations alleged in paragraphs 7l; 7m, as it relates to Mr. Knapp's purchase of 8 cattle; 7o, as it relates to Mr. Knapp's sale of 6 goats; 7p, as it relates to Mr. Knapp's purchase of 12 goats, 3 cattle, and 16 sheep; 7q, as it relates to Mr. Knapp's sale of 6 pigs; 7r, as it relates to Mr. Knapp's purchase of 1 llama, 4 goats, 1 pig, 6 sheep, and 16 cattle; 7s, as it relates to Mr. Knapp's sale of 1 cattle and 15 sheep; 7t, as it relates to Mr. Knapp's purchase of 6 cattle, 2 sheep, and 2 goats; 7u, as it relates to Mr. Knapp's sale of 2 pigs, 2 goats, and 1 llama; 7v, as it relates to Mr. Knapp's purchase of 4 llamas and 4 goats; 7w; 7x, as it relates to Mr. Knapp's purchase of 2 cattle, 6 llamas, and 2 goats; 7y, as it relates to Mr. Knapp's sale of 2 cattle; 7z, as it relates to Mr. Knapp's purchase of 10 cattle, 6 llamas, 3 goats, and 6 sheep; 7bb, as it relates to

Mr. Knapp's purchase of 6 llamas, 1 goat, and 1 cattle; and 7dd, as it relates to Mr. Knapp's purchase of 4 sheep, 4 goats, 1 llama, and 11 cattle.

Relying upon the licensing exemptions set forth in the Animal Care Resource Guide Dealer Inspection Guide published by the Animal and Plant Health Inspection Service (RX 2), Mr. Knapp argued that his sales of hoofstock do not require an Animal Welfare Act license. Policy #23 of that publication identifies transactions that do not require an Animal Welfare Act license,[14] as follows:

Hoofstock [Policy #23]

A license is **not** required for any person who sells *wild/exotic hoofstock,* such as deer, elk and bison:

➢ for nonregulated purposes

➢ to game ranches

➢ to private collectors for breeding purposes only

➢ 10 or fewer wild/exotic hoofstock in a 12-month period for regulated purposes.

RX 2 (emphasis in original).

Mr. Knapp did not exceed the quantity threshold specified in Policy #23 in any given 12-month period, and the Chief ALJ dismissed the violations alleged in paragraphs 7d; 7g; 7q, as it relates to Mr. Knapp's sale of two zebras, one wildebeest, and one addax; 7s, as it relates to Mr. Knapp's sale of three buffalo, one addax, and three nilgai; 7y, as it relates to Mr. Knapp's sale of three buffalo and one deer; and 7aa, as it relates to Mr. Knapp's sale of one buffalo. The Administrator contends the Chief ALJ's finding that Mr. Knapp's sales of hoofstock are exempt

[14] Policy #23 remained in effect at all times pertinent to the violations alleged in the Second Amended Complaint. Policy #23 has since been superseded by Policy #8 of the Animal Care Resource Guide, March 25, 2011 (RX 3).

from regulation under the Animal Welfare Act, is error (Administrator's Appeal Pet. at 22-24 ¶ IIA3).

The Chief ALJ based his conclusion that Mr. Knapp's sales of hoofstock are exempt from regulation under the Animal Welfare Act on the Animal and Plant Health Inspection Service Animal Care Resource Guide (RX 2). However, neither the Animal Welfare Act nor the Regulations contain a "10-hoofstock per year" exemption. Therefore, I find Mr. Knapp's sales of hoofstock, as alleged in paragraphs 7d, 7g, 7q, 7s, 7y, and 7aa of the Second Amended Complaint, without an Animal Welfare Act license, violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c). However, I agree with the Chief ALJ that the Animal and Plant Health Inspection Service Animal Care Resource Guide (RX 2) unambiguously exempts limited sales of hoofstock made for regulated purposes; therefore, I assess no civil penalty for Mr. Knapp's sales of hoofstock in violation of the Animal Welfare Act and the Regulations.

Of the 30 allegations contained in the Second Amended Complaint, 14 of the allegations involve Mr. Knapp's purchases of animals. Mr. Knapp contends he bought these animals for his sole enjoyment and, pursuant to 9 C.F.R. § 2.1(a)(3)(viii), he is not required to have an Animal Welfare Act license for these purchases. The Chief ALJ agreed with Mr. Knapp and dismissed all of the allegations that Mr. Knapp purchased animals in violation of the Animal Welfare Act and the Regulations. The Administrator contends the Chief ALJ's conclusion that Mr. Knapp's purchases of animals were exempt from regulation under the Animal Welfare Act because the purchases were for Mr. Knapp's personal enjoyment, is error (Administrator's Appeal Pet. at 20-22 ¶ IIA2).

The Regulations provide that a person who buys animals solely for his own use or enjoyment and does not sell or exhibit animals (or is not otherwise required to obtain an Animal Welfare Act license) is not required to obtain an Animal Welfare Act license (9 C.F.R. § 2.1(a)(3)(viii)). Mr. Knapp did not solely purchase animals for his own enjoyment. The evidence establishes and the Chief ALJ found that Mr. Knapp sold animals for regulated purposes. Therefore, I find the Chief ALJ's conclusion that Mr. Knapp's purchases of animals were exempt from regulation, is error, and I find Mr. Knapp's purchases of

animals, without an Animal Welfare Act license, violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

The Administrator's Appeal Petition

The Administrator raises seven issues in the Administrator's Appeal Petition which have not been addressed in this Decision and Order, *supra*. First, the Administrator contends the Chief ALJ's calculation of the number of Mr. Knapp's violations, is error (Administrator's Appeal Pet. at 26-27 ¶ IIB).

The Chief ALJ found that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations.[15] The Chief ALJ concluded that each of the eight transactions which he found to be in violation of the Animal Welfare Act and the Regulations constituted a violation of the Animal Welfare Act and the Regulations. However, when determining the number of violations committed by a person who purchases and sells animals without a required Animal Welfare Act license, each animal purchased or sold constitutes a separate violation of the Animal Welfare Act and the Regulations.[16] Therefore, I reject the Chief ALJ's conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations. Instead, I find that Mr. Knapp purchased and sold 235 animals in violation of the Animal Welfare Act and the Regulations; thus, Mr. Knapp committed 235 violations of the Animal Welfare Act and the Regulations.

Second, the Administrator contends the Chief ALJ erroneously failed to assess Mr. Knapp the maximum civil penalty for his violations of the Animal Welfare Act and the Regulations (Administrator's Appeal Pet. at 28-30 ¶ IIC).

The Chief ALJ assessed Mr. Knapp a $15,000 civil penalty based upon Mr. Knapp's financial condition.[17] When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give

[15] Chief ALJ's Decision and Order at 17.
[16] Shaffer, No. 01-0027, 60 Agric. Dec. 444, 479, 2001 WL 1143410 (U.S.D.A. Sept. 26, 2001).
[17] Chief ALJ's Decision and Order at 17.

due consideration to four factors: (1) the size of the business of the person involved, (2) the gravity of the violations, (3) the person's good faith, and (4) the history of previous violations.[18] A violator's financial condition is not one of the factors considered by the Secretary of Agriculture when determining the amount of the civil penalty.[19] Therefore, the Chief ALJ's consideration of Mr. Knapp's financial condition when determining the amount of the civil penalty to be assessed against Mr. Knapp, is error.

Based upon the 235 animals which Mr. Knapp purchased and sold during the period November 2005 through September 25, 2010, I find Mr. Knapp's dealer operation was mid-sized. Operation as a dealer without an Animal Welfare Act license is a serious violation because enforcement of the Animal Welfare Act and the Regulations depends upon the identification of persons operating as dealers. During almost a 5-year period, Mr. Knapp operated as a dealer without obtaining the required Animal Welfare Act license. Mr. Knapp's failure to obtain the required Animal Welfare Act license hampered the Secretary of Agriculture's ability to identify Mr. Knapp as a dealer and thwarted the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act. Mr. Knapp's conduct during this 5-year period reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. Thus, I conclude Mr. Knapp lacked good faith. Finally, Mr. Knapp has a history of previous violations of the Animal Welfare Act and the Regulations as evidenced by *Knapp*, No. 04-0029, 64 Agric. Dec. 253, 2005 WL 1283510 (U.S.D.A. May 31, 2005), *Knapp*, No. 04-0039, 64 Agric. Dec. 1668, 2005 WL 1649009 (U.S.D.A. July 5, 2005) (Order Den. Mot. for Recons.). (Order Denying Mot. for Recons.), 64 Agric. Dec. 1668 (2005), *Coastal Bend Zoological Ass'n*, No. 04-0015, 65 Agric. Dec. 993, 2006 WL 6161816 (U.S.D.A. Aug. 31, 2006), and the ongoing pattern of Mr. Knapp's violations in this case.

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.*, No. 89-03, 50 Agric. Dec. 476, 497 (1991), 1991 WL 290584 (U.S.D.A. Feb. 8, 1991) (Decision and

[18] 7 U.S.C. § 2149(b).
[19] *See* Everhart, No. 96-0051, 56 Agric. Dec. 1400, 1416-17, 1997 WL 655550 (U.S.D.A. Oct. 2, 1997).

Order as to James Joseph Hickey and Shannon Hansen), *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 generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry.

The Administrator, one of the officials charged with administering the Animal Welfare Act, recommends that I assess Mr. Knapp the maximum civil penalty for his violations of the Animal Welfare Act and the Regulations (Administrator's Appeal Pet. at 30 ¶ IIC).

Each animal which Mr. Knapp purchased or sold without the required Animal Welfare Act license constitutes a separate violation of the Animal Welfare Act and the Regulations. I conclude Mr. Knapp committed 235 violations of the Animal Welfare Act and the Regulations during the period November 2005 through September 25, 2010. However, for the reasons explained in this Decision and Order, *supra*, I assess no civil penalty for Mr. Knapp's sales of 21 hoofstock as alleged in paragraphs 7d, 7g, 7q, 7s, 7y, and 7aa of the Second Amended Complaint; therefore, I assess Mr. Knapp a civil penalty for only 214 of his violations of the Animal Welfare Act and the Regulations. Mr. Knapp could be assessed a maximum civil penalty of $1,902,500 for the 214 violations of the Animal Welfare Act and the Regulations.[20]

[20] Prior to June 18, 2008, the Animal Welfare Act, authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the

However, in addition to his recommendation that I assess Mr. Knapp the maximum civil penalty for his violations of the Animal Welfare Act and the Regulations, the Administrator proposed assessment of a $75,000 civil penalty against Mr. Knapp for his violations of the Animal Welfare Act and the Regulations.[21] The Administrator failed to explain the $1,827,500 discrepancy between his two recommendations. Therefore, I give no weight to the Administrator's disparate recommendations.

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I conclude a $42,800 civil penalty for 214 of Mr. Knapp's violations of the Animal Welfare Act and the Regulations is appropriate and necessary to ensure Mr. Knapp'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 thereby fulfill the remedial purposes of the Animal Welfare Act.[22]

Third, the Administrator contends the Chief ALJ erroneously failed to assess Mr. Knapp a civil penalty for violating the cease and desist orders issued by the Secretary of Agriculture in *Knapp*, No. 04-0029, 64 Agric. Dec. 1668, 2005 WL 1649009 (U.S.D.A. July 5, 2005) (Order Den. Mot.

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maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective June 23, 2005, the Secretary of Agriculture, by regulation, adjusted the civil monetary 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 $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). On June 18, 2008, Congress amended 7 U.S.C. § 2149(b) to provide that the Secretary of Agriculture may assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations (Pub. L. No. 110-246 § 14214, 122 Stat. 1664, 2228 (2008)). Thus, the Secretary of Agriculture may assess Mr. Knapp a civil penalty of no more than $3,750 for each of Mr. Knapp's 38 violations of the Animal Welfare Act and the Regulations that occurred before June 18, 2008, and a civil penalty of no more than $10,000 for each of Mr. Knapp's 176 violations of the Animal Welfare Act and the Regulations that occurred after June 18, 2008.

[21] Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Br. in Support Thereof at 32.

[22] I assess Mr. Knapp a civil penalty of $200 for each animal, except for 21 hoofstock, that Mr. Knapp purchased or sold in violation of the Animal Welfare Act and the Regulations.

for Recons.) (Order Denying Mot. for Recons.) and *Coastal Bend Zoological Ass'n*, No. 04-0015, 65 Agric. Dec. 993, 2006 WL 6161816 (U.S.D.A. Aug. 31, 2006) (Administrator's Appeal Pet. at 30-31 ¶ IID).

The Chief ALJ assessed Mr. Knapp a $15,000 civil penalty for Mr. Knapp's violations of the Animal Welfare Act and the Regulations.[23] However, Mr. Knapp's violations of the Animal Welfare Act and the Regulations also constitute knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture in *Knapp*, No. 04-0029, 64 Agric. Dec. 1668, 2005 WL 1649009 (U.S.D.A. July 5, 2005) (Order Den. Mot. for Recons.) (Order Denying Mot. for Recons.) and *Coastal Bend Zoological Ass'n*, No. 04-0015, 65 Agric. Dec. 993, 2006 WL 6161816 (U.S.D.A. Aug. 31, 2006).

The Animal Welfare Act leaves no room for discretion regarding the assessment of a civil penalty for a knowing failure to obey a cease and desist order:

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

. . . . Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

7 U.S.C. § 2149(b). Effective September 2, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture increased the civil penalty for a knowing failure to obey a cease and desist order from $1,500 to $1,650.[24] Therefore, the civil penalty required to be assessed for

[23] Chief ALJ's Decision and Order at 17, 23.
[24] 7 C.F.R. § 3.91(b)(2)(v) (2005); 7 C.F.R. § 3.91(b)(2)(ii) (2006).

Mr. Knapp's 214 knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture in *Knapp*, No. 04-0029, 64 Agric. Dec. 1668, 2005 WL 1283510 (U.S.D.A. May 31, 2005) (Order Den. Mot. for Recons.), and *Coastal Bend Zoological Ass'n*, No. 04-0015, 65 Agric. Dec. 993, 2006 WL 6161816 (U.S.D.A. Aug. 31, 2006), is $353,100.

Fourth, the Administrator contends the Chief ALJ erroneously failed to find that Mr. Knapp's violations of the Animal Welfare Act and the Regulations were willful (Administrator's Appeal Pet. at 31 ¶ IIE at 31).

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.[25] The record establishes that Mr. Knapp's purchases and sales of animals, without an Animal Welfare Act license, were intentional. Therefore, I conclude Mr. Knapp's violations of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c) were willful.

Fifth, the Administrator contends, under the Rules of Practice, he had an absolute right to amend the Second Amended Complaint, and the Chief ALJ erroneously denied the Administrator's May 18, 2011, Motion to Correct Second Amended Complaint (Administrator's Appeal Pet. at 31-33 ¶ IIF).

On May 18, 2011, the Administrator filed a Motion to Correct Second Amended Complaint, which, if granted, would have corrected the Second Amended Complaint to add allegations that Mr. Knapp willfully violated the Animal Welfare Act and the Regulations, on December 1, 2007, when he sold two warthogs to Trager Snake Farm, Inc., and/or Helen

[25] Terranova Enters., Inc., No. 09-0155, 71 Agric. Dec. 876, 880, 2012 WL 10767592 (U.S.D.A. July 19, 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.); Bauck, No. D-09-0139, 68 Agric. Dec. 853, 860-61, 2009 WL 8382865 (U.S.D.A. Dec. 2, 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); D&H Pet Farms, Inc., No. 07-0083, 68 Agric. Dec. 798, 812-13, 2009 WL 8382862 (U.S.D.A. Oct. 19, 2009); Bond, No. 04-0024, 65 Agric. Dec. 92, 107, 2006 WL 1430148 (U.S.D.A. May 19, 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Stephens, No. 98-0019, 58 Agric. Dec. 149, 180, 1999 WL 288586 (U.S.D.A. May 5, 1999); Arab Stock Yard, Inc., No. 5172, 37 Agric. Dec. 293, 306 (1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

Moreno and a palm civet to Trager Snake Farm, Inc. On June 7, 2011, Mr. Knapp filed an objection to the Administrator's Motion to Correct Second Amended Complaint. On June 8, 2011, the Chief ALJ denied the Administrator's Motion to Correct Second Amended Complaint stating the Administrator had failed to show good cause for the correction (Summary of Teleconference and Order, filed June 8, 2011).

The Administrator contends, as no motion for hearing had been filed prior to his filing the Motion to Correct Second Amended Complaint, he had an absolute right under the Rules of Practice to amend the Second Amended Complaint. The Rules of Practice provide, as follows:

1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.

(a) *Amendment*. At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137(a). Mr. Knapp argues the Administrator did not have an absolute right to amend the Second Amended Complaint because he (Mr. Knapp) filed multiple requests for a hearing prior to the date the Administrator filed the Motion to Correct Second Amended Complaint (Mr. Knapp's Resp. and Appeal at 13-14). However, the requests for hearing cited by Mr. Knapp are included in Mr. Knapp's answers to the Complaint, the Amended Complaint, and the Second Amended Complaint,[26] and the Judicial Officer has held that a request for hearing in a complaint or an answer is not the same as a motion for hearing referred to in 7 C.F.R. § 1.137(a).[27] Nonetheless, I conclude the Administrator did not have an absolute right to amend the Second Amended Complaint as Mr. Knapp filed a motion to continue the hearing on February 12, 2010, long before the Administrator filed the Motion to

[26] *See* Answer of Bodie S. Knapp Req. for Hr'g at 7, filed Sept. 11, 2009; Answer of Bodie S. Knapp to Complainant's Am. Compl. Hr'g Requested at 9, filed Mar. 17, 2010; and Resp't's Answer to Complainant's Second Am. Compl. at 15, filed Dec. 8, 2010.

[27] Meacham, No. 299, 47 Agric. Dec. 1708, 1998 WL 243319 (U.S.D.A. Nov. 23, 1988) (Ruling on Certified Question).

Correct Second Amended Complaint. Therefore, I reject the Administrator's contention that the Chief ALJ erroneously denied the Administrator's May 18, 2011, Motion to Correct Second Amended Complaint.

Sixth, the Administrator contends the Chief ALJ erroneously permitted Mr. Knapp to deny facts that he had agreed to in a written stipulation (Administrator's Appeal Pet. at 33 ¶ IIG).

Mr. Knapp stipulated to the facts in paragraphs 7d-7f and 7l-7dd of the Second Amended Complaint (Stipulation as to Witnesses and Exs. at 2 ¶ D, filed June 15, 2011; Resp't Knapp's Req. for Verbatim Recording and Clarification of Stipulation, filed June 17, 2011). I find nothing in the Chief ALJ's Decision and Order indicating that the Chief ALJ treated the stipulated facts as disputed. To the contrary, the Chief ALJ specifically referenced Mr. Knapp's stipulation, as follows:

Respondent denies certain of the allegations and takes the position that the other transactions, the greatest number of which were the subject of a stipulation, fall beyond the parameters of regulated conduct.

Chief ALJ's Decision and Order at 7 (footnote omitted). Therefore, I reject the Administrator's contention that the Chief ALJ erroneously permitted Mr. Knapp to deny facts to which he had previously stipulated.

Seventh, the Administrator contends the Chief ALJ erroneously made Equal Access to Justice Act rulings (Administrator's Appeal Pet. at 33 ¶ IIH).

The Chief ALJ concluded that the award of attorney fees and other expenses to Mr. Knapp under the Equal Access to Justice Act (5 U.S.C. § 504) is warranted.[28] This proceeding is administrative disciplinary proceeding instituted by the Administrator under the Animal Welfare Act and the Regulations. At the time the Chief ALJ determined that an award of attorney fees and other expenses was warranted, Mr. Knapp had not applied for attorney fees and other expenses in accordance the Equal Access to Justice Act and the EAJA Rules of Practice and there had been

[28] Chief ALJ's Decision and Order at 17, 22.

no final disposition of this proceeding.[29] Therefore, I conclude the Chief ALJ's determination that the award of attorney fees and other expenses to Mr. Knapp under the Equal Access to Justice Act is warranted, was premature, and I do not adopt the Chief ALJ's determination regarding the award of attorney fees and other expenses.

Mr. Knapp's Response and Appeal Petition

Mr. Knapp raises three issues in his Response and Appeal Petition which have not been addressed in this Decision and Order, *supra*. First, Mr. Knapp contends the Chief ALJ erroneously concluded that Mr. Knapp's sales of animals through auctions, where the intended end use of the animals is unknown, violated the Animal Welfare Act and the Regulations (Mr. Knapp's Resp. and Appeal Pet. at 15-17 ¶¶ 11-12).

The Chief ALJ rejected Mr. Knapp's argument that his sales of, or offers to sell, one kinkajou on July 12, 2008, one camel on September 27, 2008, one guanaco on April 10, 2009, three camels on April 10, 2010, four guanaco on July 10, 2010, and two camels on September 25, 2010, to or at Lolli Brothers Livestock Market, Inc., were not violations of the Animal Welfare Act and the Regulations because the intended end use of the animals is unknown. I conclude the Chief ALJ correctly inferred, based on the value of the animals and the relative rarity of these animals, that these animals sold or offered for sale by Mr. Knapp to or at Lolli Brothers Livestock Market, Inc., were used, or intended to be used, for a regulated purpose.

Second, Mr. Knapp contends the Administrator did not allege that Mr. Knapp sold two kinkajou on July 12, 2008; therefore, the Chief ALJ's conclusion that Mr. Knapp sold two kinkajou on July 12, 2008, in

[29] The Equal Access to Justice Act and the EAJA Rules of Practice provide that a party may only request attorney fees and other expenses within 30 days after final disposition of a proceeding (5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.193). *See also* Perry, No. 12-0645, 72 Agric. Dec. ___, slip op. at 4-5 (U.S.D.A. Feb. 22, 2013) (Second Remand Order); Knapp, No. 09-0175, 71 Agric. Dec. 478, slip op. at 2-3, 2012 WL 441417 (U.S.D.A. Jan. 31, 2012) (Ruling Granting the Administrator's Mot. to Strike Mr. Knapp's Pet. for Att'y Fees and Other Expenses); Asakawa Farms, No. F&V 9167-7, No. F&V 917-8, 50 Agric. Dec. 1144, 1164, 1991 WL 33616 (U.S.D.A. Nov. 27, 1991), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993).

violation of the Animal Welfare Act and the Regulations, is error (Mr. Knapp's Response and Appeal Pet. at 16 ¶ 11).

The Administrator alleged that Mr. Knapp sold two kinkajou on July 12, 2008, as follows:

o. July 12, 2008. Respondent offered for sale, delivered for transportation, transported, sold, or negotiated the sale of 10 animals (one alpaca, two kinkajou, one aoudad, three ibex, and three Pygmy goats), to or at Lolli Brothers Livestock Market, Inc., Macon, Missouri.

Second Amended Compl. at 6 ¶ 7o (footnotes omitted). Moreover, the record supports a finding that Mr. Knapp offered two kinkajou for sale to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, on July 12, 2008 (CX 29 at 1). Therefore, I reject Mr. Knapp's contention that the Chief ALJ erroneously concluded that Mr. Knapp sold two kinkajou on July 12, 2008, in violation of the Animal Welfare Act and the Regulations.

Third, Mr. Knapp, relying on the definition of the term "animal" in 7 U.S.C. § 2132(g), contends he is exempt from the Animal Welfare Act licensing requirements because he breeds and sells species of animals other than dogs, as follows:

When the Act includes dogs as a category that are to be considered animals regardless of their purpose for breeding, it means that other creatures are not to be so considered. And that means that since all of the creatures Bodie Knapp transported were those he actually bred at his breeding facility, or used in his breeding program, they were not animals under the Act.

Mr. Knapp's Response and Appeal Pet. at 18 ¶ 12.

The Animal Welfare Act specifically authorizes the Secretary of Agriculture to issue Animal Welfare Act licenses to breeders of animals other than dogs[30] and the Regulations specifically provide for issuance of Class "A" licenses to animal breeders.[31] The term "animal," as defined

[30] 7 U.S.C. § 2133.
[31] 9 C.F.R. §§ 1.1 (*Class "A" licensee*); 2.6(b)(1).

in the Animal Welfare Act, includes any warm-blooded animal, with certain species-specific exclusions and use-specific exclusions.[32] The definition of the term "animal" does not exclude warm-blooded animals used for breeding and the fact that the definition of the term "animal" specifically provides that the term "animal" means all dogs, including dogs used for hunting, security, and breeding, does not mean that other warm-blooded animals used for hunting, security, and breeding are not "animals" as that term is defined in the Animal Welfare Act. Therefore, I reject Mr. Knapp's interpretation of the definition of the term "animal" in 7 U.S.C. § 2132(g).

Based upon the record before me, the following Findings of Fact and Conclusions of Law are entered.

Findings of Fact

1. Mr. Knapp is an individual residing in the State of Texas.

2. Mr. Knapp has a mailing address in Beesville, Texas.

3. At times, Mr. Knapp has done business as "The Wild Side" and "Wayne's World Safari."

4. Prior to September 10, 2005, Mr. Knapp was licensed under the Animal Welfare Act as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, and held Animal Welfare Act license number 74-C-0533.

5. The Administrator has previously instituted disciplinary administrative proceedings against Mr. Knapp for violations of the Animal Welfare Act and the Regulations.

6. In *Knapp*, 64 Agric. Dec. 253 (U.S.D.A. 2005), the Judicial Officer: (a) found that Mr. Knapp committed 84 willful violations of the Animal Welfare Act and the Regulations during the period March 13, 2002, through March 13, 2004; (b) ordered Mr. Knapp to cease and desist from violating the Animal Welfare Act and the Regulations; and

[32] 7 U.S.C. § 2132(g).

(c) revoked Mr. Knapp's Animal Welfare Act license (Animal Welfare Act license number 74-C-0533).

7. In *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.), the Judicial Officer denied Mr. Knapp's motion for reconsideration of *Knapp*, 64 Agric. Dec. 253 (U.S.D.A. 2005).

8. In *Coastal Bend Zoological Ass'n*, 65 Agric. Dec. 993, (U.S.D.A. Aug. 31, 2006), ALJ Palmer: (a) found that Mr. Knapp violated the Animal Welfare Act and the Regulations on December 11, 2003, and December 17, 2003; (b) ordered Mr. Knapp to cease and desist from violating the Animal Welfare Act and the Regulations; and (c) assessed Mr. Knapp a $5,000 civil penalty.

9. Mr. Knapp has not held an Animal Welfare Act license since September 10, 2005, the date the order in *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.), revoking Mr. Knapp's Animal Welfare Act license became effective.

10. In November 2005, Mr. Knapp sold one camel to Kimberly G. Finley, in New Caney, Texas.

11. On September 10, 2006, Mr. Knapp sold two lemurs to the Texas Zoo, in Victoria, Texas.

12. On September 10, 2006, Mr. Knapp bought two zebras from the Texas Zoo, in Victoria, Texas.

13. On October 13, 2006, Mr. Knapp bought two animals (one eland and one Pere David) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

14. On October 27, 2006, Mr. Knapp sold one blackbuck to or at Huntsville Exotic Sales, Inc., Huntsville, Texas.

15. On May 2, 2006, Mr. Knapp bought two warthogs from Buddy Jordan, NBJ Zoological Park, Spring Branch, Texas.

16. In February 2006, Mr. Knapp sold four addax to Victor E. Garrett, d/b/a Arbuckle Wilderness, Davis, Oklahoma.

17. On April 12, 2008, Mr. Knapp bought 27 animals (1 cavy, 1 camel, and 25 miniature donkeys) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

18. On May 16, 2008, Mr. Knapp bought two water buffalo from Lupa Game Farm, Inc., Ludlow, Massachusetts.

19. On July 12, 2008, Mr. Knapp sold four animals (one alpaca, two kinkajou, and one aoudad) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

20. On July 12, 2008, Mr. Knapp bought 18 animals (one wallaroo, one squirrel monkey, three ferrets, seven dwarf hamsters, five camels, and one buffalo) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

21. On September 27, 2008, Mr. Knapp sold five animals (one camel, two zebras, one wildebeest, and one addax) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

22. On September 27, 2008, Mr. Knapp bought 46 animals (1 alpaca, 6 camels, 3 zebras, 1 addax, 23 gerbils, 8 spiny mice, 1 wallaroo, 1 coatimundi, and 2 buffalo) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

23. On April 10, 2009, Mr. Knapp sold eight animals (three buffalo, one guanaco, one addax, and three nilgai) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

24. On April 10, 2009, Mr. Knapp bought 32 animals (11 hedgehogs, 4 chinchilla, 3 rabbits, 1 Netherland dwarf, 4 alpaca, 2 camels, 3 zebras, and 4 wildebeest) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

25. On July 11, 2009, Mr. Knapp sold four chinchilla to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

26. On July 11, 2009, Mr. Knapp bought 11 animals (one chinchilla, one dingo, five camels, one aoudad, and three oryx) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

27. On September 26, 2009, Mr. Knapp bought 21 animals (eight rabbits, six alpacas, three camels, one zebra, two wallaroos, and one kudu) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

28. On April 10, 2010, Mr. Knapp sold seven animals (three buffalo, three camels, and one Axis deer) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

29. On April 10, 2010, Mr. Knapp bought eight animals (three alpaca, three camels, one kangaroo, and one Bennet wallaby) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

30. On July 10, 2010, Mr. Knapp sold five animals (four guanaco and one buffalo) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

31. On July 10, 2010, Mr. Knapp bought 14 animals (two flying squirrels, six alpacas, one camel, three zebras, and two yak) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

32. On September 25, 2010, Mr. Knapp sold two camels to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

33. On September 25, 2010, Mr. Knapp bought eight animals (four camels, one zebra, and three oryx) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri.

Conclusions of Law

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

2. In November 2005, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold one camel to Kimberly G. Finley, in New Caney, Texas, without an Animal

Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

3. On September 10, 2006, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold two lemurs to the Texas Zoo, in Victoria, Texas, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

4. On September 10, 2006, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought two zebras from the Texas Zoo, in Victoria, Texas, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

5. On October 13, 2006, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought two animals (one eland and one Pere David) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

6. On October 27, 2006, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold one blackbuck to or at Huntsville Exotic Sales, Inc., Huntsville, Texas, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

7. On May 2, 2006, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought two warthogs from Buddy Jordan, NBJ Zoological Park, Spring Branch, Texas, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

8. In February 2006, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold four addax to Victor E. Garrett, d/b/a Arbuckle Wilderness, Davis, Oklahoma, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

9. On April 12, 2008, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought 27 animals (1 cavy, 1 camel, and 25 miniature donkeys) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

10. On May 16, 2008, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought two water buffalo from Lupa Game Farm, Inc., Ludlow, Massachusetts, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

11. On July 12, 2008, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold four animals (one alpaca, two kinkajou, and one aoudad) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

12. On July 12, 2008, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought 18 animals (one wallaroo, one squirrel monkey, three ferrets, seven dwarf hamsters, five camels, and one buffalo) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

13. On September 27, 2008, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold five animals (one camel, two zebras, one wildebeest, and one addax) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

14. On September 27, 2008, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought 46 animals (1 alpaca, 6 camels, 3 zebras, 1 addax, 23 gerbils, 8 spiny

mice, 1 wallaroo, 1 coatimundi, and 2 buffalo) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

15. On April 10, 2009, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold eight animals (three buffalo, one guanaco, one addax, and three nilgai) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

16. On April 10, 2009, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought 32 animals (11 hedgehogs, 4 chinchilla, 3 rabbits, 1 Netherland dwarf, 4 alpaca, 2 camels, 3 zebras, and 4 wildebeest) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

17. On July 11, 2009, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold four chinchilla to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

18. On July 11, 2009, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought 11 animals (one chinchilla, one dingo, five camels, one aoudad, and three oryx) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

19. On September 26, 2009, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought 21 animals (eight rabbits, six alpacas, three camels, one zebra, two wallaroos, and one kudu) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

20. On April 10, 2010, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold seven animals (three buffalo, three camels, and one Axis deer) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

21. On April 10, 2010, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought eight animals (three alpaca, three camels, one kangaroo, and one Bennet wallaby) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

22. On July 10, 2010, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold five animals (four guanaco and one buffalo) to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

23. On July 10, 2010, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought 14 animals (two flying squirrels, six alpacas, one camel, three zebras, and two yak) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

24. On September 25, 2010, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, sold two camels to or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

25. On September 25, 2010, Mr. Knapp, operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, bought eight animals (four camels, one zebra, and three oryx) from or at Lolli Brothers Livestock Market, Inc., in Macon, Missouri, without an Animal

Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).

26. Each animal which Mr. Knapp purchased or sold without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c), constitutes a knowingly failure by Mr. Knapp to obey cease and desist orders entered against him by the Secretary of Agriculture in *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.) and *Coastal Bend Zoological Ass'n*, 65 Agric. Dec. 993 (U.S.D.A. 2006).

Mr. Knapp's Request for Oral Argument

Mr. Knapp's request for oral argument (Mr. Knapp's Response and Appeal Pet. at 20), which the Judicial Officer may grant, refuse, or limit,[30] is refused because the issues are not complex and oral argument would serve no useful purpose.

Criminal Prosecution of Mr. Knapp

This proceeding is the third administrative proceeding brought under the Animal Welfare Act against Mr. Knapp. As evidenced in this proceeding, the orders issued by the Secretary of Agriculture against Mr. Knapp in *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.), and *Coastal Bend Zoological Ass'n*, 65 Agric. Dec. 993 (U.S.D.A. 2006), have not deterred Mr. Knapp from continuing to violate the Animal Welfare Act and the Regulations. If Mr. Knapp knowingly violates the Animal Welfare Act or the Regulations in the future, I would urge the Administrator to consider referring the matter for criminal prosecution in accordance with 7 U.S.C. § 2149(d).

For the foregoing reasons, the following Order is issued.

ORDER

1. Bodie S. Knapp, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in

[30] 7 C.F.R. § 1.145(d).

particular, shall cease and desist from operating as a dealer without an Animal Welfare Act license.

Paragraph 1 of this Order shall become effective upon service of this Order on Bodie S. Knapp.

2. Bodie S. Knapp is assessed a $395,900 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, Regulatory, and Food Safety 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 Bodie S. Knapp. Bodie S. Knapp shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0175.

RIGHT TO JUDICIAL REVIEW

Bodie S. Knapp 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. Bodie S. Knapp must seek judicial review within 60 days after entry of the Order in this Decision and Order.[31] The date of entry of the Order in this Decision and Order is June 3, 2013.

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[31] 7 U.S.C. § 2149(c).

ANIMAL WELFARE ACT

In re: LANZIE CARROLL HORTON, JR., AN INDIVIDUAL, A/K/A JUNIOR HORTON, D/B/A HORTON'S PUPS.
Docket No. 12-0052.
Decision and Order.
Filed January 2, 2013.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Thomas D. White, Esq. for Respondent.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. This Decision and Order GRANTS in part and DENIES in part APHIS's Motion for Summary Judgment (filed June 4, 2012).

2. The Complaint was filed on November 7, 2011, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Complainant"). The Complaint alleged that the Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups ("Respondent Horton" or "Respondent") willfully violated the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*.) ("AWA" or "Act"), and a regulation issued pursuant to the Act (9 C.F.R. § 2.1(a)(1)).

3. The Answer, timely filed on November 28, 2011, requested a hearing and denied, among other things, any willful or knowing violation of the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*.).

4. APHIS's Motion for Summary Judgment (filed June 4, 2012), when compared with the Complaint, compared with the Answer, and compared with Respondent's Memorandum in Opposition (filed July 24, 2012), leads me to the following Mixed Findings of Fact and Conclusions of Law, which do **not** require the admission into evidence of testimony or exhibits.

Mixed Findings of Fact and Conclusions of Law

5. Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups, is an individual whose business was in Millersburg, Ohio, and was previously in Hillsville, Virginia.

6. On or about November 9, 2006, through September 27, 2007, Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups, without having obtained a dealer's license under the Animal Welfare Act from the Secretary of Agriculture, in commerce, for compensation or profit, delivered for transportation, or transported, or sold, or negotiated the sale of, **914 dogs** for use as pets **to** a **retail pet store**, Pauley's Pups, in violation of section 2.1(a)(1) of the Regulations. 9 C.F.R. § 2.1(a)(1). [*See* paragraphs 3.a. through 3.qq. of the Complaint, pages 2 through 8.]

7. On or about June 8, 2008, Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups, without having obtained a dealer's license under the Animal Welfare Act from the Secretary of Agriculture, in commerce, for compensation or profit, delivered for transportation, or transported, or sold, or negotiated the sale of, **42 dogs** for use as pets **to** a licensed **dealer**, Ervin Raber, in violation of section 2.1(a)(1) of the Regulations. 9 C.F.R. § 2.1(a)(1). [*See* paragraph 3.rr. of the Complaint, page 8.]

8. On or about December 27, 2008, through January 17, 2009, Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups, without having obtained a dealer's license under the Animal Welfare Act from the Secretary of Agriculture, in commerce, for compensation or profit, delivered for transportation, or transported, or sold, or negotiated the sale of, **two dogs** for use as pets **to** a licensed **dealer**, Harold Neuhart, in violation of section 2.1(a)(1) of the Regulations. 9 C.F.R. § 2.1(a)(1). [*See* paragraph 3.ss. of the Complaint, page 8.]

9. On or about September 30, 2009, Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups, without having obtained a dealer's license under the Animal Welfare Act from the Secretary of Agriculture, in commerce, for compensation or

profit, delivered for transportation, or transported, or sold, or negotiated the sale of, **four dogs** for use as pets **to** an unlicensed **dealer**, Pamela Knuckolls-Chappell, in violation of section 2.1(a)(1) of the Regulations. 9 C.F.R. § 2.1(a)(1). [*See* paragraph 3.tt. of the Complaint, page 8.]

10. APHIS claims that Respondent Horton's violations (paragraphs 6, 7, 8 & 9) were "willful"; Respondent Horton claims that if they were violations, they were not "willful" and were not even "knowing". For the purpose of this Decision, I make no determination of Respondent Horton's scienter, concluding that no such determination is required for me under 7 U.S.C. § 2149(b) to order Respondent Horton to cease and desist from violating the Animal Welfare Act; and to order Respondent Horton to pay civil penalties.

11. The maximum civil penalty for violations occurring from June 23, 2005 through June 17, 2008, was $3,750.[1] Since June 18, 2008, the maximum civil penalty for a violation has been $10,000.[2]

12. The factors regarding the appropriateness of a penalty under 7 U.S.C. § 2149(b) include size of the business, gravity of the violations, whether there is good faith, and the history of previous violations. Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups, operated a large business while in Virginia and operated a small business while in Ohio. The gravity of the violations, each of which is the sale of a dog by an unlicensed dealer, is serious, especially since there were 962 violations (914 in less than a year, ending September 2007; thereafter, the remaining 48 violations over roughly 16 months ending September 2009). Beginning on November 8, 2007 Respondent Horton failed to show good faith, in that he did not attempt to become licensed under the Animal Welfare Act [query, would he have been accepted as a licensee?], and he showed disregard for whether his sales activities were permissible while he had no AWA license. Respondent Horton does not have a history of previous violations [and, for the purpose of this Decision, I GRANT Respondent Horton's Motion

[1] 28 U.S.C. § 2461; 70 Fed. Reg. 29575 (May 24, 2005) (final rule effective June 23, 2005); 7 C.F.R. § 3.91(b)(2)(ii) ("Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $3,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.").

[2] 7 U.S.C. § 2149(b).

to Exclude Evidence (filed June 25, 2012), and I accept as true Respondent Horton's assertion that since November 2008, when he received his warning from an APHIS officer, he ceased any of the actions that may have been violative of the Act].

ORDER

13. The following **cease and desist** provisions of this Order (paragraph 14) shall be effective on the day after this Decision becomes final. [*See* paragraph 17.]

14. Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups, his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from operating as a dealer without having obtained a dealer's license under the Animal Welfare Act from the Secretary of Agriculture, in violation of section 2.1(a)(1) of the Regulations. 9 C.F.R. § 2.1(a)(1).

15. Respondent Lanzie Carroll Horton, Jr., also known as Junior Horton, doing business as Horton's Pups, is assessed civil penalties totaling **$14,430**; which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**," within one year after this Decision becomes final. [*See* paragraph 17.]

16. Respondent Horton shall reference **AWA 12-0052** 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, Colleen A. Carroll, at the following address, or at any other address specified by Colleen A. Carroll:

US Department of Agriculture
Office of the General Counsel
Attn: Colleen A. Carroll
South Building, Room 2325B, Stop 1417
1400 Independence Ave SW
Washington DC 20250-1417

Finality

17. This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, *see* Appendix A).

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

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In re: KARRI MURPHY.
Docket No. 13-0077.
Decision and Order.
Filed January 17, 2013.

AWA.

Petitioner, pro se.
Colleen A. Carroll, Esq. for Respondent.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The Petitioner is Karri Murphy (Petitioner Murphy), who represents herself (appears *pro se*) and also represents Safari's Wildlife Sanctuary, Inc.

2. The Respondent is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), represented by Colleen A. Carroll, Esq.

3. Chief Judge Davenport assigned this case to me on November 27, 2012. Petitioner Murphy was unresponsive to my Preliminary Instructions filed December 14, 2012:

(a) Petitioner Murphy failed to file with the Hearing Clerk a copy of the denial letter referenced in her Petition;

(b) Petitioner Murphy failed to file her current contact information with the Hearing Clerk by January 9, 2013; and

(c) Petitioner Murphy failed to contact Legal Secretary Marilyn ("Nita") Kennedy by January 16, 2013, so that we could schedule a telephone conference.

4. Consequently, I will decide this case on the written record (Petition filed November 6, 2012; and Response filed November 26, 2012).

Findings of Fact, Conclusions, and ORDER

5. APHIS's denial of the application for a USDA Animal Welfare Act license is AFFIRMED.

6. Petitioner Karri Murphy and Safari's Wildlife Sanctuary, Inc. are disqualified from being granted a USDA Animal Welfare Act license for a period of 1 year from the effective date of this Order. This Order is effective on the day after this Decision becomes final (*see* the following section regarding finality).

7. Petitioner Karri Murphy and Safari's Wildlife Sanctuary, Inc. may apply for an Animal Welfare Act license 60 days prior to the end of the 1 year period of disqualification, with the understanding that no license will issue until disqualification has ended.

Finality

8. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145; *see* enclosed Appendix A).

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

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ANIMAL WELFARE ACT

In re: JENNIFER CAUDILL, AN INDIVIDUAL A/K/A JENNIFER WALKER, AND JENNIFER HERRIOTT WALKER.
Docket No. 10-0416.
Decision and Order.
Filed February 1, 2013.

AWA.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondents.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER AS TO JENNIFER CAUDILL

Preliminary Statement

This license termination proceeding was initiated on September 7, 2010 by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) pursuant to Animal Welfare Act (the Act or AWA), 7 U.S.C. § 2131, *et seq.*, by the filing of an Order to Show Cause Why Animal Welfare Act Licenses 58-C-0947, 55-C-0146 and 58-C-0505 Should Not Be Terminated. The action as brought originally named Jennifer Caudill (also known as Jennifer Walker and Jennifer Herriott Walker) (Caudill), Brent Taylor (Taylor) and William Bedford (Bedford), individuals doing business as Allen Brothers Circus, and Mitchel Kalmanson (Kalmanson) as Respondents. When AWA license 55-C-0146 was voluntarily terminated on May 12, 2012, the issues concerning Taylor and Bedford were resolved. APHIS moved to withdraw the Order to Show Cause concerning Bedford and Taylor and an Order of Dismissal was entered as to them on June 15, 2012.[1] On September 24, 2012, I entered a Decision and Order as to the allegations against Mitchel Kalmanson.

Three days of trial were conducted in Tampa, Florida from June 11 to June 13, 2012.[2] At the hearing, thirteen witnesses testified.[3] Thirty-five exhibits were introduced by the government and eighteen by the

[1] Order of Dismissal, June 15, 2012, Docket Entry No. 73.
[2] Docket Entry Nos. 44, 51, 65, and 67.
[3] References to the Transcript will be indicated as "Tr." and the page number.

Respondents.[4] Post hearing briefs were filed by all parties and the remaining allegations against Jennifer Caudill will be disposed of.

Discussion

The Animal Welfare Act enacted in 1970 (P.L. 91-579) draws its genesis from, and is an amendment of, the Laboratory Animal Welfare Act (P.L. 89-54), which had been enacted in 1966 to prevent pets from being stolen for sale to research laboratories, and to regulate the humane care and handling of dogs, cats and other laboratory animals. The 1970 legislation amended the name of the prior provision to the Animal Welfare Act in order to more appropriately reflect its broader scope.[5] Since that time Congress periodically has acted to strengthen enforcement, expand coverage to more animals and activities, or conversely, curtail practices that are viewed as cruel or dangerous.[6]

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.[7] As part of his enforcement authority, the Secretary may suspend or revoke the license of any dealer or

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[4] Complainant's exhibits are referred to as "CX" and the exhibit number. Respondent Caudill's exhibits are referred to as "RCX" and the exhibit number. Respondent Kalmanson's exhibits are referred to as "RKX" and the exhibit number. Joint Respondent exhibits are referred to as "RCKX" and the exhibit number.

[5] The Congressional statement of policy is set forth in 7 U.S.C. § 2131, which provides in pertinent part: "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 or eliminate burdens on such commerce, in order –

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from theft of their animals by preventing the sale or use of animals which have been stolen."

[6] A 1976 amendment added Section 26 of the Act making illegal a number of activities that contributed to animal fighting. Haley's Act (H.R. 1947) introduced in the 100th Congress made it unlawful for animal exhibitors and dealers (but not accredited zoos) to allow direct contact between the public and large felids such as lions and tigers.

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

exhibitor who violates the Act or its Regulations. 7 U.S.C. § 2149(a). 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. *Amarillo Wildlife Refuge, Inc.*, No. 07-0077, 68 Agric. Dec. 77, 2009 WL 248415 (U.S.D.A. Jan. 6, 2009); *Vigne*, No. 07-0174, 67 Agric. Dec. 962, 2008 WL 8120951 (U.S.D.A. July 7, 2008), *aff'd with modifications*, 67 Agric. Dec. 1060, 2008 WL 8120958 (U.S.D.A. Nov. 18, 2008); *Bradshaw*, No. 90-22, 50 Agric. Dec. 499, 507, 1991 WL 290586 (U.S.D.A. May 17, 1991). Violations of the Act by licensees can result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149.

Basis Alleged for the Agency Determination Concerning Caudill

Termination of Caudill's AWA Exhibitor's License was sought under the provisions authorizing the Department to terminate any license issued to a person who:

> Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other Government agencies, ….. 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) (emphasis indicated in Complaint).

Although the Complaint alleges that Caudill made false or fraudulent statements and/or provided false or fraudulent records to APHIS,[8] the emphasis added in the above cited provision in the Complaint suggests that primary reliance is being placed upon the more general determination of unfitness.[9] The Complaint alleged that Respondents (collectively, including Caudill) engaged in activities designed to circumvent an order of the Secretary of Agriculture in revoking the AWA exhibitor's license previously held by [Lancelot Kollman] Ramos, and have acted as surrogates for Ramos. Caudill and Kalmanson were alleged to continue to act as Ramos's surrogates, and to facilitate the

[8] Paragraph 33 of Compl. (Docket Entry 1).
[9] Paragraph 32 of Compl. *Id.*

circumvention of his license revocation order.[10] The subsequent paragraph of the Complaint concluded that allowing Respondents to continue to hold AWA licenses would be contrary to the purposes of the Act as each of them willfully and knowingly engaged in activities designed to circumvent the Secretary's revocation of another person's license and in the case of Caudill, the earlier allegation of having made false statements and provided false documents to a federal agency (APHIS) was repeated.

Factual support for termination on the grounds of false statements and providing false documents however is lacking. Complainant faulted Caudill's application for the exhibitor's license that was issued to her in representing that the nature of her business was a "circus" and that she held eight dogs. Given that Caudill's application was submitted in April of 2009, the information contained on the form was correct at the time of its preparation.[11] Complainant's post hearing brief enumerated multiple inconsistencies contained in affidavits signed by Caudill but which were prepared by APHIS personnel. The statements although signed by Caudill were actually distillations of interviews with Caudill and are not her verbatim statements. Taken in the context of the antagonistic and biased investigation initiated and conducted with the obvious intent of supporting a predetermined conclusion, I conclude any inconsistencies on Caudill's part fail to rise to the level of fraud. Similarly I also give little weight to and will not attribute to fraud any of the documents prepared by Caudill under stress and with the intent of extricating herself from the predicament precipitated by the APHIS investigation and actions taken against her.

Little support is also found for the conclusion that Caudill in any way was operating as a surrogate for Ramos. The evidence instead supports the position that Caudill and her brother, both with circus background, were attempting to take advantage of a business opportunity for which they were well qualified to undertake by purchasing Ramos's animals. Tr. 681-682. Similarly, I find no evidence that Caudill was engaging in activities designed to circumvent the revocation of Ramos's license. While Complainant introduced testimony through Officer Manson that

[10] Paragraph 34 of Compl. *Id.*

[11] No explanation was introduced for the reasons for the delay from April of 2009 when the application was submitted and the issuance of the license on October 14, 2009. CX-1.

when Ramos was interviewed at his mother's property in Balm, Florida, he had stated that he was "using" Caudill's license, Ramos was not present as a witness to confirm, deny or clarify the truth of the account. While the rules of evidence are not strictly applied in administrative proceedings, the absence of a right to confront witnesses and subject them to cross examination remains a fundamental element of due process and will be invoked to reject such testimony in this case.[12] At a minimum, such uncorroborated evidence should not stand as the lynch pin of support for the Government's case.

Lancelot Kollman Ramos's (Ramos) AWA Exhibitor's License No. 58-C-0816 was ultimately revoked effective October 19, 2009 after protracted administrative proceedings commenced in April of 2005 following his unsuccessful appeal to the United States Court of Appeals for the Eleventh Circuit.[13] At the time of the revocation of his license, Ramos either owned or had in his possession approximately 34-37 exotic felids either being exhibited at circus venues or being housed at his mother's property in Florida.[14] CX-9.

Early in 2009, upon hearing that Ramos's license was subject to being revoked, Caudill and her brother Jason Caudill approached him seeking to purchase the tigers he owed that were travelling with the various circuses. Tr. 681-682. Caudill previously held a Class C exhibitor's

[12] Manson's report also contains language striking similar to that which directed to be included in the USDA reports (CX-9). On cross examination, Manson admitted that the conclusory language was only an assumption and that if he had more information, his opinion could change. Tr. 35.

[13] Octagon Sequence of Eight, Inc., No. 05-0016, 66 Agric. Dec. 670, 2007 WL 3170323 (U.S.D.A. May 9, 2007); *aff'd by Judicial Officer*; 66 Agric. Dec. 1093, 2007 WL 7278319 (U.S.D.A. Oct. 2, 2007), *aff'd sub nom.* Ramos v. Dep't of Agric., No. 08-10236, 68 Agric. Dec. 60, 2009 WL 7743722 (U.S.D.A. Apr. 7, 2009); 322 Fed. App'x 814 (11th Cir. 2009) (not selected for publication) (CX-32, 33). Although affirming the decision of the Judicial Officer, the Court found the actions of the agency not to be above reproach. Characterizing the actions as "virtually glacial and hardly represent[ing] best practice by a government agency, the decision noted that more than seven years had passed between the date of the conduct related to the two lions and the decision of the Judicial Officer.

[14] Ten tigers had been travelling with Feld Entertainment, Inc. (d/b/a Ringling Brothers, Barnum & Bailey); eight tigers and one liger were with the Cole Brothers Circus (Cole Bros); eight tigers were with Soul Circus, Inc. (UniverSoul or Soul); and 6-10 were being kept at property owned by Ramos's mother in Balm, Florida. Tr. 673-674, CX-5, 6.

license, and had in April had again applied for a new license.[15] Her brother Jason Caudill had experience presenting tigers so the brother and sister felt that it was a perfect opportunity for them.[16] Tr. 681-682. When approached, Ramos was at first disinclined to sell the animals, however, as the revocation date drew nearer he relented and agreed to their sale. In a series of documents dated November 5, 2009, 37 felids and the related contractual agreements were transferred to Caudill slightly more than two weeks after the effective date of Ramos's license revocation.[17] CX-2, 3, 34, 35, RCX-1, 2. The sale agreement involving the ten tigers travelling with the Feld circus (also referred to at times as Ringling Brothers, Barnum and Bailey) was expressly made subject to a leasing agreement of the tigers to Feld through November of 2010. When USDA contacted Feld in December of 2009, investigators were informed by Feld that it no longer had any contractual arrangement with Ramos, advising instead that it was leasing the tigers from Caudill who was licensed as an exhibitor. CX-4, RCX-4. Similar contractual arrangements were entered into by Caudill with Soul Circus, Inc. and Cole Bros. Circus.[18] CX-13. During the same approximate time Caudill sent a letter to Dr. Goldentyer informing her that she had acquired Ramos's animals and providing her contact information. RCX-3. She also made numerous telephone calls to Goldentyer's office, all of which Dr. Goldentyer refused to take. Tr. 652-654. Despite the remedial nature of the Act, Dr. Goldentyer felt herself under no obligation to assist Caudill in any way by providing guidance, explaining instead that she would not "talk people around what the requirements are." Tr. 331-332.

[15] Caudill submitted her application in April of 2009; it was finally issued in October of that year.

[16] Jason Caudill's qualifications were also questioned despite his extensive experience. As with his sister, the review of their experience appears less than unbiased. *See* Tr. 647, RCX-6.

[17] Ramos's options would be severely limited once revocation took place. According to Dr. Goldentyer's testimony, he could keep the animals as long as he did not engage in regulated activity, or he could donate them. USDA could have provided assistance, but did not offer to do so with Ramos. Tr. 336-339.

[18] No written agreement was introduced, but the testimony at trial indicates that Caudill had assumed responsibility for those animals.

Unwilling to believe that the felids had been sold[19] or that Ramos was no longer "involved" in exhibiting them, Dr. Elizabeth Goldentyer, in her capacity as the Eastern Regional Director for the USDA Animal and Plant Health Inspection Service, Animal Care Program, concluded that Caudill and others were engaged in activity designed to circumvent an Order of the Secretary of Agriculture revoking Ramos's AWA exhibitor's license. The resulting investigation directed against Caudill (and Kalmanson) was inappropriately influenced and unacceptably biased from its onset as APHIS personnel involved in preparing inspection reports were ordered by Goldentyer and her staff to include language in their reports to the effect that "This licensee appears to be circumventing the revocation of Lancelot Kollman Ramos-2.10(b), 2.11(d), 2.12." Tr. 386-387, CX-20 (McFadden), 23 (Geib), 24 (Baltrush), 25 (Baltrush),[20] 28 (Howard).[21]

Dr. Gloria McFadden, Dr. Mary Geib, and Jan Baltrush, an experienced USDA Animal Care Inspector since 1988, all testified that they were directed to include the language even though none of them found any factual basis for its inclusion. Tr. 159-160, 177-179, 198. While possibly not rising to the level of "fraud upon the Court" as was suggested in Caudill's post hearing brief, Goldentyer's egregiously improper conduct produced such a thoroughly flawed investigation that scant reliance should be placed upon its conclusions. Just as evidence illegally obtained in criminal proceedings is generally excluded pursuant to the doctrine of "the fruit of the poisonous tree" the conclusions reached by the investigation at issue should, by analogy, be excluded here. Such application of the doctrine should suffice to deter future recurrences.[22]

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[19] USDA apparently would not have objected if Ramos had donated the animals. Dr. Goldentyer indicated the Department's objective was to have a situation where "he is not involved in the tigers anymore." Tr. 337.

[20] "Should a Contracted Licensee act in a manner that is circumventing the AWA the Cole Brothers Circus may be held responsible." CX-25.

[21] CX-28 was not admitted as that inspection was conducted after the dates alleged in the Complaint. Its note indicated "This licensee appears to be assisting in the direct circumvention of a USDA revocation order."

[22] The phrase "fruit of the poisonous tree" was first used by Justice Felix Frankfurter in *Nardone v. United States*, 308 U.S. 338 (1939).

On February 13, 2010, Dr. Christopher E. Nichols, then a USDA Veterinary Medical Officer, conducted what was termed a "routine" inspection of the Soul Circus in Macon, Georgia. Tr. CX-10, 11. Despite the benign and innocuous characterization given to the inspection, it is clear from the testimony concerning the elaborate preparation for it that it was anything but routine. Nichols was accompanied by Sherri Thomas, an IES Investigator, who prior to arriving at the circus had provided Nichols with "detailed information and [he was] shown frontal photographs of the possible violators…."[23] Tr. 477-479, CX-11. During the course of his inspection, Nichols found four deficiencies, the most significant of which was that Caudill lacked sufficient knowledge and experience to handle dangerous animals. Of the other deficiencies, a sanitation violation was subsequently removed as being unsupported. A food storage issue was corrected on the spot, and the deficiency relating to an inappropriate cage was expeditiously dealt with.[24] Tr. 495-496, CX-10. In the briefing given to him prior to the inspection, Nichols had been instructed to see if Ramos was present. Tr. 486-487. Ramos was never observed in the ring, but rather was observed in the audience and later seen behind the ring opening the cages and assisting in getting the tigers into the ring. Tr. 131-134, 488-489, 491-493, CX-11. Although it was clear from the preparation for the inspection that Ramos's involvement was central to the investigation, inexplicably no effort was made at the time to interrogate Ramos concerning his role, leaving it unclear as to whether Ramos was present as a principal, volunteer or employee.[25] In addition to his past relationship with Soul as an exhibitor, Ramos had also worked for the circus in other capacities and testimony was later introduced that Soul preferred to use their own employees. Tr. 657.

In light of the circumstances and the fatally flawed fashion in which the investigation was conducted, the handling violation is highly questionable, raising significant questions as to whether the issue of Caudill's "qualifications" was pretextual or was in fact fairly and

[23] Some of the information reportedly came from the Department's "intelligence branch." Tr. 129-130.

[24] Nichols report was changed after review by his supervisors. Tr. 524-525, CX-10. Nichols subsequently performed a follow up inspection in Atlanta and determined that three of the four prior deficiencies had been corrected (leaving only the handling violation), but failed to prepare an amended report. Tr. 513, 525.

[25] There was some indication that Ramos built props for the circus and was paid for that work by Soul. Tr. 465-466.

impartially evaluated. At the time of the inspection, Caudill possessed a valid exhibitor's license and was not directly involved in presenting the tigers. According to Bedford's testimony, most USDA licensed exhibitors hire someone else to present the tigers in the ring. Tr. 80. That certainly was the situation at the Soul circus as it was one of Soul's employees, John Jhiro, (whose qualifications apparently were never questioned) who presented the tigers during the performances. Tr. 589-591, 648, 657, 668-669. Jhiro was an experienced presenter, having worked for numerous circuses in South America and with four years experience with Ringling Brothers, where he worked with big cats.[26] Tr. 591, 648-649. Caudill herself had extensive exposure to working with big cats, and while she may not have "presented" the animals in the ring previously, the evidence introduced during the hearing concerning her qualifications convinced me that she was at least as, if not more qualified to handle dangerous animals than many exhibitors in other cases that I have heard. Tr. 76-77, 639-647, 661-662, RCX-6, 7, 8. A seasoned and experienced exhibitor himself, in contrast the conclusion reached by USDA, Bedford considered Caudill fully qualified. Tr. 76-77.

Regardless of its appropriateness,[27] the pronouncement concerning Caudill's lack of qualifications contained in the Inspection Report proved to cause its intended destructively devastating damage to Caudill. Not only was Caudill embarrassed and humiliated by being described as "unqualified,"[28] once Sedrick Walker (one of the owners of Soul) was informed that she (and the act) would be "unable to conduct regulated activity," and after rejecting the use of Bedford to assume responsibility for the act, without approval from her, he contacted and within two weeks had made arrangements with Mitchel Kalmanson to assume

[26] Kalmanson testified that Jhiro provided him with two or three inches of his resume. Tr. 591.

[27] Given the direction to include specific language in the Inspection Reports without regard to whether it was supported or not, one can only speculate as what the detailed information given to VMO Nichols was or whether he was also directed to make specific findings as to Caudill's qualifications.

[28] Caudill's fax to Nicolette Petervary was considered insufficient by Dr. Goldentyer. CX-15, RCX-6. Although additional information was later provided, given the apparent animus against Caudill, it apparently was either ignored or not even considered. RCX-7, 8. It is manifestly clear that USDA never contacted any of the references that Caudill gave to them. Tr. 661-662.

custody of the animals without payment for the animals to Caudill.[29] Tr. 658-659, CX-10. Effectively precluded from being able to continue to engage in regulated activity with the animals at Soul but still hoping to maintain some relationship with Soul and to get her cats back, Caudill lost both possession and control of the animals and the income that they generated. Tr. 664-666. The immediate and considerable financial loss was soon to be repeated with her animals that had been placed with Cole Brothers.

While the evidence does establish that Ramos was present at the circus in Macon, Georgia on February 13, 2010 and was "assisting" getting the tigers into the ring, it is also undisputed that once Caudill was informed by Investigator Thomas that it was not permissible for Ramos to be present or to assist in the act in any way his involvement ceased and he was never again observed working in any way with the animals. Tr. 133-134, 177-179, 198, 684-685, CX-11. I will accordingly find that Ramos's limited participation on February 13, 2010 fails to establish that Caudill was attempting to circumvent the revocation of Ramos's license.[30]

Having also concluded that any statements by Caudill or documents prepared by her did not rise to the level of fraud, that she was not a surrogate of Ramos, and that the allegation that she engaged in conduct designed to circumvent Ramos's license revocation was unsupported, consideration will next be given to whether Caudill should nonetheless be determined to be unfit. I conclude otherwise. The record certainly fails to contain any allegation that Caudill failed to provide humane care and treatment of her animals, the fundamental purpose of the Act. Instead the record supports the conclusion that Caudill was subjected to

[29] Caudill had attempted to resolve the problem on a temporary basis by transferring the animals to William Bedford; however, that apparently was not satisfactory to Walker and without Caudill's approval arrangements were made by Walker for Kalmanson to assume responsibility for the animals.

[30] Having trained and worked with some of his animals for a long time, Ramos's reluctance to terminate all contact with his animals certainly is understandable. In his appeal to the Judicial Officer, Ramos claimed to be an animal lover. The Judicial Officer however noted that even were he to find that Ramos was an animal lover as he claimed that fact would not operate as to defense to his violations of the Act. Octagon Sequence of Eight, No. 05-00016, 66 Agric. Dec. 1093, 1100, 2007 WL 7278319 (U.S.D.A. Oct. 2, 2007).

an improperly conducted investigation by individuals misusing the authority vested in them, the result of which was professional embarrassment and significant financial loss.

On the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Jennifer Caudill is a resident of the State of Florida. CX-1.

2. Caudill is a member of the fourth generation on both sides of her family to be a circus performer. RCX-6. Her father is an exotic animal trainer, her mother is a horse trainer, both older brothers have worked with exotics, and her grandmother was an aerial artist. Tr. 639, RCX-6. Although Caudill has never presented tigers in a ring, she has been around circus animals since she was in diapers and has extensive prior experience with lions, tigers, elephants, horses, zebras, camels and dogs. Tr. 76-77, 639-647, CX-6, 7, 8.

3. In April of 2009 Caudill applied for and in October of 2009 was issued Animal Welfare Act Exhibitor's License 58-C-0947.[31] CX-1.

4. Although licensees must provide information concerning the animals they possess at the time of annual renewal of the license, Animal Welfare Act Exhibitor's licenses, once granted, contain no restrictive endorsements or limitations as to what animals may be exhibited on the face of the license.

5. Seeing a potential business opportunity, in early 2009 prior to Ramos's license being revoked, Caudill and her brother Jason Caudill approached Ramos seeking to purchase his tigers; however, at that time he was unwilling to sell them. Tr. 681-682, CX-6.

[31] The Application for License bears a stamped date of April 29, 2009, but elsewhere is stamped "received" on June 26, 2009. Given the renewal date of 16 October 2010, it appears to have been effective October 15, 2009. There was no reason given for the delay in issuing the license.

6. As the revocation date for Ramos's license approached, he agreed to sell the 37 felids and transfer the related contractual agreements in a transaction finally consummated with a series of documents dated November 5, 2009, slightly more than two weeks after the effective date of his license revocation. CX-2, 3, 34, 35, RCX-1, 2. There were two written agreements (one for $150,000 covering the animals under contract to Soul Circus, Inc. and Cole Brothers Circus and a second for $80,000 covering the Ringling Brothers, Barnum and Bailey Circus [Feld] animals); Ramos received $10,000 as a down payment and was to get the balance in installments. RCX-1, 2, Tr. 650-651.

7. The sale agreement involving the ten tigers travelling with the Feld circus was expressly made subject to a leasing agreement of the tigers to Feld through November of 2010. When USDA investigators contacted Feld in December of 2009, they were informed by Feld that it no longer had any contractual arrangement with Ramos and were advised that it was leasing the tigers from Caudill who was licensed as an exhibitor. CX-4, RCX-4.

8. Similar contractual arrangements were made by Caudill with Soul Circus, Inc. and Cole Bros. Circus.[32] CX-13.

9. On February 13, 2010, Dr. Christopher E. Nichols, then a USDA Veterinary Medical Officer, conducted what was termed a "routine" inspection of the Soul Circus, Inc. in Macon, Georgia. Tr. 524-525, CX-10, 11. Nichols found four deficiencies, including a lack of qualifications violation, the second a food storage issue which was corrected on the spot, and the third relating to sanitation issues (subsequently removed as unsupported) and a fourth, an inappropriate cage which was expeditiously dealt with.[33] Tr. 524-525, CX-10. His report was subsequently altered after review by his supervisors. Tr. 524-525.

[32] No written agreement was introduced, but the testimony at trial indicates that Caudill had assumed responsibility for those animals.

[33] Nichols report was changed after review by his supervisors. Tr. 524-525, CX-10. Nichols subsequently performed a follow up inspection in Atlanta and determined that three of the four prior deficiencies had been corrected (leaving only the handling violation), but failed to prepare an amended report. Tr. 513, 525.

10. As a result of the handling or lack of qualifications violation, Soul Circus was informed that the animals could no longer be exhibited under Caudill's license.

11. In an attempt to find a temporary solution permitting the continued exhibition of the animals, Caudill called her family friend and licensed exhibitor William Allen Bedford and asked him to assume responsibility for the animals until she could satisfy USDA that she was qualified. Tr. 39. Bedford agreed and Caudill executed a transfer of the animals to him. CX-12.

12. Bedford's attempt to assume responsibility for the act was rejected by Soul Circus's Sedrick Walker and without approval from Caudill, he contacted and within two weeks made arrangements with Mitchel Kalmanson to assume custody of the animals without payment for the animals to Caudill.[34] Tr. 56, 658-659.

13. Despite submission of additional supporting documentation and references concerning her prior experience working with big cats, Caudill's efforts to change the determination of her qualifications proved unsuccessful. Tr. 641-644, 646, 660, CX-15, RCX-6, 7, 8. As there was no testimony concerning the extent of the evaluation process, it is unclear whether the additional documentation was actually examined or simply ignored. It is clear that none of the references were contacted.

14. On February 25, 2010, Kalmanson met with Soul Circus officers and then IES Officer Godfey who suggested to him that the animals should be considered to have been abandoned. Tr. 575. With Godfrey's approval, Kalmanson then prepared a transfer sheet and took possession of the animals. Tr. 577-579, CX-14. Neither Caudill nor Bedford was involved in the discussions.

15. On March 2, 2010, at the direction of the Georgia Department of Natural Resources, Caudill prepared a second transfer sheet for the Soul animals. Tr. 581, 666-667, CX-14.

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[34] Caudill had attempted to resolve the problem on a temporary basis by transferring the animals to William Bedford; however, that apparently was not satisfactory to Walker and without Caudill's approval arrangements were made by Walker for Kalmanson to assume responsibility for the animals.

16. Unable to alter USDA's position on her qualifications to handle felids, on April 30, 2010, Caudill sold to Feld the animals they were leasing. Tr. 655-656, RCX-5. With the proceeds, she paid Ramos the $80,000 owed to him for those animals. Tr. 676.

17. In May of 2010, a USDA Investigator emailed a Florida Fish and Wildlife Commission officer advising him that Ramos was going to receive a $225,000 civil penalty and Caudill would be assessed a $12,500 civil penalty and a one year suspension of her license. RCX-16.

18. USDA Inspections of Cole Brothers Circus were conducted on May 13, 2010, June 8, 2010and July 8, 2010. On each occasion, as directed by Goldentyer and other supervisors, language indicating that the licensee appeared to be attempting to circumvent the revocation of Ramos's license was included in the Inspection Reports. CX-20, CX-23, CX-25. McFadden's report indicated (although she admitted not knowing what Ramos looked like) that a man was observed at a horse trailer that "could have been" Ramos. Tr. 157, CX-20. Neither Mary Geib nor Jan Baltrush, the authors of the other reports, observed Ramos being present. Tr. 177-179, 198.

19. As had been done with the Soul animals because of Caudill's alleged lack of qualifications, Caudill transferred the animals being exhibited at Cole Brothers animals to Bedford and his partner where they continued to be exhibited under Brent Taylor's and William Allen Bedford's license as was reflected in the inspection report. CX-7, 20. Bedford subsequently notified USDA that he had donated the animals back to Caudill and the handling violations were again included. CX-23, 24.

20. Similar to the pressure exerted on the Soul circus, Jan Baltrush's report advised Cole Brothers that they must assume responsibility for "these dangerous animals" and that they would have to bring in another licensee if the act was to continue. Shortly thereafter, Cole Brothers also contacted Kalmanson who agreed (again without compensating Caudill) to assume responsibility for the animals. Tr. 200, 598, CX-25, RKX-7, RKX-8.

21.No evidence was introduced indicating that Caudill failed to provide humane care and treatment to the animals which she purchased from Ramos.

22.The abuse of authority in directing that unsubstantiated language be placed in inspection reports and the questionable review of Caudill's qualifications to handle felids was the proximate cause of Caudill experiencing the loss and control of animals she had purchased and the revenue generated by their exhibition.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Although Respondent had initiated discussions with Ramos concerning the purchase of his animals prior to the effective date of his license revocation, her subsequent consummation of the transaction after his license had been revoked constitutes a violation of 9 C.F.R. § 2.132.

3. The evidence is insufficient to find that Respondent Caudill is unfit to hold an AWA license or that maintenance of a license by her would in any way be contrary to the purposes of the Act.

ORDER

1. The determination by the Administrator that Respondent Jennifer Caudill is unfit to be licensed as an exhibitor under the Act is **REVERSED** and the license termination proceedings against AWA License No. 58-C-0947 are **DISMISSED**.

2. Any application for EAJA fees shall be submitted not later than 30 days after this Decision and Order becomes final. In the event of an appeal by the Complainant within that period, action on the application will be deferred until a final Decision is entered.

3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding

within thirty (30) days, 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.

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In re: AARON B. BLOOM.
Docket No. 12-0355.
Decision and Order.
Filed February 19, 2013.

AWA-D.

Petitioner, pro se.
Colleen A. Carroll, Esq. for Respondent.[1]
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

1. APHIS properly denied the 5 applications at issue here for a license under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("AWA" or "Act"). In each instance, the application was not complete, and denial was proper for that reason. In each instance, denial was in accordance also with a regulation issued pursuant to the Act, 9 C.F.R. §§ 2.11(a)(5) and (a)(6).

Procedural History

2. Aaron B. Bloom ("Petitioner Bloom" or "Petitioner") filed his Petition on April 11, 2012, requesting a hearing on APHIS's denial of his application for a USDA Animal Welfare Act license.

[1] The Respondent is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), represented by Colleen A. Carroll, Esq.

3. The "Response to Request for Hearing" was filed on April 26, 2012, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Respondent").

4. APHIS filed a Motion for Summary Judgment on October 2, 2012; and Petitioner Bloom's "Response to Motion for Summary Judgment" was filed November 15, 2012, asking that I deny APHIS's Motion and proceed with a hearing. This Decision and Order GRANTS in part and DENIES in part APHIS's Motion for Summary Judgment.

5. The following Mixed Findings of Fact and Conclusions of Law, rely on Petitioner's exhibits PX 1 through PX 4; APHIS's exhibits RX 1 through RX 16; and the Declaration dated October 1, 2012 attached to APHIS's Motion for Summary Judgment filed October 2, 2012.

Mixed Findings of Fact and Conclusions of Law

6. Aaron B. Bloom, the Petitioner, does business in the State of New York.

7. Petitioner Bloom's business Aaron's Roaming Reptiles does not require a USDA Animal Welfare Act license.

8. Petitioner Bloom applied for a USDA Animal Welfare Act license, and my analysis here focuses on 5 of those applications:

2011, June 1
2011, June 30
2011, July 19
2011, August 10
2012, January 13 (rec'd January 23).

9. Petitioner Bloom wants "his own fitness" (to be licensed to exhibit) to be measured without reference to Jeffrey W. Ash, an individual doing business as Ashville Game Farm. I see Petitioner Bloom's point. Jeffrey W. Ash had his Animal Welfare Act exhibitor's license (21-C-0359) terminated. *See Ash*, decided September 14, 2012 by the Judicial Officer in AWA Docket No. 11-0380 (RX 16), found on-line at http://www.nationalaglawcenter.org/assets/decisions/ash.pdf.

So I will analyze whether Petitioner Bloom's own fitness can be measured without reference to Jeffrey W. Ash. Each of the 5 applications at issue here is considered, (a) through (e).

(a) Petitioner Bloom's AWA application submitted in 2011 on June 1 indicated Petitioner Bloom would be "purchasing 21-C-0359" (Jeffery W. Ash's license). So, that application, even if it had been properly completed, could not have been evaluated without reference to Jeffrey W. Ash. RX 3.

(b) Petitioner Bloom's AWA application submitted in 2011 on June 30 indicated Petitioner Bloom would be operating a roadside zoo and showed the same address for Petitioner Bloom as was the address for Jeffrey W. Ash, doing business as Ashville Game Farm, that is, 468 Lick Springs Road, Greenwich, NY 12834. So, that application, even if it had been properly completed, could not have been evaluated without reference to Jeffrey W. Ash. RX 5.

(c) Petitioner Bloom's AWA application submitted in 2011 on July 19 was more complete but had the same flaw, showing that the business was the same business as was being operated by Jeffrey W. Ash, even with the same business name "Ashville Game Farm", 468 Lick Springs Road, Greenwich, NY 12834. So, that application, even if it had been properly completed, could not have been evaluated without reference to Jeffrey W. Ash. RX 7.

(d) Petitioner Bloom's AWA application submitted in 2011 on August 10 again had the same flaw; it was for a business already being operated by a licensee who had not terminated his license and who was occupying the premise at 468 Lick Springs Road, Greenwich, NY 12834. That licensee was Jeffrey W. Ash, doing business as Ashville Game Farm. So, that application, even if it had been properly completed, could not have been evaluated without reference to Jeffrey W. Ash. RX 9 and RX 10.

(e) Petitioner Bloom's AWA application dated in 2012 on January 13, and received by APHIS in 2012 on January 23, showed the business name as "Adirondack Family Zoo":

Adirondack Family Zoo
424 Anthony Rd
Greenwich, NY 12834

County: Washington Phone: [same as Aaron B. Bloom's]
Did this January 2012 application contain a connection to Jeffrey W. Ash ? Yes. The address is real estate in the vicinity of (adjacent to) Jeffrey W. Ash's premise at 468 Lick Springs Road, Greenwich, NY 12834.
By choosing this site (PX 4) as his business location, Petitioner Bloom has maintained the same impression that he created and sustained through all 5 applications. What impression is that? The impression that the "circumstances" "circumvent the order" terminating 21-C-0359, the license of Jeffrey W. Ash, doing business as Ashville Game Farm, 468 Lick Springs Road, Greenwich, NY 12834. RX 13.

Additionally fueling the impression of entanglement with Jeffrey W. Ash is the "Adirondack Family Zoo" paperwork, showing its location as of August 16, 2011 to be the same location as that of Jeffrey W. Ash, doing business as Ashville Game Farm [468 Lick Springs Road, Greenwich, County of Washington, State of New York]. PX 2. Then as of March 7, 2012 the "Adirondack Family Zoo" shows its location to be 424 Anthony Rd, Greenwich, County of Washington, State of New York. PX 3. This is in the vicinity of (adjacent to) Jeffrey W. Ash's premise at 468 Lick Springs Road, Greenwich, NY 12834. So, that January 2012 application, even if it had been properly completed, could not have been evaluated without reference to Jeffrey W. Ash. RX 13.

10. Petitioner Bloom's 5 applications considered here show that Petitioner Bloom tried very hard to step into the shoes of Jeffrey W. Ash. Even with the following "business location," the effort continued.

Adirondack Family Zoo
424 Anthony Rd
Greenwich, NY 12834

11. In the process, Petitioner Bloom's identity was represented in his applications as if he was Jeffrey W. Ash - - for example, describing the animals held now or during the last year as if Petitioner Bloom held Jeffrey W. Ash's animals. RX 5. RX 7.

12. Under these circumstances, taking testimony will not be useful. Instead, the hearing has been held, on the written record already before me: Petitioner's exhibits PX 1 through PX 4; APHIS's exhibits RX 1 through RX 16; and the Declaration dated October 1, 2012 attached to APHIS's Motion for Summary Judgment filed October 2, 2012.

13. APHIS denied Petitioner Bloom's applications for an Animal Welfare Act license properly, because Petitioner Bloom showed through his applications that a license issued to him, Petitioner Bloom, was to "circumvent the order" terminating 21-C-0359, the license of Jeffrey W. Ash, doing business as Ashville Game Farm, 468 Lick Springs Road, Greenwich, NY 12834. Petitioner Bloom's applications for an Animal Welfare Act license violated 9 C.F.R. §§ 2.11(a)(5) and (a)(6).[2]

14. APHIS's denial of Petitioner Bloom's applications for a USDA Animal Welfare Act license is AFFIRMED.

ORDER

15. Petitioner Aaron B. Bloom is disqualified from being granted a USDA Animal Welfare Act license for a period of 1 year from the effective date of this Order. This Order is effective on the day after this Decision becomes final (see the following section regarding finality).
16. Petitioner Aaron B. Bloom may apply for an Animal Welfare Act license 60 days prior to the end of the 1 year period of disqualification, with the understanding that no license will issue until disqualification has ended.

Finality

17. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, *see* enclosed Appendix A).

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

[2] [and also 9 C.F.R. § 2.11(d)]

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In re: JEFFERY[1] W. ASH, AN INDIVIDUAL D/B/A ASHVILLE GAME FARM; AND ASHVILLE GAME FARM, INC., A NEW YORK CORPORATION.
Docket No. 12-0296.
Decision and Order.
Filed March 22, 2013.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Robert M. Winn, Esq. for Respondents.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

On March 16, 2012, Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service filed a Complaint alleging that Respondents had violated the Animal Welfare Act, as amended (AWA or Act), 7 U.S.C. § 2131 *et seq.* and the regulations and standards issued thereunder, 9 C.F.R. § 1.1 *et seq.* A copy of the Complaint and the Rules of Practice were served by certified mail upon Respondent Jeffery W. Ash on March 22, 2012. The attempt to serve Ashville Game Farm, Inc. was unsuccessful and was returned by the U.S. Postal Service.

The Complaint filed by the Acting Administrator alleged several violations of the Act and its regulations occurring between July 3, 2007[2] and January 10, 2011 and sought a cease and desist order, a civil penalty, and either suspension or revocation of Ash's AWA license.

[1] Although the Complaint names Jeffrey W. Ash as the Respondent, his Answer identifies him as Jeffery W. Ash.

[2] Paragraph 4 of the Complaint however alleges that from June of 2007 to January of 2012 operated a zoo without a valid license. Paragraph 1 of the Complaint however alleges that Ash's AWA License No. 21-C-0256 expired on February 18, 2010 when he failed to renew it, a fact disputed by Ash in his Answer.

On April 9, 2012, Respondent Ash's Answer was received and filed in the Hearing Clerk's Office. In his Answer, Ash denied generally the allegations contained in the Complaint and acknowledged that a New York Corporation was formed and registered in the name of an attorney by the name of Amy W. Cohen at the request of his ex-wife, but indicated that all business activities at the Greenwich, New York address were conducted by Respondent Ash doing business as Ashville Game Farm.

On August 31 of the previous year Complainant had initiated action against Respondent Jeffrey W. Ash, doing business as Ashville Game Farm by the filing of an Order to show cause why his exhibitor's license should not be revoked, the same being *In re Jeffrey W. Ash, an individual doing business as Ashville Game Farm*, Docket No. 11-0380. In that action, the Administrator contended that Ash was no longer fit for licensure under the AWA due to his conviction for the misdemeanor of reckless endangerment, second degree in relation to his exhibition of wild and exotic animals.[3]

On April 2, 2012, only days shortly before Ash's Answer was due to be filed in Docket No. 12-0296, Judge Janice K. Bullard entered a Decision and Order in Docket No. 11-0380 granting summary judgment in favor of the Complainant and revoking AWA License No. 21-C-0359. In her decision, Judge Bullard noted that the State of New York had revoked his State license.

Following the filing of an Answer by Ash, I entered an Order directing the exchange of witness and exhibit lists with the Hearing Clerk's Office and further directed the parties to exchange exhibits. The parties were also directed to confer with each other and to report the expected duration of any hearing of the issues in the action, the preferred location for the hearing, and a list of mutually agreeable dates. Counsel for the Complainant filed that report on June 15, 2013. As the dates agreed upon by the parties were not available, a teleconference was scheduled for February 20, 2013 to set a hearing date. Counsel for Respondent Ash was available; however, Complainant's Counsel was

[3] No attempt was made by Complainant to request consolidation of the two actions against Ash although obviously, the violations alleged in the second action predated the filing of the first action.

not. Efforts to schedule this matter for hearing being unsuccessful and mindful of current budgetary constraints all but precluding travel, review of the file was undertaken to determine whether the matter could be resolved without the need for a hearing.

Review of the prior action reflecting that AWA License No. 21-C-0359 has been terminated,[4] so much of the relief sought as asks for suspension or revocation of the license has been mooted by action taken in *Ash*, No. 11-0380, 71 Agric. Dec. 430 (U.S.D.A. Apr. 2, 2012), *modified by the Judicial Officer*, 71 Agric. Dec. 900, 2012 WL 10767598 (U.S.D.A. Sept. 14, 2012) (ALJ's decision to revoke not adopted, but rather license terminated).

Official notice being taken that Respondent can no longer legally operate and is no longer in business as both his New York license and AWA licenses have been revoked, entry of a cease and desist order would currently appear to be of limited utility.

Given the remedial nature of the AWA and the fact that Respondent Ash has been precluded from exhibiting animals and effectively put out of business, I further find that imposition of a civil penalty in this case is not necessary to advance the purposes of the Act.

Service never having been made on Ashville Game Farm, Inc. and no further action having been taken to do so, the allegations against it are **DISMISSED.**

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

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[4] Although the license was revoked in Docket No. 11-0380, it had apparently previously expired for failure to renew it.

In re: WILLA MAE PAGE.
Docket No. 13-0012.
Decision and Order.
Filed March 28, 2013.

AWA.

Brian T. Hill, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

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 Willa Mae Page willfully violated the Act. The Respondent was served with copies of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151) by certified mail on October 10, 2012.

By letter dated November 1, 2012, Respondent was advised that she had failed to file an Answer within the allotted time and she would be advised of further action being taken in her case. On November 5, 2012, I entered an Order directing the parties to show cause why a Default Decision and Order should not be entered.

On November 6, 2012, the Hearing Clerk received a handwritten letter from Respondent in which she admitted selling the dogs without being properly licensed, indicated that she was in poor health, had very little income, was experiencing financial problems and had been having difficulty affording the food to feed the dogs, and expressed remorse over her transgressions.

Consistent with my Order, on November 15, 2012, Complainant moved for entry of a Decision based both upon default and the admissions made by Respondent. The Proposed Order accompanying

that Motion however cited an incorrect statute and a corrected Motion and Order were filed on March 7, 2013.

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

Findings of Fact

1. Respondent Willa Mae Page is an individual residing in Huggins, Missouri.

2. Respondent, at all times material herein, was not a licensed dealer as defined in the Act and the Regulations.

3. On or about November 14, 2007, Respondent, without having a valid dealer's license, sold approximately 29 dogs at a public auction.

4. On or about May 24, 2008, Respondent, without having a valid dealer's license, sold approximately 11 dogs at a public auction.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully violated section 2.1(a)(1) of the Regulations, 9 C.F.R. § 2.1(a)(1).

ORDER

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards issued thereunder, and in particular, shall cease and desist from conducting regulated activity without being licensed under the Act.

2. Respondent is assessed a civil penalty of $5,000.00, all of which shall be held in abeyance provided that she, after having been given notice and opportunity for a hearing, is not found to have violated the Act or the Regulations and Standards issued thereunder, for a period of 3 years.

3. Respondent is permanently disqualified from obtaining and holding a license under the Act.

4. This Decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to Section 1.145 of the Rules of Practice (7 C.F.R § 1.145).

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In re: GUSTAVE L. WHITE, III, D/B/A COLLINS EXOTIC ANIMAL ORPHANAGE.
Docket No. 12-0277.
Decision and Order.
Filed April 26, 2013.

AWA.

Sharlene Deskins, Esq. for Complainant.
Gustave L. White, IV, for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

I. INTRODUCTION

The above-captioned matter involves administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Gus White, also known as Gustave L. White, III, doing business as Collins Exotic Animal Orphanage (Respondent"; "Collins Zoo"). Complainant alleges that Respondent violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "Regulations and

Standards"). The instant decision[1] is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

Procedural History

In a complaint filed on March 9, 2012, ("the Complaint") Complainant alleged that Respondent willfully violated the Act and the Regulations on multiple occasions between 2007 and 2010. Generally, the Complaint alleged that Respondent failed to properly handle and care for a variety of animals; failed to maintain proper records; failed to maintain an adequate plan of veterinary care, or employ an attending veterinarian; failed to adequately maintain facilities in a variety of circumstances; failed to employ adequate numbers of properly trained employees; failed to properly store supplies and food; and exhibited animals without sufficient barriers.

Respondents timely filed an Answer and the parties exchanged evidence and filed submissions in compliance with my pre-hearing Order issued April 11, 2012. A hearing was held beginning December 11, 2012, in Hattiesburg, Mississippi. Over the course of the three day hearing, I admitted to the record the exhibits proffered by both Complainant and Respondent[2]. I held the record open for the submission of additional evidence by Respondent, which was filed on December 28, 2012. Both parties filed written closing argument.

II. ISSUE

Did Respondent violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?

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[1] In this Decision & Order, the transcript of the hearing shall be referred to as "Tr. at [page number]. Complainant's evidence shall be denoted as "CX-[exhibit #]"and Respondents' evidence shall be denoted as "RX-[exhibit number]". Exhibits admitted to the record *sua sponte* shall be denoted as "ALJX-[exhibit number]".

[2] I excluded Respondent's exhibits that constituted notes made by Bettye White and did not separately admit Respondent's exhibits that were duplicates of Complainant's evidence.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Admissions

Respondent admits that Gustave L. White, III is an individual residing in Collins, Mississippi who operates an animal exhibition under the business name of Collins Exotic Animal Orphanage. Respondent further admits that he operated as an exhibitor as comprehended by the Act and prevailing regulations, and held Animal Welfare Act license Number 65-C-0012 at all times relevant to the instant adjudication.

B. Summary of Factual History

Respondent has worked with animals all of his life and has learned animal care from experience, lectures, books, and other animal experts. Tr. at 918. Mr. White, III has exhibited animals for the public at facilities in Slidell, Louisiana, and then at the current site in Mississippi, as well as at public lectures. Tr. at 624; 919. Respondent has held a license under the Animal Welfare Act for 43 years. Tr. at 625; 920. Respondent has experience with all kinds of animals, including exotic cats. Tr. at 931.

Mr. White has experienced deteriorating health in recent years that has limited his daily hands-on oversight of the facility, but he visits the site often, as his home is also located on the property where the exhibition is situated. Tr. at 929. His wife is now the primary caretaker of the animals, and his son also is very involved in caring for animals and maintaining buildings and structures. Tr. at 932-933. Respondent provides instructions that his wife, son or volunteers are able to carry out. Tr. at 933. Besides his wife and son, three people regularly volunteer their time and work for Respondent. Tr. at 932.

Mrs. Bettye White, wife of Mr. Gus White, III, has worked with her husband at his animal exhibition facilities for more than 30 years, and developed her expertise with handling animals through her experience. Tr. at 625-626. She helped to hand-raise a variety of animals from birth. Tr. at 626. Mr. White IV was raised on the facility and has been around and worked with animals in one capacity or another for his entire life. Tr. at 978. He was trained how to feed them, care for them and their

habitats, and to observe their behaviors by his parents and volunteers. Tr. at 979; 988. Mr. White IV did not diagnose or treat animals, but discussed his observations with his parents, who would decide whether to consult a veterinarian to give treatment to animals. Tr. at 991. One of the volunteers, Jennifer Farmer, is a biologist who has formal training in animal care and who has worked for years at Respondent's facility. Tr. at 1027-1028.

Most of the animals owned by Respondent stayed at the facility until their deaths. Id. Mrs. White was raised on a farm and was familiar with the care of typical farm animals. Tr. at 815. 846-847. Veterinary care for the animals is provided by Dr. Lisa Ainsworth, who volunteers her services to Respondent. CX-43. Dr. Ainsworth visits the zoo several times a year, dropping by when she is in the area, or coming to the facility when Mrs. White asks for a visit. Tr. at 631. Dr. Ainsworth updates the records required by the Act, including plans for veterinary care. CX-43.

Many of the animals at the facility were abandoned by people, and Respondent is not always able to ascertain their source. Tr. at 845. People have left reptiles, birds and mammals at the entrance. *Id.*

In 2007 Respondent considered entering into a partnership with Mr. White III's friend, John Cornwell. Tr. at 791; RX-40. It was anticipated that Mr. Cornwell would receive 50% of Respondent's profits, and would help with expenses and making business decisions. Tr. at 792-793; 896; RX-40. Mr. Cornwell hired people to do some work at the facility and brought reptiles to the facility. Tr. at 896. Mrs. White denied that Mr. Cornwell brought a coatimundi to the facility; Respondent had a coatimundi from a donor who left it with Geri Williamson one day when Mrs. White was not on site. Id. The partnership dissolved when Mr. Cornwell failed to provide the money to finish a wall building project that he helped to start. Tr. at 937-938. The Whites paid to finish the project by using credit cards. Tr. at 939.

In January, 2012, Respondent's larger animals were confiscated by the Mississippi Department of Wildlife. Tr. at 728. Respondent challenged the confiscation and a state court ruled that it was an illegal seizure. Tr. at 729. However, Mrs. White did not know when the

animals would be returned. Id. Respondent has had previous instances where the Mississippi Department of Wildlife ignored ruling by courts in Respondent's favor. Id. At the time of the hearing before me, the only animals covered by the Act that were at the facility were one coyote hybrid, rabbits, and a kinkajou. Tr. at 729.

C. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals by 7 U.S.C. §§ 2143(a), 2151. The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a $2,500 maximum, between April 14, 2004 and June 17, 2008, the maximum for each violation was $3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation had been increased to $10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. § 2139, which states, in pertinent part: "the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission or failure of such . . . exhibitor as well as of such person." 7 U.S.C. § 2139.

Implementing regulations provide requirements for licensing, recordkeeping and attending veterinary care, as well as specifications and standards for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size of and environmental requirements of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people. *Id.*

D. Cited Violations

APHIS cited Respondent with violations of the Act and regulations that generally pertain to the facility's physical equipment and maintenance; the existence of proper veterinary care; the proper retention and storage of records; and handling of animals, as follows:

Handling of Animals 9 C.F.R. § 2.131 (c)(1)

Respondents were cited with several violations of this regulation, which provides:

> During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. § 2.131(c)(1).

On July 11, 2008, APHIS inspector Dr. Tami Howard concluded that the barrier fence in front of the leopards' enclosure could be easily moved to allow the public close access to the animals. Tr. at 173-174; CX-16; CX-17. Mrs. White explained that she and her son were replacing the railing in front of the leopard's cage when the inspectors came to the site, and it may not have looked solid. Tr. at 689. The railing

installation was completed immediately after the inspectors left. Tr. at 790.

I accord weight to both the inspector's testimony and to the Respondent's explanation and find that the evidence is in equipoise on this issue. This violation has not been established by a preponderance of substantial evidence.

On September 8, 2010, Dr. Howard observed that the construction of the tiger Stave's barrier was not sufficient to keep the public from getting access to the tiger's enclosure. Tr. at 149; 547; CX-7; CX-8. Dr. Howard explained that although the problem was with the construction of the fencing, the fact that it created a potential for breach of a barrier brought the defect under a "handling" violation. Tr. at 547-548. Mrs. White testified that there were several fence posts and gates at the back of the tiger's cage that restricted access to the area. Tr. at 653-654. I accord weight to this testimony, considering that this violation involves a construction issue that had not been cited before, but existed before the date of this inspection. I find that this violation has not been substantiated.

On March 23, 2010, Dr. Howard cited Respondent for the condition of the public barrier fence in the coyote mix area. Tr. at 209. She considered the fence flimsy and unstable, and inadequate to prevent contact between the public and the animals. CX-26; CX-27. Dr. Kirsten recalled that wires were broken from the post, making the fence very unstable. Tr. at 379-380. He believed it was very important that the barrier be sufficient to keep visitors safe from dangerous animals. Tr. at 380. Mrs. White disagreed that the fence could have been easily broken, and asserted that it would have been easier to climb over the fence than to have tampered with it. Tr. at 697-698.

The preponderance of the evidence supports Complainant's contention that the public barrier to the coyote mix enclosure was inadequate. This violation is substantiated.

1. Facilities and Operating Standards

Many of the cited violations involved in the instant adjudication fall within the general penumbra of "facilities", and shall be addressed categorically.

2. Structural Strength

The pertinent regulation states that

> [t]he facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. § 3.125(a).

On September 24, 2009, holes and insufficient substrate were noted in wolf-hybrid enclosures, and Respondent was cited with violations of standards for "[h]ousing facilities for dogs". CX-22; Tr. at 183-184. Mrs. White testified that she regularly added clay to the floor of the coyote enclosure because it liked to dig. Tr. at 731-732. Ms. Williamson helped Mrs. White put dirt in enclosures twice a week. Tr. at 577. I find that the evidence is in equipoise and this violation has not been proven.

In addition, Dr. Howard cited Respondent with a violation of this standard because of the presence of holes and ruts on the floors of the enclosures of the cougar and tigers, which allowed rain and excreta to accumulate. Tr. at 189; CX-22; CX-23. On inspection conducted on January 21, 2010, Respondent was cited with a repeat violation for the condition of the flooring in the tigers' enclosures. The tiger Stave was laying in mud, and Dr. Howard believed that the floor needed additional substrate to be compliant with structural integrity standards. Tr. at 195-196; CX-24; CX-25. Inspector Howard found similar unsatisfactory conditions at the hybrid wolves' enclosures. CX 24, ¶ 1; Tr. at 195. On September 24, 2009, Dr. Howard cited Respondent with a violation of structural standards because of the presence of holes and ruts on the floors of the enclosures of the cougar and tigers, which allowed rain and excreta to accumulate. Tr. at 189; CX-22; CX-23. On March 23, 2010,

the enclosures for the tiger Stave and the lion Haggard needed additional substrate, as the floor had been worn down. Tr. at 209-213; CX-26; CX-27. Dr. Howard's supervisor, Dr. Kirsten agreed with this assessment. Tr. at 398.

Mrs. White was unaware of holes in the cougar cages, but admitted that holes that would collect water would not be good for cougars. Tr. at 726-727. She disagreed that the tigers' enclosure was hazardous, as the tigers were responsible for creating pools of water when they finished swimming. Tr. at 727. She also did not agree with the citation for the flooring of the tiger Stave's enclosure, and explained that if she added too much dirt, it would run off because the enclosure was situated on an incline. Tr. at 727-728. She routinely filled in the cages with dirt, with the help of volunteer Geraldine Williamson. Tr. at 577-578. Mrs. White considered moving the tiger's enclosure, but the State Department of Wildlife confiscated Respondent's big cats in January, 2012. Tr. at 728. Mrs. White explained that the wolves liked to dig. Id. No real explanation was provided for the condition of the floor of the lion's enclosure.

I find that the evidence regarding the cougars', lion's, and wolves' enclosures establishes that the condition of the flooring violated structural regulations. However, the evidence fails to establish that the condition of the tigers' enclosures represented a hazard to the animals. I credit the testimony that tigers like to swim and dripped water that pooled in the enclosures. I also credit the evidence that dirt was added to the enclosure, but too much dirt in the location of the enclosure would have caused run off in rain. This citation has not been proved by a preponderance of the evidence.

On March 23, 2010, Inspector Howard cited Respondent with multiple violations of structural defects. She found rotted posts at the bottom of both cougars' (Delilah and Star) enclosures that were not anchored in the ground. Dr. Howard observed that a perch in the leopards' enclosure was broken. The cyclone fencing around the tiger India's enclosure was on the outside of the vertical posts and not clamped to the posts, which compromised the strength of the fence. There was also a gap at the bottom of the left end of the enclosure big enough to allow the tiger to pass its paw through, presenting a hazard to

passers-by. There were broken resting platforms in both the tiger Brother's and the jungle cat Gypsy's enclosures. Dr. Kirsten also observed structural defects at this inspection. Tr. at 381-383.

Mrs. White admitted that posts at the bottom of the cougars' enclosures had some rot, but since they were not support posts, she did not believe that there was a danger to structural integrity. Tr. at 702. Mrs. White also agreed that resting perches were broken. Tr. at 703. She explained that the cyclone fence was constructed as it was to allow an inside metal perch to be bolted to the fencing, but she had her son change the fencing to address the inspectors' concerns Tr. at 703-704. Mrs. White did not disagree that there was a gap in fencing, but she did not think it presented a problem because no one generally went to that area of the enclosure. Tr. at 704.

Complainant has established violations of structural standards pertaining to broken perches, poorly constructed fencing, and compromised fence posts.

Upon inspection conducted on September 8, 2010, Respondent was charged with violations of structural soundness standards because large dead trees within the exhibition space posed a danger to animal enclosures. CX-7; Tr. at 151. Dr. Howard testified that Mrs. White acknowledged that the trees had to come down, and the inspector believed that the attending veterinarian recommended the removal of the trees. *Id.* Dr. Kirsten testified that Dr. Ainsworth's records documented the recommendation to remove the trees. Tr. at 396.

Mrs. White denied that Dr. Ainsworth had recommended that the trees be removed, but rather, offered assistance when Mrs. White told her that she had been cited for the trees. Tr. at 660. Dr. Ainsworth's friends removed the trees at no cost. Tr. at 661.

I accord weight to the testimony that the trees represented a danger to the structural integrity of fencing and find that this allegation has been sustained. I note, however, that Dr. Ainsworth's notes that are in evidence do not reflect that she recommended the removal of the trees. *See* CX-43.

In the ceiling of the building housing food storage freezers, Dr. Howard observed holes that she believed could compromise the food. She also believed that the sagging ceiling presented a safety hazard to people who might hit their heads when entering the building. CX-7; CX-9; Tr. at 152.

At the time of this citation, the structure had a second roof on top of one that had leaked in the past. Tr. at 663. There were no leaks, and if there were, the food was protected because it was kept in freezers. Id. Animals were not kept in the building, and it did not present a danger to them or to people Tr. at 663-664. Despite their belief that there was no problem with the building, Respondent covered freezers with tarps at Dr. Howard's suggestion, and eventually moved the freezers to a new room at a different location. Tr. at 664-665.

I find that the evidence fails to establish that the condition of the structure containing the freezers was unsound or represented a hazard to animals or to people, even if one had to stoop to enter the building. This allegation has not been proven.

3. Storage of Food and Bedding

"Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food." 9 C.F.R. § 3.125(c).

Dr. Howard testified that on September 8, 2010, she observed that food stored in Respondent's freezers had partially defrosted in violation of regulations that require that food be stored to protect against deterioration, molding and contamination. She concluded that the freezers were not working properly, which placed food in danger of being spoiled. The thermometer on the cooler read 50º Fahrenheit, which is too warm. The inspector also saw a dirty bucket of vitamins and items that were stored in disarray on a rack in the cooler. Tr. at 152-154; CX-7; CX-9. Dr. Kirsten recalled that someone explained that the circuit breaker had been inadvertently turned off. Tr. at 400.

Mrs. White believed that on the day in question, the circuit breaker had been tripped because her son had been using a power washer. The meat was not entirely thawed out, and it was not her procedure to cut off power to the freezer to thaw meet. She usually cut meat up and moved it to the cooler to defrost. She never experienced problems with the quality of the meat. Tr. at 699-671. Mrs. White did not know why the thermometer showed the cooler temperature in the 50's, as it usually read in the 40's unless the door was left open during cleaning. Tr. at 671-672. She stored empty plastic bags in the freezer to collect excess fat which had to be frozen for disposal, because she had nowhere else to store them Tr. at 673. Mrs. White explained that the bucket that the inspectors saw was used to mix vitamins, and residue from the meat that was mixed with the vitamins sometimes got in the bucket. She washed the bucket several times a week. Tr. at 674-675.

The practices described by Dr. Howard in her inspection report reflect some careless handling of vitamins and storage of items, but Respondent's explanations are reasonable, particularly where Dr. Howard had not made similar observations over the course of the years covered by this adjudication. I find that the evidence is in equipoise and does not establish inadequate storage of food.

4. Waste Disposal

Respondent was cited for a variety of violations of regulations pertaining to this obligation. The regulations require that:

Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State and local laws and regulations relating to pollution control and the protection of the environment.

9 C.F.R. § 3.125(d).

On September 8, 2010, Inspector Howard cited Respondent with failure to promptly remove food waste from the kinkajou enclosure. Tr.

at 154; CX-7; CX-9. Dr. Kirsten believed that the food was moldy and insect covered and that the enclosure should have been more promptly cleaned. Tr. at 400. Mrs. White disagreed that food for the kinkajou was moldy, though she had seen fruit left overnight get ripe. Tr. at 675-676. She cleaned the kinkajou's enclosure every morning. Tr. at 677.

The evidence is in equipoise and does not establish a violation of this standard. No testimony was given about when the inspection was conducted, or whether it interrupted Mrs. White's daily routine, although it is reasonable to conclude that it had. Dr. Howard did not routinely cite the facility for violations pertaining to the quality and condition of the kinkajou's food, and I credit Mrs. White's explanation.

5. Outdoor Facilities

Shelter from sunlight and inclement weather

"When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals. . . to protect themselves from direct sunlight." 9 C.F.R. § 3.127(a). In addition, exhibitors are required to provide "for all animals kept outdoors [appropriate shelter] to afford them protection and to prevent discomfort to such animals. . ." 9 C.F.R. § 3.127(b). Rabbits must be provided shelter from sunlight (9 C.F.R. § 3.52(a)); shelter from rain or snow (9 C.F.R. § 3.52(b)); shelter from cold weather (9 C.F.R. § 3.52(c)); shelter from predators (9 C.F.R. § 3.52(d)); and proper drainage (9 C.F.R. § 3.52(e)).

At the inspection of March 23, 2010, Complainant cited Respondent for failing to provide appropriate shelter from inclement weather to two cougars. CX-26; CX-27. Dr. Howard testified that the overhang from roofing and a cover over a perch were not sufficient to allow the cats to escape from driving rain. She also did not think that the opening in a rock formation provided comfortable space for a cougar to shelter. Tr. at 213-214. Dr. Kirsten agreed with Dr. Howard. Tr. at 385.

Mrs. White testified that until that inspection, no one had pointed out a problem with the cougars' habitat. She thought that the tin overhang on

the enclosure provided sufficient cover, but after being site, she installed a dog igloo in the enclosure for shelter. Tr. at 709-711.

The record establishes a violation of this regulatory standard.

In the Complaint at Heading IV, ¶ D. 1, Complainant charged Respondent with a violation of 9 C.F.R. § 3.127(a), but described the violation as failure to maintain structurally sound facilities. Since the cited regulation pertains to sheltering animals from weather, and the standards relating to structural integrity are found at 9 C.F.R. § 3.127(a)[3], that particular count is dismissed.

On September 24, 2009, Dr. Howard concluded that the outdoor enclosure for rabbits violated § 3.52 (b) by not providing for dry ground. CX-22. The inspector found no place for rabbits to go to be free from rain or snow other than their primary enclosure, which was a small box. Tr. at 194-185. Mrs. White disagreed that the rabbits had no other enclosure, and she felt that they were better off on the ground than on artificial flooring. Tr. at 721-723. According to Mrs. White, Dr. Howard had expressed concern about the public's perception of the rabbits if they had dirty feet. Tr. at 723.

I find that the evidence is in equipoise and does not establish a violation of this standard. To the extent that the charge is based on speculative public perceptions, it is dismissed. The evidence also suggests that Dr. Howard eventually agreed that the rabbits had sufficient space and a place to shelter from the elements.

6. Drainage

A suitable method must be provided to rapidly eliminate excess water from outdoor housing facilities for animals. 9 C.F.R. § 3.127(c). On September 24, 2009, Dr. Howard saw the tiger Stave lying in mud, and learned from Mrs. White that a drain may have been blocked. Tr. at 190-

[3] I acknowledge that this charge of a violation of § 3.127(a) may represent a typographical error, since Respondent was charged with structural violations pursuant to § 3.125(a) as well as. § 3.127(d) pertaining to the perimeter fence. However, Respondent was also charged with violating standards requiring shelter from the elements. This inaccuracy fails to give Respondent notice and opportunity to answer a specific charge and must be dismissed.

191. Dr. Howard conveyed her opinion that standing water presented a health hazard and proper drainage must be provided. Tr. at 191. Dr. Kirsten observed drainage problems when he was at the facility on March 23, 2010. Tr. at 383-384.

Respondent was charged with repeat violations of this standard on the inspection conducted on January 21, 2010. CX-24; CX-25. Inspector Howard testified that she suspected drainage problems at Respondent's facility and intentionally scheduled an inspection after it had rained. Tr. at 318-319. She found significant pooling of water in the leopards' enclosure and observed one of the cats lying in water. Tr. at 196. Dr. Howard testified that standing water presents a health hazard for animals, and she directed Respondent's to correct the problem. Tr. at 196-197. On that date, the inspector also noted pools of standing water in the tiger Stave's enclosure that needed to be resolved. Tr. at 197.

I have credited Mrs. White's explanations about the difficulty with keeping tigers out of water that they enjoy and in keeping compacted dirt on an incline. Ms. Williamson testified that tigers enjoy the water and drip pools when they emerge from their pools. Tr. at 577. Although Dr. Howard expressed concerns about standing water, the record does not reflect that the tigers suffered a disease or health condition due to water. Also, it is axiomatic that inspections of outdoor facilities conducted on rainy days will reveal pools of water. The evidence on this issue is in equipoise and fails to establish a violation of drainage standards that was not corrected by sunshine or drain cleaning.

7. Perimeter fence

The regulations mandate that "all outdoor facilities must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out." 9 C.F.R. § 3.127(d). The fence must be at least 8 feet high for potentially dangerous animals as identified by the regulations and must be constructed so as to protect the animals and "function as a secondary containment system." *Id.* The perimeter fence must be sufficiently distance from the primary enclosure "to prevent physical contact between animals inside the enclosure and those outside the perimeter fence" and fences less than 3 feet from the primary enclosure must be approved by APHIS. 9 C.F.R. § 3.127(d).

On March 23, 2010, Dr. Howard cited Respondent for failing to remove dead trees near the perimeter fence that presented a hazard to the fence. Tr. at 226-227; CX-26; CX-27. The trees had been dead for some time, and the inspector had pointed out the problem in the past. Tr. at 227. Dr. Kirsten believed that the integrity of a perimeter fence is paramount when dangerous animals are on exhibition. Tr. at 385-386. The fence must somehow prevent and immobilize an animal from escaping as well as prevent unauthorized individuals from getting near the animals. Tr. at 386. He did not believe that Respondent's fence adequately met those goals. Tr. at 386-387. Dr. Kirsten considered a perimeter fence to be an integral part of protecting the welfare of an animal, which would not survive outside of the facility. Tr. at 387-388.

Dr. Howard recalled her inspection of September 8, 2010, which disclosed portions of the perimeter fence of the facility that did not meet the 8 foot height required by the regulations. Tr. at 154-155; CX-7; CX-9.. In addition, deficits in the fencing were seen, such as openings at the bottom, and areas where the fence was not fixed to posts. Tr. at 155. Dr. Howard stated that she considered the problems a repeat violation because she had previously cited Respondent for problems with perimeter fencing, even though the problems may not have been the same. Tr. at 157. Dr. Howard explained that she did not have the ability to measure the entire perimeter fence, but her sample measurements on September 8, 2010, revealed that it was not the required height. Tr. at 287-288. The inspector also rejected Respondent's contention that bamboo represented a natural perimeter fence. CX-11.

Mrs. White testified that the perimeter fence was inspected at every inspection, and she was not always cited for conditions that had never changed. Tr. at 676-678. She nevertheless did not contest that there were sections of the fence that buckled, and that she considered bamboo an adequate perimeter. The evidence substantiates this violation.

8. Primary Enclosures for Rabbits

Enclosures for rabbits must be structurally sound and maintained to protect rabbits, keep them inside and keep predators out (9 C.F.R. § 3.53(a)(1)); must be constructed to keep rabbits dry and clean (9 C.F.R. §

3.53(a)(2)); must allow rabbits convenient access to food and water (9 C.F.R. § 3.53(a)(3)); must have floors that protect rabbits' feet and legs from injury, and be provided with litter on solid floors (9 C.F.R. § 3.53(a)(4)); and must be provided a suitable nest box with nesting materials for females with litters of less than one month of age (9 C.F.R. § 3.53(a)(5)). The primary enclosures for rabbits acquired after 1990 must "provide sufficient space for the animal to make normal postural adjustments with adequate freedom of movement" for each rabbit in the enclosure, exclusive of food and water receptacles. 9 C.F.R. § 3.53(b). The regulations provide a table of space requirements at 9 C.F.R. § 3.53(c).

On September 24, 2009, Inspector Howard cited Respondents with violations of §§ 3.53(a)(2) and 3.53 (c)(2) because she believed that the primary enclosure for rabbits did not allow the animals to remain dry and clean and did not meet the standards for minimum floor space. CX-22. The box that served as the rabbit enclosure was set directly on the ground and did not protect the animals from recent rain accumulation. Tr. at 185. It was too small for all of the rabbits to occupy it comfortably. *Id.* Respondent denied this contention because in addition to the box, there was a concrete cage that the rabbits could enter. Tr. at 722. Mrs. White tried to use shavings and other floor coverings, but she did not think those additions improved the space. *Id.*

The evidence is in equipoise and fails to establish a violation of housing standards for rabbits.

9. Animal Health and Husbandry Standards

The regulations require that animals be provided wholesome, palatable food, free from contamination, and appropriate in quantity and nutritive value for the age, species and condition of animals. 9 C.F.R. § 3.129(a). Potable water must be provided as often as necessary if not accessible at all times. *Id.* In addition to being fed at least once a day with wholesome food, rabbits must have access to food receptacles in a primary enclosure that is located so as to minimize contamination by excreta. 9 C.F.R. § 3.54(a) and (b). All receptacles for rabbit feed must be cleaned and sanitized at least once every two weeks. 9 C.F.R. § 3.54(b).

10.Feed

On March 23, 2010, Dr. Howard could not determine whether chicken parts in greenish liquid in an unmarked bucket were meant as food or were meant to be discarded. Tr. at 216-217. Although Respondent advised that the chicken was left over and would be thrown away, Dr. Howard believed that there was the potential for someone to feed them to animals because the bucket was not marked and she cited Respondent for violating 9 C.F.R. § 3.129(a). Tr. at 217; CX-26; CX-27.

I decline to accord substantial weight to Dr. Howard's conclusion, and credit Mrs. White's contention that she and her son took care of feeding the animals. I find it improbable that either of them would mistake good food for food that must be discarded. I also do not know whether Mrs. White's routine was interrupted by the inspection, thereby preventing her from discarding the waste in a timely fashion. I note that this was not a violation that was cited regularly. The evidence fails to substantiate this citation.

When Dr. Howard inspected Respondent's premises on September 8, 2010, she concluded that Respondent was feeding the big cats a diet comprised primarily of chicken backs, which are not nutritionally adequate for large cats. Tr. at 158. Respondent was told by USDA's big cat specialist, Dr. Laurie Gage, that chicken backs were not appropriate. Id. Respondent assured Dr. Howard that they had run out of the usual feed of chicken legs, and also advised that the diet was supplemented with venison, but no venison was seen and Dr. Howard noted that the cougars remained thin. Tr. at 159. She cited Respondent for failure to provide appropriate food. CX-7; CX-9.

Mrs. White asserted that she fed the cats a variety of meat, and that chicken backs were just one source of food. Tr. at 684. On the day of the inspection, she mistakenly believed that only chicken backs were on hand, but her son showed her other meat later that day. The following day, Mrs. White she showed leg quarters in the freezer to Dr. Howard, who told her that the citation had already been written in the inspection report. Tr. at 684-685.

Investigator Stevie Harris interviewed one of the facility's volunteers, Tim Chisolm, who said that chicken was the primary source of the cats' diet. CX-41. Mr. Chisolm picked up donated chicken from a chicken producer, and he believed that the cats were fed primarily chicken backs in 2010.

I find that the preponderance of the evidence does not support the conclusion that the large cats were not fed a proper diet. I accord substantial weight to Mrs. White's explanation that the cougars' weight had fluctuated from the time they came to the facility. Tr. at 686. I note that in a "complaint response" authored by Dr. Howard on July 11, 2008, the doctor "found all of the animals in decent condition. In fact, most of the animals are more towards being overweight…" CX 18. I decline to accord substantial weight to a conclusion about the quality of food on one day, which appears to be based upon a mistaken comment made by Mrs. White. This allegation is not supported by the preponderance of the evidence.

I accord no weight to Mr. Chisolm's affidavit because statements made in 2010 may reflect bias against Respondent. I credit the Mrs. White's testimony that Mr. Chisolm lived on the White's property and volunteered at the Collins Zoo until he and Gustave White, IV argued in early 2010, whereupon Mr. Chisolm left the facility. Tr. at 846-847. He returned and was living on Respondent's property at the time of the hearing.

The inspection of September 24, 2009, revealed the lack of a receptacle for food and vegetables for rabbits. Their food was left on the ground, which increased the risk of food contamination, and Respondent was cited with violations of §§ 3.54 (a) and (b). CX-22; Tr. at 184-185. Dr. Kirsten recalled that the food receptacles for the rabbits were contaminated. Tr. at 396. Dr. Howard cited Respondent again on September 8, 2010, for violations pertaining to rabbit feed. Dr. Howard found old produce, pellets and excreta in the food tray for five rabbits. She believed that the trays were not positioned so as to minimize contamination. CX-7; Tr. at 150.

Mrs. White speculated that her son had removed the rabbits' feeding tray from the enclosure when the inspectors conducted their inspection.

Tr. at 725. She also explained that "some of [the feed] does fall on the ground when you throw it in there…" Tr. at 725-726.

The evidence supports this violation. Respondent's explanation for the condition of the rabbits' enclosure and feeding methods does not demonstrate a reasonable effort to assure that the foodstuff is sanitary.

11. Sanitation; Cleaning and Housekeeping

"Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. . ." 9 C.F.R. § 3.131(a)(1).

On March 23, 2010, Inspector Howard cited Respondent for unsanitary conditions within the shelter box housing Respondent's kinkajou, because she believed that the enclosure was excessively soiled and stained. CX-26; CX-27. Dr. Howard testified that her inspection report and accompanying photographs adequately explained the conditions that led to the citation she issued. Tr. at 217-218. Dr. Kirsten similarly found the enclosure excessively dirty. Tr. at 389.

According to volunteer Geraldine Williamson, kinkajous can eat twice their weight each night, and she routinely left a lot of food at night for the kinkajou. Tr. at 569. His cage was cleaned first thing in the morning, and uneaten food was removed and new food was provided. *Id.*

The evidence is in equipoise. Although the foodstuffs depicted in the photograph from Dr. Howard's inspection appear rather unsavory, I credit the testimony of Mrs. White and Ms. Williamson, particularly where the condition of the kinkajou's enclosure and food did not appear to be an ongoing problem, as it was not repeatedly charged on inspections. Moreover, the record does not clarify whether Respondent's daily routine was hampered by the arrival of the inspectors, thereby preventing prompt cleaning of the enclosure. This charge is not sustained.

12. Employees

Exhibitors are required to use "a sufficient number of adequately trained employees. . . to maintain the professionally acceptable level of husbandry practices" required by the regulations. 9 C.F.R. § 3.132. "Such practices shall be under a supervisor who has a background in animal care". *Id.* In addition, the care of nonhuman primates must be provided by "enough employees" who are "trained and supervised by an individual who has the knowledge, background and experience in proper husbandry and care of nonhuman primates…" 9 C.F.R. § 3.85.

Respondents were charged with not utilizing a sufficient number of adequately trained employees for the entire period covered by the Complaint, beginning on May 24, 2007. *See* Heading II, ¶¶ A-C. Based upon her years of experience inspecting Respondent's facility, Dr. Howard concluded that Respondent did not have sufficient help to keep the facility well maintained. Tr. at 225-226. Although the inspector acknowledged that the regulations do not require a particular number of employees, she believed that the repeated problems that she observed with drainage, with the perimeter fence, with structures and enclosures in disrepair would have been avoided with more help at the premises, thereby safeguarding animals from the potential hazards caused by the deficiencies. Tr. at 226-227.

Dr. Howard further testified that she was unable to ascertain the expertise of the few people she regularly saw at the facility. Tr. at 228. She knew that the licensee, Gustave White, III had experience with animals, but she believed that he directed the facility from his house, and that Mrs. White was primarily responsible for the animals, with the help of her son. Tr. at 229. Dr. Howard observed some volunteers at the facility, but she had no knowledge of how volunteers were trained, or their experience with animals. Tr. at 228.

Dr. Kirsten had only observed Mrs. White and the young Mr. White at the facility with the exception of one occasion where he saw another person helping. Tr. at 405-406. Dr. Kirsten believed that Mrs. White was not in the best of health, and Mr. White was very young when the doctor first visited the facility. Dr. Kirsten concluded that Respondent was inadequately staffed for the amount of work required to maintain the facility, feed and care for the animals, and attend to their medical needs. Tr. at 406-407.

Volunteer Geraldine Williamson has worked at the zoo in one fashion or another since approximately 1986. Tr. at 560. She had worked with animals for many years, beginning as a teenager helping her local vet. Tr. at 559. She generally reported to the facility at about 8:00 a.m. o'clock and a number of volunteers would come later in the day and were assigned chores that did not involve feeding the animals. Tr. at 573. She was trained by Mr. White, III. Tr. at 561. Since her heart attack in 2006, Ms. Williamson no longer works at the facility eight hours a day or visits the facility every day. Tr. at 596.

Ms. Williamson continues to help the facility's veterinarian, Dr. Ainsworth, at her office, and has treated animals at the Collins Zoo pursuant to Dr. Ainsworth's instructions to Mrs. White. Tr. at 597-599. In recent years she has helped mostly with paper work and administration and organizing volunteers. Tr. at 606. Ms. Williamson was not involved with the facility in 2010, but in 2009, she estimated that at least five other people volunteered services there. Tr. at 607.

Mr. White III, who founded the facility, has worked with animals all of this life. Tr. at 918-919. He is self-taught, though has read widely about animal care and attended classes and lectures. Tr. at 919. He worked with animal experts such as Marlin Perkins, has trained fire and police departments about safety and animals, and has held a license under the AWA for forty-three years. Id. Mr. White's health no longer allows him to do daily maintenance, but he visits the facility, which is adjacent to his home, regularly and is in daily contact with his wife, who has primary responsible for the daily functions of the Collins Zoo. Tr. at 928-929; 932-933. His wife and son do the main work at the facility with the help of volunteers Geri Williamson, Tim Chisolm and biologist Jennifer Farmer. Tr. at 932-934. Mr. White testified that his wife worked with veterinarians to treat animals. Tr. at 930.

Complainant hypothesizes that many of the violations cited by Dr. Howard would not have occurred if Respondent had more money and had employed more workers. Tr. at 465-466. Complainant did not say how many employees it considered sufficient to run a facility with an area of less than one acre. The record clearly establishes that the facility depended on volunteer workers and donations. Mr. Chisolm donated

time and money to the facility, and Jonathan Cornell hired itinerant workmen to remove trees at the facility and donated a used truck to the Whites. Respondent relied upon the volunteer services of a veterinarian. The record also establishes that with the declining health of Mr. White, III and long-term volunteer worker Ms. Williamson, the facility lost manpower during the period encompassed by the inspections at issue herein. At the same time, Mr. White, IV was able to take on more chores as his adolescence advanced. With the exception of a brief absence, Mr. Chisolm continued to perform maintenance work at the facility. Other volunteers do work, and a biologist regularly volunteers.

Despite the perceived lack of resources, Respondent was able to correct many of the structural and facility maintenance violations cited by Complainant. In addition, some of the citations were for conditions that had been in existence without offending inspectors for some time. Complainant was unable to articulate APHIS' expectation of what constitutes a well trained and experienced individual, but Dr. Howard conceded that individuals would not need as much training if experienced supervisors were on site. Tr. at 497-498.. Dr. Howard's answers to repeated questions about whether Mrs. White's thirty-two years of experience represented adequate training were non-responsive, e.g.:

> Q: Would you consider 32 years of working at a zoo -- and I mean, not particularly one specific zoo, but maybe another zoo full time, every day experienced enough?
>
> A: I would not hazard a guess, Mr. White. Again, I would have to see -- decisions are made on experience nowadays, based on the type of experience the person has had, the length of the experience and the quality of the experience and the education and training involved. So, you know, it's -- you know, I'm not going to speculate on -- on that.
>
> Q: And would you consider my mother, Bettye White, an adequately trained employee? Did she seem to be not adequately trained in your inspections or --

> A: I think that from what I have seen over the years, I think that Mrs. White gets a lot of her instruction from Mr. White, III. I can think of instances where, you know, she has basically insinuated that she runs a lot of what she does by Mr. White to make sure that it's -- you know, she's doing something appropriately.

Tr. at 498-500.

Dr. Howard appeared reluctant to acknowledge Mrs. White's experience, and she overlooked the significance of Mr. White's presence and his supervision of the facility. In concluding that the facility did not have adequate numbers of properly trained employees, APHIS dismissed the one standard articulated by Dr. Howard—that individuals working for experienced supervisors could have less training. Mrs. White's daily contact with the facility's animals under her husband's tutelage, and her care for the animals should be credited. Mrs. White certainly had more hands-on experience with caring for animals than did Dr. Howard, despite the inspector's education.

I find that APHIS has failed to establish by a preponderance of the evidence that Respondent failed to employ an adequate number of trained employees.

Complainant charged Respondent with failure to employ adequate employees to care for non-human primates in compliance with 9 C.F.R. Part 3 of the regulations. *See* Complaint at Heading II, ¶ B. Dr. Howard testified that there were non-human primates at Respondent's home but not on display at the facility. Tr. at 501. This charge is dismissed.

13.Attending veterinarian and adequate veterinary care

Exhibitors are required to employ "an attending veterinarian under formal arrangements. . . which include a written program of veterinarian care and regularly scheduled visits to the premises." 9 C.F.R. § 2.40(a). The program of care must demonstrate "the availability of appropriate facilities, personnel, equipment, and services. . .; the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries and the availability of emergency, weekend, and holiday care; daily

observation of all animals to assess their health and well-being . . .with a mechanism of direct and frequent communication [with] the attending veterinarian; adequate guidance to personnel involved in the care and use of animals regarding handling; and adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures." 9 C.F.R. § 2.40(b)(1)-(5).

Complainant has charged Respondent with failure to maintain programs of disease control and prevention, euthanasia and adequate veterinary care for its animals in violation of 9 C.F.R. § 3.40. Complainant relied upon several incidents as evidence of Respondent's failings in this regard.

On April 3, 2008, Dr. Howard stopped by the facility and observed a discharge from both eyes of a caracal that appeared to cause discomfort to the cat. CX-21. Mrs. White advised that the condition was long-standing and that she was treating the animal as instructed by the veterinarian, but she agreed to call the doctor. *Id.* At a later inspection on November 6, 2008, the animal's eyes had not improved Tr. at 301. Respondent advised that she had called the veterinarian, and was following treatment advice. CX-19; Tr. at 301-302. Dr. Howard acknowledged that the animal had had the problem for some time, but she believed that the condition had worsened based upon the cat's behavior, and she felt it should be examined by a veterinarian. Tr. at 175-176; 302. Dr. Howard explained that the animal's temperament might have interfered with proper treatment. Tr. at 302-303.

At that inspection, Dr. Howard also observed what she believed to be a lesion on the skin of the wolf-hybrid named Olive. CX-22; Tr. at 176; 303. Mrs. White believed that the skin condition was due to shedding, but Dr. Howard did not agree with that assessment, and believed that the animal needed to be seen by a veterinarian. Tr. at 303-304.

On December 10 and 11, 2009, a volunteer at the facility observed the wolf-hybrid Olive with a distended abdomen and in distress. Tr. at 202. The volunteer spoke to Mrs. White about the animal, and Mrs. White believed that the wolf may have been pregnant. Mrs. White reported the animal's condition to Dr. Ainsworth, who planned to examine Olive if

her condition had not improved. She was found dead on Sunday, December 13, 2009. Tr. at 202-203.

Dr. Howard testified that these circumstances demonstrated a violation of the regulations requiring veterinary care. Mrs. White did not contact Dr. Ainsworth until two days after Olive's condition was reported by the volunteer, and the veterinarian diagnosed several possible conditions and made recommendations for general treatment. Tr. at 203-204. Dr. Howard believed that Respondent should have called Dr. Ainsworth earlier, and made sure that the animal was seen, particularly given the range of ailments that Dr. Ainsworth speculated as the cause of Olive's symptoms. Tr. at 205-208. No necropsy was performed, and it was difficult to ascertain exactly what treatment Olive was given. Tr. at 209.

On September 8, 2010, Dr. Howard cited Respondent with failing to provide proper veterinary care to a cougar named Delilah who was euthanized five days after the action was recommended by the facility's veterinarian. CX-7; CX-9; Tr. at 141-143. The tiger named Sister developed a limp, and Mrs. White advised that Dr. Ainsworth prescribed prednisone after examining the animal on May 26, 2010, though no records were maintained about how treatment was given. Tr. at 143; 393. The leopard named Amber had a lesion on its rump, and Mrs. White acknowledged that she had not consulted the veterinarian about the condition because it was observed on a holiday weekend. Tr. at 145-146; 394; CX-9.

Dr. Kirsten again visited Dr. Ainsworth to see her records, particularly those involving the animal that Dr. Ainsworth had recommended euthanizing. Tr. at 390-391. He believed that Mrs. White's delay in euthanizing the animal represented a violation of the Act because it flaunted the authority of the attending veterinarian. Tr. at 392. Dr. Kirsten similarly found fault with Mrs. White's failure to call Dr. Ainsworth over a weekend to consult about a lesion on one of the leopard's tail. Tr. at 394. Dr. Kirsten observed that the Act requires licensees to have access to emergency care at all time. *Id.*

Dr. Howard, accompanied by Investigator Steve Harris, conducted an inspection of Respondent's facility on April 19, 2011 and learned that an

older jungle cat had died in December, 2010, and an older leopard had died in February, 2011, both of unknown causes. CX-1. In addition, a dingo died in January, 2011. No necropsy was performed on any of the animals to determine the cause of death. CX-1; CX-2. In a three page report dated April 19, 2011, Dr. Howard summarized her findings, noting that Respondent did not contact the veterinarian upon the death of any of the animals, which died without apparent illness or injury. CX-3.

Dr. Howard's inspection of the facility on January 21, 2010, yielded no violations pertaining to veterinarian care. CX-24. On March 23, 2010, Dr. Howard was accompanied on inspection of the facility by Dr. Rick Kirsten, Dr. Laurie Gage, and other APHIS employees in response to a complaint[4]. Tr. at 199. A discharge was observed on rabbits' ears; the leopard Smokey had a three-inch long lesion on its tail; and the caracal Sonny appeared to be lame. Tr. at 199-201. Although Mrs. White had consulted Dr. Ainsworth by phone about the leopard's lesion, she had not contacted the doctor about the rabbits or the caracal. Tr. at 201. Respondents were given the deadline of March 26, 2010, for the animals to be examined and treated by a veterinarian. Dr. Howard also cited Respondent for violating regulations pertaining to veterinary care for the events leading to Olive's death. Tr. at 202.

Dr. Kirsten agreed with the conclusion that animals appeared in need of veterinary care when he was at the facility for the inspection of March 23, 2010. Tr. at 372 – 379. Dr. Kirsten did not believe that Respondent had an appropriate plan for veterinary care, noting that Mrs. White did not keep records of treatment of animals, but relied solely upon her memory. Tr. at 373. He and Dr. Howard visited Dr. Ainsworth to see her treatment records, and to determine whether there was regular and timely communication with the veterinarian about the condition of Respondent's animals. Tr. at 373-374. Dr. Kirsten recalled that Mrs. White expressed reluctance to call the veterinarian because Respondent didn't pay for vet services and Mrs. White felt guilty. Tr. at 377.

Dr. Kirsten upheld Dr. Howard's April 19, 2011, citations for failure to provide adequate veterinary care with respect to the animals that died without explanation when Respondent appealed that citation. CX-4. He

[4] Dr. Kirsten testified that the complaint that instigated this inspection was made by the volunteer who questioned Olive's condition. Tr. at 374.

testified that a necropsy was necessary in a situation where three animals died without explanation over a three month period, considering that they had received no prior veterinary care. Tr. at 404. The regulations require that diseases be diagnosed and treated, and there was no diagnosis for why the animals died. Tr. at 404-405.

The totality of the evidence demonstrates that Respondent failed to maintain an adequate plan for veterinary care and failed to provide prompt and adequate treatment and care to animals. Dr. Lisa Ainsworth, D.V.M., has donated her services as attending veterinarian to the Collins Zoo since approximately 1994. CX-43. Dr. Ainsworth pays approximately four formal visits to the facility annually "to comply with government regulations" and attends to animals in person when necessary, but most issues raised by Respondent are "handled over the phone or at [her] next visit." CX-43. There was no formal plan for care for all of the facility's animals, since Dr. Ainsworth believed her "regular health maintenance program [was for] the cats and dogs." CX-34.

The doctor's affidavit is consistent with the testimony. Ms. Williamson and Mrs. White confirmed that Dr. Ainsworth did not come to the facility frequently. The record demonstrates that Mrs. White was slow to contact Dr. Ainsworth, and did not contact her at all in some circumstances that seemed to require a veterinarian consultation or examination. I need not determine the reasons for Respondent's hesitation to call the doctor. The evidence establishes that certain conditions were not properly diagnosed (condition of Olive's skins and whatever ailment led to her death); and certain conditions were not promptly treated (tail sucking of leopard that led to the veterinarian proposing euthanasia; rabbits' ear problems; caracal's eye problems; animals' limps) (CX-43 a, p. 1). The treatment records kept by Dr. Ainsworth and admitted to the record show only eight documented exchanges with Respondent during the period from May 10, 2005 until March 25, 2010. CX-43(a).

Although I generally agree that one would no more call a veterinarian about every minor condition than would a parent call a pediatrician, I nevertheless conclude that Respondent was less than vigilant about assuring that animals were in healthy condition. Respondent's casual approach to animal care is manifested by sores on a rabbit's ear that were

not timely treated; lesions on a leopard's rump that were not adequately treated; a caracal's ocular problems that went poorly treated for an extended period of time; and animals limping for no documented reason. Dr. Ainsworth's records reflect that some of the calls from Respondent were obviously prompted by APHIS' inspection (e.g., call made about a rabbit's ear on March 23, 2010; CX-43(a); CX-26; CX-27).

Although the regulations do not require necropsy to determine the cause of death of animals, the unexplained deaths of three animals in a three month period without any documented medical condition, treatment or diagnosis, casts suspicion on the facility. Consultation with Dr. Ainsworth about the deaths would have been prudent, and her treatment records reflect that she had been consulted in the past about animal deaths and had made an assessment about taking action to ascertain the cause of the deaths. CX-43(a).

I credit Mrs. White's testimony that she occasionally consulted a veterinarian with experience with exotic animals when Dr. Ainsworth could not be reached. Dr. Ainsworth confirmed as much in her affidavit. CX-43. I also find nothing to conclude that Respondent was ill-intentioned towards the animals, and that Mr. & Mrs. White believed they had the requisite expertise and experience to care for the animals without too much guidance from a veterinarian. In some instances, it appears that Mrs. White made extra efforts to extend the life of an animal, such as where she tried to stave off the euthanization of the cougar Delilah. In that instance, I find that APHIS did not establish that Mrs. White failed to follow the recommendations of a veterinarian, but rather conclude that the alternate feeding plan was sanctioned by Dr. Ainsworth. I credit Mrs. White's testimony that asserted that Dr. Ainsworth confirmed that the animal seemed to be in no apparent pain. Tr. at 636-637. However, Respondent's failure to develop, maintain and follow a program of veterinary care is supported by the preponderance of the record and I find that Respondent has violated this regulatory standard. In addition, I find that Dr. Ainsworth's limited involvement with the facility's animals does not meet the standard for attending veterinarian.

14. Failure to retain records

Respondent is charged with failure to maintain records relating to the acquisition and disposal of animals in violation of 9 C.F.R. § 2.75(b) during inspections conducted on March 23 and March 26, 2010 (CX-26 through CX-31), and on September 8, 2010 (CX-7; CX-10)[5]. On March 23, 2010, Dr. Howard was accompanied by a number of other APHIS employees to inspect the premises in response to a complaint and observed a possum for which no acquisition records were kept. CX-31.

Respondent was cited on September 8, 2010, for failing to keep acquisition records for rabbits. CX-7; Tr. at 146. In addition, other records were incomplete. Tr. at 147-148. Respondent had documented on a record for a dingo "papers missing taken by USDA or Wildlife." CX-9, p. 12. Dr. Howard authored a memorandum in which she noted that Mrs. White acknowledged receiving copies of photocopied records from the previous inspection, but nevertheless maintained that records were missing, speculating that USDA or "Wildlife" took them. CX-10. The records were incomplete and reconstructed, and Inspector Howard concluded that hardly any original records were available. The records did not match previously photographed records. CX-10.

In addition, acquisition records raised questions about the provenance of certain animals. CX-12 through CX-14; CX-40. Acquisition records dated May 24, 2007, document "Barry Weddleton Jr. from Slidell, Louisiana" as the donor of a wolf hybrid (CX-12) and a coatimundi and approxxage (CX-40). In interviews with APHIS investigator Bob Stiles, Mr. Weddleton's father admitted that his son had known Respondent many years previously, but would not have donated any animals to Mr. White. CX-12 through CX-15; Tr. at 470-473.

Jonathan Cornwell testified that he donated a coatimundi that was less than one year old to Mr. White's facility sometime in 2007. Tr. at 70-72. Geraldine Williamson testified that an older coatimundi was donated to the facility by a man who identified himself as Mr. White's "friend from Slidell." Tr. at 581-582. The donor was not Mr. Cornwell, whom Ms. Williamson knew. Tr. at 583. The male coatimundi that was left with Ms. Williamson was the only coatimundi kept by the facility. Tr. at 610. Mr.

[5] The inspection report from September 24, 2009, refers to Respondent's failure to properly tag the coyote, but the complaint does not charge Respondent with a specific violation for this failure.

Cornwell promised to donate a female to the Collins Zoo but he never did. *Id.*; Tr. at 843. Respondent's only coatimundi was an older animal that was donated in 2007 and that died a few years later. Tr. at 843-845.

I am unable to glean the source or age of the coatimundi from the record. The preponderance of the evidence establishes that the animal was not donated by the individual noted on the acquisition papers. Respondent did not confirm the identity of the unnamed donor, nor did Respondent confirm any information about the animal, but conjectured that Mr. Weddleton had left the animal. Mr. Weddleton denied that assertion, explaining that his son had known Mr. White years before, but had lived in Oklahoma for twenty years. CX-14.

Fortunately, I need not determine whether the coatimundi was in fact donated by Mr. Cornwell to conclude that the records were improperly maintained. His testimony was not entirely credible, and did not cure inconsistencies with the affidavit he signed on May 3, 2010. *See* CX-35. Neither can I fully credit the testimony of Mrs. White or Ms. Williamson on this issue. Whatever the source of the animal, the evidence suggests that the acquisition record was fabricated in violation of recordkeeping standards.

Respondent's records regarding the source of rabbits are similarly unreliable. Mrs. White admitted that she did not know the donor of the rabbits and instead used the name of a friend who raised rabbits. Tr. at 695-696. This blatantly violates recordkeeping standards.

Other records were missing or reconstituted and Respondent's contention that they were removed by agents of a government agency does not constitute a valid defense to the requirement to maintain records. Respondent's recordkeeping system is deficient. In addition to the problems with animal acquisition records, incomplete records were kept of veterinary care or losses of animals when they left the facility or died. These allegations have been sustained.

E. Summary

APHIS has established that Respondent failed to maintain records and in some instances, fabricated records. In addition, Respondent failed to

develop and maintain a program of veterinary care from an attending veterinarian and further failed to provide adequate and prompt care to animals. Although APHIS did not meet its burden of proving all of the deficits it had documented regarding facility maintenance, staffing, and animal husbandry standards, those allegations that were supported by the preponderance of the evidence constitute serious violations of the Act and prevailing regulations.

F. Remedies

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *Zimmerman*, No. 94-0015, 56 Agric. Dec. 433, 1997 WL 327152 (U.S.D.A. June 6, 1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the person's good faith and history of previous violations. *Lee Roach & Pool Labs.*, No. 91-54, 51 Agric. Dec. 252, 1992 WL 142012 (U.S.D.A. Feb. 7, 1992). Moreover, it has been observed that the AWA is a remedial statute, and the purpose of imposing sanctions is for deterrence, not punishment. *Zimmerman*, No. 98-0005, 57 Agric. Dec. 1038, 1997 WL 799196 (U.S.D.A. Nov. 19, 1998). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. *Shepherd*, No. 96-0084, 57 Agric. Dec. 242, 1998 WL 385884 (U.S.D.A. June 26, 1998).

The record establishes that Respondent willfully violated the Act on repeated occasions. Respondent failed to develop and follow a plan for veterinary care that led to the failure to diagnose the cause of a wolf-hybrid's symptoms and eventual death. Respondent's approach to consulting the facility's attending veterinarian resulted in the failure of prompt diagnosis for a rabbit's ear condition, a caracal's eye condition, and lesions on a leopard's rump, as well as the proper treatment for a leopard's tail-sucking habit, which led to a recommendation of euthanasia. Three animals died over a three month period without consultation with a veterinarian. Respondent's perimeter fence and other structures did not meet standards for soundness and at times feeding and sanitation standards fell below expectations.

It is clear that the deteriorating health of Gustave White, III, the arduous workload placed on Mrs. White, the limited time of their college-student son, and the health-related restrictions on the activities of their loyal volunteer Geraldine Williamson have led to the decline of Respondent's facility. Respondent has very few animals at the facility, and it is unclear whether the animals confiscated by the State of Mississippi will be returned to them. The erosion of Respondent's resources has placed animals in jeopardy, and it is imperative that future risk of harm be avoided.

Despite Mr. White's long and capable experience exhibiting and working with animals, the current conditions of the Collins Zoo do not reflect his abilities and talents. I find it appropriate to revoke Respondent's license. I find that the deterrent purpose of sanctions would not be furthered by imposing a civil money penalty.

G. Findings of Fact

1. Respondent in this matter is Gustave L. White, III, also known as Gus White is an individual who holds license number 65-C-0012 to exhibit animals under the Animal Welfare Act.

2. Respondent operates a facility named Collins Exotic Animal Orphanage in Collins, Mississippi, at which a variety of animals are exhibited to the public.

3. Respondent directs and supervises the operation of his facility, but no longer does any of the heavy manual work involved in maintaining the facility or caring for the animals.

4. Respondent has a lifetime of experience with caring for animals of all kind.

5. Respondent's wife, Bettye White and son, Gustave L. White, IV, are primary caretakers of the animals and facility.

6. Mrs. White has cared for animals along with her husband for thirty-two years.

7. Gustave White, IV, has been around animals all of his life and was trained by his father in the care of animals.

8. A number of other volunteers regularly assist in maintaining the facility and administering its operations.

9. Mrs. White is responsible for maintaining Respondent's records.

10. Dr. Lisa Ainsworth serves as the facility's attending veterinarian on a volunteer basis, and offers advice primarily over the phone.

11. During the period from 2007 to 2011, APHIS conducted a number of inspections of Respondent's facility and cited Respondent for violations of the Act and prevailing regulations.

12. A number of animals died at the facility and the cause of their deaths was not determined either by examination and diagnosis of a veterinarian, or by necropsy.

13. At times, animals showed obvious symptoms of distress, discomfort, and/or disease and were not provided veterinary care.

14. The source and donors for certain animals were not identified and records about their acquisition were not complete.

H. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The following violations brought against Respondent are dismissed for lack of proof by a preponderance of the evidence:

(a) Allegations of violations of 9 C.F.R. § 2.131(c), alleging failure to properly handle a leopard on July 11, 2008, and a tiger on September 8, 2010.

(b) Allegations of violations of 9 C.F.R. § 3.125(a), alleging insufficient structural strength of the floor of the tigers' enclosures.

(c) Allegations of violations of 9 C.F.R. § 3.125(a) alleging structural defects of the roof of the building where freezers were located.

(d) Allegations of violation of 9 C.F.R. § 3.125(c) alleging improper storage of food on September 8, 2010.

(e) Allegations of violations of 9 C.F.R. § 3.125(d) alleging sanitation violations with respect to the kinkajou's food on September 8, 2010.

(f) Allegation of September 8, 2010, that cites a violation of 9 C.F.R. § 3.127(a), but describes structural defects.

(g) Allegations of violation of 9 C.F.R. § 3.127(c), alleging failure to provide adequate drainage in the tiger's enclosure.

(h) Allegations pertaining to outdoor facilities and enclosures for rabbits pursuant to 9 C.F.R. §§ 3.52(b); 3.53(a)(1); 3.53(a)(3); 3.53(a)(5); 3.53(b).

(i) Allegations of violations of animal husbandry standards set forth at 9 C.F.R. § 3.129(a) regarding the storage of food and the diet provided to animals, particularly cats and a kinkajou.

(j) Allegations of violations of sanitation and housekeeping standards set forth at 9 C.F.R. § 3.131(c) pertaining to the kinkajou's enclosure.

(k) Allegations charging Respondent with not using a sufficient number of adequately trained employees pursuant to 9 C.F.R. § 3.132.

(l) Allegations pertaining to non-human primates.

3. The following violations are established by a preponderance of the evidence:

ANIMAL WELFARE ACT

(a) On March 23, 2010, Respondent failed to handle animals (coyote mix) in a manner to prevent risk of harm in violation of 9 C.F.R. § 2.131(c) because the barrier fence was not structurally sound.

(b) Respondent failed to provide structural integrity of the flooring of the enclosures for cougars, wolf-hybrids, and a lion in violation of 9 C.F.R. § 3.125(a).

(c) Respondent failed to provide structural integrity of the enclosure housing cougars, tigers, jungle cats, and failed to correct broken perches in violation of 9 C.F.R. § 3.125(a).

(d) Respondent failed to provide structural integrity of fencing by failing to remove dead trees in violation of 9 C.F.R. § 3.125(a).

(e) Respondent failed to provide shelter from the elements at the outdoor enclosure for cougars in violation of 9 C.F.R. § 3.127(a).

(f) Respondent failed to meet and maintain the regulatory requirements pertaining to perimeter fencing in violation of 9 C.F.R. § 3.127(d).

(g) Respondent failed to provide a method to keep food sanitary and free from risk of contamination to rabbits in violation of 9 C.F.R. §§ 3.54 (a) and (b).

(h) Respondent failed to employ an attending veterinarian and failed to develop and maintain a written program of veterinary care in violation of 9 C.F.R. §§ 2.40(a) and 2.40(b)(1)-(5).

(i) Respondent failed to maintain a program of disease control and prevention, and adequate veterinary care for the animals in violation of 9 C.F.R. § 3.40.

(j) Respondent failed to retain accurate records of animal acquisition and disposal in violation of 9 C.F.R. § 2.75(b).

ORDER

Gustave White, III, also known as Gus White, doing business as the Collins Exotic Animal Orphanage, and his agents, employees, successors and assigns, directly or indirectly through any individual, corporate or other device is hereby ORDERED to cease and desist from further violations of the Act and controlling regulations.

AWA license number 51-C-0064 is hereby revoked to further the purposes of the Act, as explained in this Decision and Order.

This Decision and Order shall become effective and final 35 days from its service upon Respondent unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

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

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CIVIL RIGHTS

DEPARTMENTAL DECISIONS

In re: JAMES QUARTERMAN.
Docket No. 13-0159.
Decision and Order.
Filed May 10, 2013.

Civil Rights – Discrimination – Jurisdiction, lack of.

Petitioner, pro se.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On April 17, 2012, James Quarterman filed a United States Department of Agriculture program discrimination complaint with the Assistant Secretary for Civil Rights, United States Department of Agriculture [hereinafter the ASCR]. On January 14, 2013, Mr. Quarterman filed a request for a hearing before the Office of Administrative Law Judges, United States Department of Agriculture [hereinafter the OALJ], regarding the April 17, 2012, discrimination complaint pending before the ASCR.[1] Mr. Quarterman contends that, as the ASCR failed to issue a decision with respect to his discrimination complaint, "the law" gives him the right to bypass the ASCR review of his discrimination complaint and obtain review by the OALJ (Pet. at 2).

On March 18, 2013, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order in which the ALJ concluded the OALJ has no jurisdiction to hear and decide Mr. Quarterman's program discrimination complaint and the ALJ denied Mr. Quarterman's Petition.

[1] Letter dated January 3, 2013, from Mr. Quarterman addressed to the Office of Administrative Law Judges, Eugene Whitfield, Hearing Clerk, and filed in this proceeding on January 14, 2013 [hereinafter the Petition].

On April 10, 2013, Mr. Quarterman appealed the ALJ's Decision and Order to the Judicial Officer. On April 30, 2013, the ASCR filed a response to Mr. Quarterman's appeal of the ALJ's Decision and Order. On May 1, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

The Secretary of Agriculture has delegated authority to the Judicial Officer to act as final deciding officer in the adjudicatory proceedings identified in 7 C.F.R. § 2.35. The United States Department of Agriculture program discrimination proceeding which is pending before the ASCR and which is the subject of Mr. Quarterman's appeal petition is not an adjudicatory proceeding identified in 7 C.F.R. § 2.35. Therefore, I have no jurisdiction to hear Mr. Quarterman's appeal petition and the appeal petition must be dismissed for lack of jurisdiction.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Quarterman's appeal petition filed April 10, 2013, is dismissed. This Order shall be effective upon service on Mr. Quarterman.

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In re: JAMES QUARTERMAN.
Docket No. 13-0159.
Decision and Order.
Filed March 18, 2013.

Civil rights.

Petitioner, pro se.
Dr. Joe Leonard, Jr., Assistant Secretary for Civil Rights, USDA, unrepresented.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

1. I decide that Administrative Law Judges have no authority to grant the relief requested; accordingly, the Petition must be denied.

Findings of Fact

2. James Quarterman, the Petitioner ("Petitioner Quarterman"), is an individual who asserts that an Administrative Law Judge should provide him a hearing and a decision.

3. Petitioner Quarterman asserts that his complaint alleges discrimination against him by an agency of the United States Department of Agriculture, Farm Service Agency ("USDA Farm Service Agency").

4. Petitioner Quarterman asserts that his complaint has been pending with the United States Department of Agriculture since April 2012.

5. The Secretary of Agriculture has delegated authority to the Assistant Secretary for Civil Rights, United States Department of Agriculture (Dr. Joe Leonard, Jr.). *See* 7 C.F.R. § 2.25.

6. Petitioner Quarterman asks that the Administrative Law Judge proceed by the authority granted in 7 C.F.R. Part 15, Subpart A, especially 7 C.F.R. §§ 15.6 (Complaints.) and 15.9 (Hearings.)

7. The Secretary of Agriculture has delegated authority to the Office of Administrative Law Judges. *See* 7 C.F.R. § 2.27.

8. Administrative Law Judges do hold hearings under the Administrative Procedure Act (*see* 5 U.S.C. §§ 551-57) as contemplated by 7 C.F.R. § 15.9 and 7 C.F.R. § 2.27.

9. It is not within the delegation of authority to the Office of Administrative Law Judges to hear and decide the civil rights issue raised by Petitioner Quarterman: his complaint of discrimination by USDA Farm Service Agency pending before the Assistant Secretary for Civil Rights.

Conclusions

10. The relief requested by Petitioner Quarterman cannot be granted.

ORDER

11. The Petition must be and hereby is denied.

Finality

12. This Decision shall be final and effective thirty five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service. Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

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COMMERCIAL TRANSPORTATION OF EQUINE FOR SLAUGHTER ACT

DEPARTMENTAL DECISIONS

In re: JOHN (JACK) HENNEN.
Docket No. 12-0092.
Decision and Order.
Filed February

CTESA.

Thomas N. Bolick, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before me pursuant to a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture ("USDA"; "Complainant") against John (Jack) Hennen ("Respondent"), alleging violations of the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 ("the Act") and prevailing regulations set forth at 9 C.F.R. part 88.

This Decision and Order[1] is based upon the pleadings and arguments of the parties, and the photographic, documentary and testamentary evidence.

I. ISSUES

1. Whether Respondent was the owner-shipper as defined by the regulations for the shipment of horses commercially transported for slaughter on February 8, 2007 and March 6, 2007;

[1] Complainant's evidence shall be denoted as "CX-#"; Respondent's evidence shall be denoted as "RX-#"; and references to the transcript of the hearing shall be designated "Tr. at [page number]".

2. Whether Respondent violated 9 C.F.R. § 88.4(b)(2) by failing to obtain immediate veterinary assistance for horses that were in obvious physical distress;

3. Whether Respondent violated 9 C.F.R. § 88.3(a)(1) by commercially transporting horses to slaughter in a conveyance which did not provide adequate protection for the health and well-being of the animals;

4. Whether Respondent failed to handle horses as carefully and expeditiously as possible so as not to cause them unnecessary discomfort, stress, physical harm or trauma in violation of 9 C.F.R. § 88.4(c);

5. Whether Respondent failed to prepare a complete and accurate owner-shipper certificate (Veterinary Services (VS) Form 10-13) in violation of 9 C.F.R. § 88.4(a)(3);

6. Whether Respondent violated 9 C.F.R. § 88.4(b)(4) by offloading horses during the commercial transportation to slaughter and failing to prepare a certificate documenting when and where the horses were reloaded;

7. Whether a civil money penalty should be assessed against Respondent, and if so, the amount of the penalty.

II. STATEMENT OF THE CASE

A. Procedural History

On November 30, 2011, Complainant filed a Complaint against the Respondent with the Hearing Clerk for the Office of Administrative Law Judges for USDA ("OALJ"). On December 9, 2011, Respondent filed an Answer. The parties exchanged evidence and filed witness and evidence lists pursuant to my Order, and I set the hearing to commence on August 28, 2012. The parties convened at that time, and testimony was taken by appearance in Washington, D.C., by audio-visual connection with Minneapolis, Minnesota, and by telephone.

At the hearing, Complainant dismissed Count II (c) and Count V of the complaint. I admitted to the record Complainant's exhibits, identified as CX-1 through 20; CX-30 through CX-33. I held the record open for the receipt of the transcript of the hearing and written closing argument.

Complainant filed Proposed Findings of Fact and Conclusions of Law on December 6, 2012. On January 22, 2013, Respondent submitted correspondence in which he advised that he would not be engaged in the business of transporting horses under the Slaughter Horses Program. In addition, he provided a copy of a notice of default on a mortgage, and he advised of his intention to file for bankruptcy protection. I have identified this submission as "RX-1"and admit it to the record.

The record is now closed and the matter is ripe for adjudication.

B. Statutory and Regulatory Authority

The Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note *et seq.*) was included in the 1996 Farm Bill and was intended to assure that horses being transported for slaughter would not be subjected to unsafe and inhumane conditions. Congress directed the Secretary of Agriculture to issue guidelines to accomplish this purpose, and the Secretary delegated this rulemaking authority to APHIS. APHIS established the Slaughter Horse Transportation Program ("SHTP") to identify how to accomplish Congress's mandate, and in December, 2001, published a final rule, effective April, 2002, which incorporated the results of SHTP's studies. *See* 9 C.F.R. Part 88.

The 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 final rule set forth conditions that determine whether horses being transported to the slaughterhouse are fit to travel. Horses must be weight-bearing on all four legs; must not be blind in both eyes; must be able to walk unassisted; must be older than six months of age; and must not be about to give birth. They are to be transported in a manner so as not to cause injury; must be observed at least once every six hours while being

transported; and must be offloaded and fed and watered on trips lasting over 28 hours. 9 C.F.R. § 88.4(b).

"During transit to the slaughtering facility, the owner-shipper must obtain veterinary assistance as soon as possible from an equine veterinarian for any equines in obvious physical distress." 9 C.F.R. § 88.4(b)(2). Further, "if offloading is required en route to the slaughtering facility, the owner-shipper must prepare another owner-shipper certificate…and record the date, time, and location where the offloading occurred. In this situation both owner-shipper certificates would need to accompany the equine to the slaughtering facility." 9 C.F.R. § 88.4(b)(4).

The regulations apply to any "owner-shipper", which is defined as someone who commercially transports more than 20 equines a year to slaughtering facilities. 9 C.F.R. § 88.1. The regulations also impose record-keeping requirements. Each horse must be identified with a backtag supplied by USDA. In addition, each horse being shipped must be accompanied by an owner-shipper certificate, VS 10-13, which must contain pertinent information about the owner-shipper, the receiver (the slaughterhouse), the shipping vehicle, and the horse, including a statement of the animal's fitness to travel.

The regulations authorize the Secretary to assess civil penalties of up to "$5,000 per violation of any of the regulations" set fort at 9 C.F.R. part 88. 9 C.F.R. § 88.6(a). Further, "each equine transported in violation of the regulations of this part will be considered a separate violation". 9 C.F.R. § 88(b). The amount of the civil penalty shall be based on the severity of the violation. *In re: Richardson*, 66 Agric. Dec. 69 (U.S.D.A. 2007).

C. Summary of the Evidence

1. *Documentary and Photographic Evidence*

CX 1-20; CX 30-33 include copies of owner-shipper certificates, VS Form 10-13; photocopies of photographs of horses and trailers at Cavel International Inc.; affidavits and statements drafted by inspectors and investigators; photocopies of invoices; and shipment information forms.

RX-1 consists of correspondence from Respondent regarding his ability to pay any penalty imposed herein.

2. *Testamentary Evidence*

Harry Dawson (Tr. at 17 – 67; corroborated by CX-2 through CX-10)

Mr. Dawson has worked as an investigator with APHIS's Investigative Enforcement Services for 24 years. He has worked for APHIS for more than 35 years. Mr. Dawson was asked to conduct an investigation into Respondent's business by Dr. Knight, the veterinarian in charge of Veterinary Services in Illinois. Dr. Knight's request was prompted by a report of an APHIS inspection of a load of horses owned by Respondent and delivered to Cavel International Slaughterhouse ("Cavel") on February 9, 2007. Former APHIS inspector Ellen Kroc[2] described her inspection of that date of a load of horses from Mr. Hennen, driven by James Hall. Ms. Kroc had no prior experience with Mr. Hennen or Mr. Hall, but Cavel's manager told her that Mr. Hall had called before the shipment arrived to report that horses on his trailer were down. The manager arranged for Respondent's horses to be unloaded as soon as they arrived.

Ms. Kroc observed one horse down on the trailer floor, which she photographed. The plant veterinarian recommended that the horse be euthanized in the trailer. She noted that the horses appeared generally unsettled. Mr. Hall explained that the horses seemed uneasy from the start, and he stopped 60 miles into the trip and found down horses that he couldn't get up. He traveled to a stockyard in St. Paul, Minnesota where he unloaded the horses to check for injuries. They were all on their feet, but Mr. Hall allowed the horses to rest for about thirty minutes, before he re-loaded them. He stopped for a third time at Osseo, where he discovered two horses down. Mr. Hall managed to get them on their feet and continued his journey. He stopped again in Beloit, where he found three horses down that he could not get up. All but one was on their feet when he arrived at Cavel in DeKalb.

[2] Ms. Kroc no longer worked for USDA at the time of Mr. Dawson's investigation, but she provided an affidavit regarding her inspection, in evidence at CX-6, 7.

Ms. Croc's inspection report suggested that Mr. Hennen's shipment violated the Act because horses must be able "to withstand the rigors of the transport". CX-7. Mr. Dawson averred that a veterinarian should have been called to examine the downed horses to assess their ability to weather the travel and to provide treatment.

Mr. Dawson's investigation also revealed violations of recordkeeping requirements. The documents that he reviewed included an owner-shipper certificate, VS Form 10-13, in the name of Jack Hennen, dated February 8, 2007. CX-1. The VS Form 10-13 documented a shipment of horses to Cavel originating from Hennen Farms in Paynesville, Minnesota. Mr. Dawson testified that several sections of the VS Form 10-13 were not complete. The USDA tag number was not completely listed for all of the horses and the form failed to identify the sex and color of all the horses.

In addition, Mr. Hall should have prepared a new owner-shipper certificate when he unloaded and then reloaded the horses at the stockyard in St. Paul. Mr. Dawson explained that Mr. Hall had custody for the load when he unloaded them and reloaded them, and USDA would have accepted him as a shipper from the point of reloading in St. Paul. Tr. at 64.

Douglas Hoffman (Tr. at 67-109; 239 - 241)

Mr. Hoffman worked for APHIS for seven years until he took a new position in March, 2008. His worked as APHIS' primary inspector under the Act at Cavel. He trained Ms. Croc, who was hired to also conduct inspections at Cavel for compliance with the Act. He was working at Cavel on March 6, 2007, when a load from Respondent arrived. The paperwork associated with the load identified Mr. Hennen as the owner. Mr. Hoffman observed that one of the horses had fresh cuts on its face and about both of its eyes. He took pictures of the horse and its injuries, and inspected the conveyance, where he observed a shovel with the blade turned out suspended on two mounts near the ceiling of the conveyance. He took photographs of blood-stains on the wall of the conveyance. The documents that accompanied the load did not note a pre-existing injury on any of the horses.

Mr. Hoffman saw nothing in the conveyance that could have injured the horse but the shovel. He believed it was dangerous to store a shovel with the blade turned out as horses can jump and be injured on the blade. He did not believe that the shovel could have been stored with the blade turned inward and then later dislodged. Mr. Hoffman referred to his photographs, which he believed depicted blood on the blade of the shovel. Mr. Hoffman confirmed that bungee cords with hooks were used to secure the shovel. No horses were on the trailer when he inspected it, and he did not know the height of the horse relative to the shovel, or the distance from the shovel of a large blood stain on the trailer wall.
In Mr. Hoffman's opinion, the cause of injury to the horse did not matter, because the owner-shipper is responsible for ensuring its safety during transport. Mr. Hoffman testified that horses can get hurt during transport due to a number of reasons, including their temperaments, the temperaments of other horses, or the metal construction of a trailer. He believed that the injuries he observed were caused by something metal, and not by other animals. Mr. Hoffman believed that the presence of the shovel posed a higher risk of injury to the horses in the trailer, as the animals could be pushed against the shovel.

Mr. Hoffman clarified that although one of the horse's eyes appeared to be white, suggesting cataract or blindness, the white area was actually the reflection of his camera's flash. He noted that blindness is a condition that owner-shippers are required to describe on the VS 10-13, and the Form listing the horses in this shipment did not identify such a condition (CX-11).

Leslie Vissage (Tr. at 110 – 122; corroborated by CX-20)

Ms. Vissage has worked as an investigator with the Investigative and Enforcement Division of APHIS since 2003. Her primary duty is to conduct investigations into alleged violations of statutes and regulations that fall within APHIS' jurisdiction from her duty station Minnesota. Ms. Vissage was asked to assist Mr. Dawson's investigation of Respondent's activities on March 6, 2007 by interviewing John Eveslage. She spoke with Mr. Eveslage by telephone, but he declined to meet with her to sign an affidavit. Mr. Eveslage confirmed that he had delivered a load of horses for slaughter for Respondent on that evening, and that one of the horses reared up and cut its head on a shovel that was mounted on the

wall of the trailer near the ceiling. Mr. Eveslage told Ms. Vissage that he wasn't aware that a horse could do such a thing. Mr. Eveslage did not place the shovel in the trailer, and he did not prepare the paperwork for the load.

Ms. Vissage also interviewed Mr. Hennen with respect to the March 6, 2007 load and prepared an affidavit that Mr. Hennen signed. Mr. Hennen had confirmed that Mr. Eveslage was the driver, and he told Ms. Vissage that any injury to a horse on that load must have happened in transit.

Dr. Timothy Cordes (Tr. at 123 – 180; 245 – 268)

Dr. Cordes has worked for APHIS's Veterinary Services for twenty years as the agency's equine expert, and he is currently the Senior Veterinarian for the agency. In 2007, Dr. Cordes was the Director of the Slaughter Horse Transport Program ("SHTP") which the doctor had developed in the 1990s. Before his government service, Dr. Cordes worked with horses in private practice for twenty years. His experience with horses includes serving as the veterinarian for the United States Equestrian Team.

Dr. Cordes reviewed photographs of downed horses in the trailer (CX-7; CX-8) and stated that the amount of fecal matter on the trailer floor was "treacherous", as horses would have difficulty standing on the uneven surface in a swaying trailer. Tr. at 131. The amount of fecal matter evident on the trailer floor would not have accumulated in the 24 hours or less that would have transpired in moving the horses on this occasion. Dr. Cordes concluded that the owner of the trailer did not thoroughly clean it out before loading and transporting the horses, and the doctor opined that "Mr. Carter knows better than that". Tr. at 148. The trailer should have been cleaned to the metal floor and then lined with shavings to give the horses traction.

In Dr. Cordes' experience, it is unusual for horses to fight as much as the horses apparently did on the February 8, 2007 trip. The regulations segregate stallions to avert aggression during transport, and the doctor believed that horses scheduled for slaughter should be observed for behavioral risks before loading.

Dr. Cordes reviewed the photograph of the injured horse (CX-18) and offered his opinion that the injury to the horse's eye was caused by trauma. The doctor pointed to lacerations along the front of the horse's head that he believed to be compatible with striking the shovel. Dr. Cordes surmised that the injured horse reared up and struck its head and eye on the shovel, which was affixed to its mount with its blade facing out. The doctor explained that since horses have limited close vision, the injured horse may not have seen the shovel. He further testified that horses often rear up during transit. The doctor's studies and experience with the SHTP demonstrate that 80% of injuries to horses in transit to slaughter occur to the head. Dr. Cordes testified that the shovel was "the most likely etiology" of the injury to the horse's eye and face.

Dr. Cordes explained that whether the trailer was six feet, nine feet, or twelve feet high, a horse could easily rear up and strike its head on a shovel blade one foot lower than the ceiling. He did not believe the injury was caused by fighting with other horses because he would have expected to see other horses injured. Dr. Cordes credited the statements of the driver, who was unfamiliar with horses and who was not aware that they could have jumped and injured themselves on the shovel. The doctor conceded that an almost horse-head shaped blood stain was evident on the photographs at a place much lower than the shovel and closer to what appears to be a horizontal rail around the trailer. Although the rail appeared smooth, the doctor observed that it would not take much of a protuberance to gravely injure a horse's eye and head.

Dr. Cordes believed that the injury to the horse's eye may have healed if the horse had been meant to live. He also thought that what looked like a cataract in the horse's other eye in the picture he reviewed was actually a reflection of the camera's flash.

The doctor believed it was "unconscionable" to have stored a clean-out shovel in the same space as the horses, given how easily horses sustain head injuries during transit. Tr. at 135. Dr. Cordes described how the regulations and SHTP imposed standards for transporting horses, but did not mandate a particular design for the trailers used to carry them. The overall purpose of the regulations was to ensure transportation methods least likely to hurt horses.

Dr. Cordes addressed the requirement to fill out a new VS Form 10-13 when a shipment of horses is unloaded and reloaded en route to slaughter, explaining that the regulations are meant to ensure that USDA can ascertain exactly what horses are being transported. USDA adopted the term owner-shipper to address the reality that often the driver of the transport is not the actual owner of the horses, and to impute the obligations of the owner to the driver where circumstances warranted.

Dr. Cordes testified that owner-shippers had been required to document the contents of their loads from the inception of the SHTP. Tr. at 249. He explained that civil penalties were provided for in the Act to encourage compliance and uniformity with the mandates for the program. In the current case, the SHTP recommended a civil penalty of $17,375.00. In making the recommendation, such factors as the seriousness of the violations, their frequency, and the history of the Respondent's compliance with the Act and regulations were considered. Serious violations are those that result in injury to horses, such as transporting horses in poorly maintained equipment, or failing to provide veterinary care.

The SHTP concluded that Respondent had committed serious violations of the Act, when Respondent failed to provide veterinary care on February 8, 2007, when at least one horse went down during transport. Dr. Cordes believed that the condition of the trailer, added to the failure to provide veterinary care, demonstrated a failure to carefully transport horses in a manner designed to minimize injury, stress and discomfort. Each of these violations merits a penalty of $5,000.00. In addition, the injury to the horse's head during the transportation of the load on March 6, 2007 represented failure to carefully transport horses in a manner designed to minimize injury, stress and discomfort, which merited a sanction of $5,000.00. The injury to the horse also reflected the failure to provide cargo space that would protect the health and well-being of the transported horses, for which a penalty of $2,000.00 was sought.

Dr. Cordes considered Mr. Hennen's lapses with paperwork to be "minor offenses". Tr. at 252. Nevertheless, SHTP recommended a penalty of $25.00 each for erroneously prepared health certificates, for a

total of $175.00, and a penalty of $200.00 for unloading and reloading horses without preparing a new certificate.

In requesting the maximum penalty, Dr. Cordes testified that he considered Respondent's otherwise unblemished history of transporting horses under the Act, but nevertheless believed that the violations were egregious enough to merit the maximum sanction. The doctor believed that the injury to horse's eye was severe enough to merit the maximum penalty, particularly given that he believed the harm could have been avoided. Dr. Cordes did not assess the maximum penalty for the presence of the shovel. Dr. Cordes did not credit Respondent's contentions that he was being unfairly held responsible for the actions of others, because the intent of the program is to hold the self-designated owner-shipper liable under the Act.

John Hennen[3]

Mr. Hennen has worked with horses and cattle since he was fifteen (15) years old. Tr. at 186. He primarily farms and raises cattle, but he also hauls horses for slaughter at times because there is a need for people to do that. Id. He testified that he special-hires transportation to get horses to the slaughterhouse. Tr. at 61 – 65. Mr. Hennen had not shipped horses for slaughter for months before the agency implemented the reporting requirements. Tr. at 162-163. He contacted USDA to get some advice about how to proceed, and received only the tags and forms in the mail, without instruction on how to use them. Tr. at 65; 163.

Mr. Hennen was not aware of the requirement to prepare another form whenever horses are unloaded, but maintained that even if he had known, the driver should be the person held responsible for completing the form. Tr. at 188. Mr. Hennen agreed with Dr. Cordes that the driver of the load that had been offloaded should have prepared an additional VS-10-13. Tr. at 146. He did not understand why he was responsible for the driver's failure to complete the form. Tr. at 63; 187. Mr. Hennen acknowledged that the hired driver may not have had a VS 10-13 form because USDA provides them to Mr. Hennen as the owner. Tr. at 65. However, he believed that "it [is] totally wrong that I am responsible

[3] Because Mr. Hennen's questioning often took the form of testimony, I have referenced each of his statements to the transcript.

especially in the one case of a driver being hired by Cavel, which is proved by the documents. They paid him, they lined him up. They sent him out with a trailer that was froze up so bad that if I was there, I would never have loaded it". Tr. at 187. Mr. Hennen did not know which trucking company would be dispatched by Cavel to pick up his February 8, 2007 load of horses. Tr. at 228; 230. He was contacted by Cavel and put together the load in a hurry. Tr. at 228-229. He was not involved in paying the trucker. Tr. at 229. Mr. Hennen had never met Charlie Carter, but he was aware that Mr. Carter did not have the best reputation. *Id.*

Mr. Hennen concurred with Dr. Cordes' observations about the condition of the trailer that Cavel had hired to transport his horses. Tr. at 145. He agreed that the frozen floor was responsible for the horses being "jittery" and then downed. Tr. at 146. He compared the floor of the trailer on that load with the other load at issue in this case, and observed that the second trailer's floor looked as he would have expected for the number of horses and distance traveled. Tr. at 188. Mr. Hennen explained that his hired man loaded the trailer, which he never saw. Tr. at 187.

Respondent remembered receiving a call from the driver of the February load, and instructing him to go to St. Paul and unload the trailer because horses were down. *Id.* Mr. Hennen testified that the driver failed to state in his affidavit that he left two horses at St. Paul, which accounts for the discrepancy between the head count and the paperwork. Tr. at 187-188. In his opinion, the driver took an inordinate amount of time to reach his destination; the distance was 550 miles and is usually covered in 10 hours. Tr. at 188.

Respondent praised the driver of the other load as "about the most conscientious that hauls livestock". Tr. at 194-195. He compared the pictures depicting the two loads and observed that the floor of Mr. Eveslage's trailer was clean, and had been salted and covered with sand and shavings. Tr. at 195.

Respondent took good care of his horses, fattening them up so that he could get a good price. Tr. at 189. Mr. Hennen referred to the pictures of horses as examples of how well fed his horses were. Tr. at 190. Mr. Hennen has shipped "hundreds of loads of horses" and never had a horse

injured or condemned. Tr. at 190. He observed that there was no advantage to him to have horses downed or injured, as that would affect how he was paid. Id. Mr. Hennen believed that the driver should be held responsible for the horses en route because he could not do anything for horses from 500 miles away. Tr. at 190. He did not know that a horse was injured. Tr. at 191.

Mr. Hennen has purchased his own floor trailers, and he loads compartments separately. Tr. at 191. Before loading horses, he keeps them together in a pen to observe their behavior, as Dr. Cordes recommended. Tr. at 191-192. If he notices a horse fighting, that animal is loaded in a separate compartment from the others. Tr. at 192.

Mr. Hennen disputed that the injured horse was hurt by the shovel, observing that the blood print on the wall was closer to a hog panel around the trailer. Tr. at 192-193. He speculated that the trailer may not have been appropriate for hauling horses to slaughter. Tr. at 193. Even if the shovel did not hurt the horse, Mr. Hennen would have removed it if he had seen it. Tr. at 194.

The driver, Mr. Eveslage, had hauled as many as ten loads of slaughter horses for Mr. Hennen during the spring in question, but refused to transport any more horses after the horse was injured. Tr. at 193. Mr. Hennen asserted that it was not unusual for horses in transport to be injured, but he acknowledged that the injury to the eye of the horse at issue here was "terrible". Tr. at 194. Nevertheless, he testified, "it isn't like I inflicted it. So, I can't see why I should be judged and fined eight, $10,000 for something a third party totally did. I have no control over it. I took care of them as well as I know how and that I have for 40 years. No different today as I did then." Tr. at 194.

Mr. Hennen addressed the photographs showing the dirty trailer floor and testified that the horses in the trailer would have had trouble staying up. Tr. at 196. He also noted that the driver was aware that the horses were fractious, and unloaded them. *Id.* Mr. Hennen was not on the scene for the unloading and reloading, and did not understand how he would be held accountable for what the driver did. Tr. at 198. He also was not responsible for the time the trailer spent at Cavel waiting to be unloaded. Tr. at 199-200. Mr. Hennen observed that he suffered the financial loss

of the horse that died, and stated that it was in his interest to assure that the horses arrived safely at their destination. Tr. at 202-205.

Respondent explained that he was not present when his hired hand loaded the horses on February 8, 2007 (CX-1; CX-8). Tr. at 206-208. The horses are loaded at night so they may be delivered in the morning because the Cavel plant has no pens to hold horses that are unloaded. Tr. at 208-209. Mr. Hennen's drivers have told him that they sometimes have to wait in line for six hours for the horses to be unloaded. Tr. at 210. The driver who transported the load on February 8, 2007, Mr. Hall, called Mr. Hennen approximately 100 miles into the trip to report down horses, and Mr. Hennen directed Mr. Hall to a location in St. Paul, where he could unload the horses and leave them until Mr. Hennen could collect them the following week. Tr. at 211. Instead, Mr. Hall unloaded the horses, reloaded all but two (which remained in St. Paul), and continued on his trip. Tr. at 211-212.

Although he acknowledged that his hired hand should have noticed the condition of the trailer and reported it, Mr. Hennen explained that his help generally only perform the jobs they are assigned. Tr. at 212. Also, the hired hand probably did not go onto the truck, as the driver generally leads the horses. Tr. at 214. The horses are sorted by temperament and size in an effort to eliminate aggressive behavior. Tr. at 212-213. Mr. Hennen was not familiar with the truck used on that trip, and his own trucks are designed specifically to accommodate the horses. Tr. at 214-215.

Mr. Hennen maintained that the trucking company, Carter, should be held responsible for the down horses, and explained that the driver called him to ask about unloading them because Carter would not have known where to send the driver. Tr. at 218. He recalled that he was attending a social function when he received the call, and he was contacted again by the driver at about 2:00 a.m., after the horses were unloaded. Tr. at 218-219.

Mr. Hennen had used Mr. Eveslage and his equipment frequently before the load of March 6, 2007, and his equipment had always been maintained and power washed, and always had fresh shavings on the trailer floor. Tr. at 220-221; 227. Mr. Hennen had been in Mr.

Eveslage's trailer at times and had not noticed a shovel. Tr. at 221. He learned that Mr. Eveslage had always stored a clean-out shovel in the trailer after the horse was injured during the load of March 6, 2007. Tr. at 224. Mr. Hennen noted that he was not present when the horses were loaded for that trip by a hired hand, Mr. Lahr. CX-11; Tr. At 224. He did not learn about the injury to the horse's eye until Ms. Vissage told him, possibly a year or more after the fact. Tr. at 225.

Mr. Hennen agreed that he had made mistakes with filling out paperwork, but noted that he had no instructions on how to prepare the paperwork, which showed up unexpectedly. Tr. at 61-62.

D. Discussion

1. *Violations*

Status of Respondent as "owner-shipper" under the Act. See 9 C.F.R. § 88.1

Documents prepared to accompany both loads of horses at issue herein list Respondent's name as the owner-shipper and bear Mr. Hennen's signature. *See* CX-1; CX-11. In both instances, the horses were loaded at Respondent's place of business. Documents from Cavel International reflect that Mr. Hennen was the consignor, vendor, or payee for both shipments of horse. *See* CX-2; CX-3; CX-13; CX-14. The driver of the February 8, 2007 shipment identified Mr. Hennen as the owner and shipper of the horses he transported, and also identified Mr. Hennen as the person who loaded the horses at Respondent's business site in Paynesville, Minnesota. *See* CX-7; CX-9.

I reject Respondent's contention that he should not be held responsible for the condition of the trailer or the events that transpired during the transportation of the horses on February 8, 2007. I accept Mr. Hennen's testimony that this shipment of horses was expedited upon the request of Cavel, who arranged for the transportation company and driver. However, Mr. Hennen had no obligation to use that shipper, and as he testified that Mr. Carter did not have a stellar reputation, the wise course of action would have dictated the use of another conveyance. At the very least, the conveyance should have been inspected for suitability.

Mr. Hennen's employee helped to load the horses, and while Mr. Hennen testified that he would have hoped that his hired hand would have noticed the dirty trailer floor, it is clear that the employee was not charged to do so. Mr. Hennen believes that because the driver is responsible to keep his trailer in good condition, and not hired help, the driver and Carter should be held responsible for what happened to horses that night. Tr. at 214-215.

This attempt to shift responsibility to the driver is without merit. Respondent benefited from the sale of the horses, and it is clear from the record that he was in contact with the driver during the trip and directed his actions. I give little weight to Mr. Dawson's contention that APHIS would have accepted Mr. Hall as a shipper if he had filled out a new VS 10-13 when he unloaded the horses. Respondent bore the ultimate responsibility for the load's safety and took no action to assure that the horses were being transported in compliance with the Act and regulations.

Although it is true that there was little Mr. Hennen could have done for the horse injured in March, 2007, it is not apparent that the driver would have known what to do. He was not familiar with horses. Moreover, Mr. Hennen neglected to confirm that a trailer generally used to transport cattle was appropriate to meet the regulatory demands of transporting horses to slaughter.

Other indicia of Mr. Hennen's obligation for the horses are that he signed the owner-shipper documents that accompanied the horses to their final destination, and directed the driver's conduct during the trip. Though Mr. Hennen protested that there was nothing he could do for loads that were traveling 500 miles from where he was, he nevertheless managed to dispatch Mr. Hall to a stockyard in St. Paul when Hall called to report that the horses were unsettled. As Mr. Hennen explained, the driver was not familiar with facilities in Minneapolis. Respondent was aware that the driver left two horses behind at the facility, and Mr. Hennen presumed that he paid for their board during the interim before he retrieved them. Further, Mr. Hennen testified that it was to his advantage to have horses arrive in good health, as he financially benefited from their sale.

There is no affirmative evidence of record that Carter or Cavel assumed responsibility for the animals at any time during the transaction. I find Mr. Hennen's suggestion that Carter could have provided Mr. Hall with paperwork to complete is not consistent with the fact that Mr. Hennen signed the VX 10-13 prepared at the start of the trip. All of the circumstances suggest that Mr. Hennen remained in control of the loads until they were delivered to Cavel. I find it significant that Mr. Hall did not call either Mr. Carter or anyone at the Cavel facility when he first encountered difficulties with the horses during his trip. Although Mr. Hall called Cavel in advance of his arrival, it was to give warning of his problem and allow him to advance to the front of the line of trailers waiting to be unloaded. It is undisputed that hours could pass in line while waiting to be unloaded.

The preponderance of the evidence establishes that Respondent was the owner-shipper of the two loads of horses at issue herein, and is responsible under Act and prevailing regulations for non-compliant conduct.

February 8, 2007 Shipment

Cavel contacted Mr. Hennen and asked if he could send them a load of horses on a conveyance arranged for by Cavel. A trailer owned and operated by C.C. Horse Transport, owned by Charles Carter ("Carter") was sent to Respondent for that purpose on February 8, 2007. Although Mr. Hennen did not personally load the horses, his employee helped James Hall, the driver hired by Carter, to load them. Approximately one hour into his trip, Mr. Hall called Mr. Hennen to report that the horses in the trailer had seemed fractious and unsettled, thereby prompting Mr. Hall to stop to inspect the horses. He found horses down and had trouble getting them on their feet. After seeking advice from Mr. Hennen by telephone, Mr. Hall drove to a stockyard in St. Paul, where he unloaded the horses and rested them before re-loading them and continuing his trip. Mr. Hall felt constrained to stop again en route because he was concerned about the horses. Again, he found downed horses that were not easily put on their feet. Mr. Hall called Cavel to report the situation and when he arrived at his destination, all but one horse was standing. That horse was euthanized.

The record reflects that the trailer used to transport horses on February 8, 2007 was less than optimum for its purpose. The floor of the trailer was covered with a thick layer of frozen manure that in all likelihood contributed to the problems that the horses experienced during this trip. I accord substantial weight to Dr. Cordes' testimony that the surface of the floor made it difficult for horses to maintain their footing, and I note that Mr. Hennen agreed with Dr. Cordes's observations. That numerous horses fell during transit and one horse could not be roused and had to be euthanized demonstrates the de facto dangerous condition of the conveyance. The failure to provide a trailer with a floor that would stabilize the horses in transit constitutes a violation of the mandate to handle the horse as carefully as possible so as to avoid unnecessary discomfort, stress, physical harm or trauma in violation of 9 C.F.R. § 88.4(c).

Further, by failing to call a veterinarian when confronted with numerous downed horses, Respondent demonstrated that he was more committed to fulfilling Cavel's expectations than to meet the regulatory mandate to safeguard his horses. Mr. Hennen testified that the trip took an inordinate amount of time, apparently not considering that Mr. Hall was concerned enough about the horses to stop several times to inspect them. Other than to assert that the driver was responsible for the trip, Mr. Hennen provided no explanation for why he did not find a veterinarian to assess the fitness of the horses to continue their journey, despite several calls from Mr. Hall reporting their distress and condition. Mr. Hennen perceived that Mr. Hall was not familiar with the area and therefore directed him where to unload the animals. It strains credibility that Respondent would not have reached the same conclusion about Mr. Hall's knowledge of local veterinarians. An examination of the animals and inspection of the conveyance by a qualified veterinarian may have resulted in the cleaning of the trailer, and prevented the need for a horse to be euthanized. Complainant has established that Respondent violated 9 C.F.R. § 88.4(c) when he failed to provide prompt veterinary care.

March 6, 2007 Shipment

Respondent shipped a number of horses to Cavel on March 6, 2007, in a conveyance driven by John Eveslage, whom Mr. Hennen trusted and admired. Mr. Hennen described the trailer containing the horses as being

kept in "spotless" condition, and explained that the trailer floor was always lined with shavings, and that the equipment was always power-washed after a load. Tr. at 234. Nevertheless, during transit, one horse suffered a severe injury to its head and eye. Inspector Hoffman inspected the load upon its arrival at Cavel and observed and photographed the injured animal and the trailer. His photographs include one of a triangle-shaped blood-stain on the trailer wall. He also noticed the presence of a shovel that was used to clean out the trailer, affixed by bungee cords to an improvised rack near the ceiling of the compartment holding the horses. The blood stain was on the wall midway between the trailer floor and the shovel, which was placed so that its blade faced outwards toward the trailer space.

Mr. Hoffman concluded that the horse had injured itself on the shovel blade. Referring to his photographs, Mr. Hoffman described reddish marks on the shovel as blood stains. Dr. Cordes similarly testified that the horse's injuries were caused by impact with the shovel blade, based upon the photographs, the testimony, and documentary evidence. The doctor explained that horses had poor eyesight and thin skin on their heads, making them susceptible to injury. Dr. Cordes further described their tendency to jump and rear up, thereby putting them at risk of harm. He said they often fight and injure each other. Investigator Vissage interviewed the driver of the load, who told her that one of the horses injured its head when it reared up and struck its head on a clean out shovel that was hung high on the wall of the trailer. CX-20.

I find that the evidence regarding the cause of the horse's injury is inconclusive. There were no witnesses to the incident that caused the injury. Although the driver believed the horse injured itself on the shovel, he had little experience with horses as he usually transported cattle. Mr. Eveslage's conclusions may have been influenced by the opinion of Mr. Hoffman. As Mr. Eveslage did not testify, I am unable to discern the basis for his opinion. The horse sustained lacerations on its head, but considering Dr. Cordes' testimony about the poor eyesight of horses and the susceptibility of their heads to injury, impact with the shovel is but a theory. Upon questioning, Mr. Hoffman conceded that the horse could have reared up and struck the metal bungee cord hooks that held the shovel in place. Mr. Hennen believed that the horse could have been hurt on hog panel construction of the trailer.

The preponderance of the evidence does not clearly point to the shovel as the instrument of the horse's harm. Mr. Hoffman did not know the height of the trailer, or the distance of the shovel from the floor or from the ceiling. Tr. at 86-87. Although Mr. Hoffman testified that the shovel, which remained affixed to the wall despite the conjectured contact with the horse, had blood stains on the blade, no forensic tests are in evidence to confirm the presence of blood on the shovel. The photographs depict reddish stains evenly distributed along the outside edges of the shovel blade, and another small, discrete stain on the handle of the shovel, away from the blade. The reddish stains on the shovel could have been caused by rust, as Mr. Hennen suggested. The presence of rust is consistent with the use of the shovel to clean a trailer in cold climate in winter time.

I further note that the stains are uniform, and appear along both edges of the blade, which seems incongruous with a jarring impact that created the wounds sustained by the horse. The photographs show no splatter pattern on the surface of the shovel and no blood stains on the wall near the shovel, which remarkably was not dislodged when the horse supposedly struck it. The pictures of the horse's wounds suggest a violent impact, and Dr. Cordes described the eye injury as "severe". Tr. at 257. There is no streak of blood running down the trailer wall consistent with the horse jumping up, hitting the shovel, and returning to a standing position.

By contrast, there is a large blood stain, shaped convincingly like a horse's head, on the trailer wall, some feet below the location of the shovel and generally at the height of a standing horse's head. Despite Mr. Hoffman's description of the trailer wall as smooth, the photographs show some kind of fitting running horizontally along the trailer wall, suggestive of a chair rail. It is as likely that the horse injured itself by hitting its head on a jagged edge of that rail as it is that the injury was caused by the horse jumping up and hitting the shovel or bungee cord hooks. I decline to accord substantial weight to speculations and theories, and accordingly, I find that the preponderance of the evidence fails to establish how the horse was injured in transit.

Although I am unable to determine the cause of the horse's injury, the fact remains that an animal was brutally harmed during transport to slaughter. The regulations demand that the conveyance used for such animals be maintained in a manner to assure their safety and well-being. Given the evidence regarding the fragility of horses and their propensity for injury, it appears that one may not entirely guarantee that horses shall be entirely free of the risk of harm during transportation to slaughter. Dr. Cordes observed that horses often fight and injure each other. Nevertheless, I accord substantial weight to Dr. Cordes's opinion that the shovel presented a risk of injury to horses, particularly as it was stored with its blades turned outward. Respondent concurred with this conclusion, saying he would not have had the shovel in the cargo area, and observing that "if anything could happen, it would happen to a horse". Tr. at 237.

Mr. Hennen testified that he had not observed that shovel in the cargo area of Mr. Eveslage's conveyance. He generally used Mr. Eveslage to transport cattle, which would not be at the same risk as a horse from the shovel. After the March 6, 2007 incident, Mr. Eveslage admitted to Mr. Hennen that he always kept his clean out shovel in the animal cargo area, but stored it with the blade turned towards the wall. Since Mr. Eveslage was more familiar with transporting cattle, Mr. Hennen should have made more efforts to establish that the trailer was safe to carry horses. It is not clear whether Mr. Hennen helped load the horses for the March 6, 2007 trip, as his testimony about that load was vague at best. However, I infer from the gravamen of his testimony that Mr. Hennen relied upon his experience with the cleanliness of Mr. Eveslage's equipment and did not inspect further for potential risks. Mr. Hennen admitted that the conveyance may not have been suitable for horses.

It is immaterial that the source of the horse's injuries cannot be identified, since the very presence of the shovel in the cargo area violated the mandate that the conveyance used to transport horses to slaughter be maintained in a manner to avoid unnecessary discomfort, stress, physical harm, or trauma. The responsibility for the horses' welfare in transit, and for assuring that the container conveying them would pose no risk of harm, lies on Respondent. Although the conveyance did not belong to Respondent, Mr. Hennen contracted for its use, was the acknowledged owner-shipper, and profited from the sale of the horses. I find that the

preponderance of the evidence demonstrates that Respondent failed to transport horses bound for slaughter in a manner that at all times protected their health and well-being in violation of 9 C.F.R. § 88.4(c).

Recordkeeping Violations

Respondent admitted that he had little experience with completing owner-shipper certificates, and that errors and omissions on the forms were inadvertent. On the two certificates at issue, the drivers of the loads of horses listed their information and Mr. Hennen completed the rest of the form. Tr. at 119-120. Mr. Hennen was not aware that a new certificate was required when horses were unloaded; but he argued that the driver could not have prepared a new certificate because he did not have one with him. Tr. at 188.

I credit Mr. Hennen's explanation that he did not receive instruction on completing the required certificates. Dr. Cordes corroborated Mr. Hennen's testimony when he acknowledged that information about the SHTP did not always reach all participants. Tr. at 160-162. However, when he undertook to transport horses to slaughter, Respondent assumed full responsibility to comply with the regulations controlling such transportation. The regulations were published, and Mr. Hennen had at least constructive notice of their content. Since he was sent VX 10-13 forms and backtags, Respondent was provided some actual notice of regulatory requirements. Mr. Hennen did not make a persuasive case that he aggressively sought direction about the requirements imposed by regulation on owner-shippers in the SHTP. Mr. Hennen testified that he sought instructions on filling out paperwork. When he received no response to his inquiry, he proceeded as best he could. There is no evidence that Mr. Hennen willfully violated recordkeeping requirements pertaining to the SHTP, but I conclude that his attempts to determine his obligations were half-hearted at best.

Accordingly, I find that Respondent violated the recordkeeping requirements imposed by regulations implementing the Act when he failed to accurately record information on VS Form 10-13. A further violation occurred on February 8, 2007, when he failed to instruct his driver to complete a new certificate that would have reflected that the load was unloaded and reloaded, and that two horses were left behind in

St. Paul. I accord full weight to Dr. Cordes's explanation that SHTP needs accurate information regarding the identify of horses shipped for slaughter. *See* Tr. at 142-143.

The record establishes that Respondent's dereliction regarding paperwork led to violations of 9 C.F.R. § 88.4(a)(3) and 9 C.F.R. § 88.4(b)(4).

2. *Sanctions*

Dr. Cordes testified that the events that led to a downed horse that had to be euthanized and the severe injury to a horse during transit culminated in serious violations of the Act and regulations. SHTP concluded that Respondent's actions were serious enough to merit the imposition of the maximum civil penalty per violation for the failure to obtain veterinary assistance for the downed horse; the failure in two instances to transport horses in a manner that did not cause unnecessary discomfort, stress, physical harm or trauma; and the failure to maintain the animal cargo space in a manner that at all times protected the health and wellbeing of the horses. Dr. Cordes characterized these violations as very serious to moderately serious. Dr. Cordes acknowledged that Respondent had no record of previous violations, but he observed that the circumstances merited the maximum penalty because he perceived the violations as preventable. The paperwork violations were considered relatively minor.

The preponderance of the evidence supports the imposition of civil money penalties in this case. Respondent's actions regarding the two loads under discussion herein demonstrate a naïve, if not cavalier, approach to his duty of care to the horses. Although I credit Mr. Hennen's testimony that he sorted horses to prevent trouble in transit, and fed horses in advance of their trip, both of those actions accreted to Mr. Hennen's benefit by bringing him a good price at their destination. Meanwhile, Mr. Hennen sought to transfer responsibility for the horses' welfare to the drivers of the loads. He failed to inspect either trailer used for the trips. When informed about downed horses, he failed to call for veterinary care. He remained ignorant of his responsibilities regarding paperwork. Although there is no evidence that Respondent intended to

violate the Act and regulations, neither is there much evidence that he strove to comply with them.

Although I generally agree with the sanctions recommended by SHTP, I find that the facts suggest a different apportionment of the penalties than what was proposed. I concur with the maximum penalty of $5,000.00 for the failure to obtain veterinary care and $5,000.00 for the failure to transport the horses in a manner designed to prevent stress and harm during the load shipped on February 8, 2007. A cleaner trailer may have been all that was needed to prevent horses from going down throughout their journey.

Although I find that the circumstances leading to the horse's injuries on March 6, 2007 warrant sanctions, the recommended penalties are not consistent with the facts[4]. As I explained in detail herein, *supra*, the fact that the horse was injured during transport in a manner suggesting impact with something man-made represents a failure to transport horses in compliance with the regulations, and merits the imposition of the maximum penalty of $5,000.00. Dr. Cordes ruled out a fight with another horse as the cause of the injury. A simple inspection of the conveyance by Mr. Hennen may have led to the removal of the shovel, and the potential determination that the trailer was not good to transport horses, as he speculated at the hearing. Mr. Hennen pointed out that hog panels could have caused injury.

Since I cannot conclusively identify the cause of the horse's injury, I decline to impose the maximum penalty of $5,000.00. However, the severity of the injury, which logically was related to some condition in the trailer, merits a penalty of $2,000.00.

I adopt SHTP's calculation of sanctions for the paperwork violations, and hereby impose a penalty of $25.00 for each omission or mistake on the VS 10-13 prepared for the February 8, 2007 shipment, for a total of $175.00. I further impose a penalty of $200.00 for the failure to prepare

[4] Although one might find my approach to be a matter of semantics as the proposed sum of the penalties remains unchanged, I have endeavored to relate the penalty with the factual evidence of a violation in furtherance of the purpose of sanctions to deter similar conduct.

a second certificate when some of the horses from that load were left behind in St. Paul.

Mr. Hennen has presented testamentary and documentary evidence of his financial inability to pay any penalties. However, the ability to pay is not a factor for consideration when determining the merits of imposing sanctions. *Baker*, No. 08-0074, 67 Agric. Dec. 1259, 2008 WL 8120975 (U.S.D.A. Dec. 15, 2008). The imposition of sanctions is designed to further the congressional purposes of the Act and to deter violations of the Act and its regulations. *Spencer Livestock Comm'n Co.*, No. 6254, 46 Agric Dec. 268, 431, 1987 WL 115049 (U.S.D.A. Mar. 19, 1987).

III. FINDINGS OF FACT

1. Respondent John (Jack) Hennen is a resident of the state of Minnesota and was, during the time relevant to this proceeding, in the business of buying and selling livestock, including horses intended for slaughter.

2. On February 8, 2007, Respondent commercially transported 32 horses to Cavel for slaughter but failed to properly complete required owner-shipper certificate VS Form 10-13, in that the form failed to include the color and sex of all of the horses and did not completely include the prefix for the USDA back tag for one horse.

3. During the February 8, 2007 transportation, Respondent instructed his driver to stop at a stockyard in St. Paul, Minnesota after learning that horses were down, but failed to instruct the driver to complete a second VS Form 10-13 that would have reported that the horses had been unloaded and reloaded, and the fact that two horses were left behind.

4. Respondent failed to obtain veterinary care for the horses transported on February 8, 2007, despite being aware that some had been downed during the trip.

5. Upon arrival of the February 8, 2007 shipment at Cavel, one downed horse needed to be euthanized.

6. The unsanitary condition of the floor of the trailer used to transport the horses on February 8, 2007, was the most likely cause of horses being down.

7. Respondent had not inspected the trailer to assure that it would provide safe transportation for the horses.

8. On March 6, 2007, Respondent commercially transported 26 horses to Cavel for slaughter.

9. Respondent had frequently used the driver and his equipment to transport cattle with positive results.

10. Respondent did not inspect the cargo space of the container used to transport the horses and did not identify the presence of a shovel with its blade turned toward the cargo space, which was affixed by bungee cords to the wall near the ceiling.

11. Upon the arrival of the March 6, 2007 shipment at Cavel, one of the horses was observed to have severe lacerations on its head and eye.

12. A triangular blood stain was present midway up the wall of the container, beneath the area where the shovel was affixed.

13. It was hypothesized that the horse reared and struck the shovel, but no one witnessed the accident and no forensic testing established the cause of the horse's injuries.

14. The construction of the trailer may have posed a risk of injury to horses as well as the presence of the shovel.

IV. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Respondent is an owner-shipper as defined by the Act and prevailing regulations.

3. By failing to accurately complete VS Form 10-13, Respondent violated 9 C.F.R. §§ 88.4(a)(3)(v) and (vi).

4. Respondent violated 9 C.F.R. § 88.4(b)(4) by failing to instruct the driver of the February 8, 2007 load to prepare a VS Form 10-13 when the horses were unloaded and reloaded on that date in St. Paul, Minnesota.

5. Respondent violated 9 C.F.R. § 88.4(b) when he failed to obtain veterinary assistance for horses that were downed during the February 8, 2007 trip.

6. As evidenced by the need to euthanize one horse upon the load's arrival at Cavel, Respondent failed to handle 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).

7. By failing to inspect the cargo space used to transport horses to slaughter on March 6, 2007, and assuring that it was an appropriate conveyance for the transportation of horses which did not present obvious risk of injury, Respondent failed to maintain the animal cargo space of the conveyance used in a manner that at all times protected the health and wellbeing of the horses transported in violation of 9 C.F.R. § 88.3(a)(1).

8. As evidenced by the injury sustained by one horse during transit on March 6, 2007, Respondent failed to handle slaughter 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).

9. The imposition of sanctions is warranted in these circumstances.

ORDER

Respondent John (Jack) Hennen is assessed a civil penalty of seventeen thousand three hundred and seventy-five ($17,375.00). Within thirty (30) days from the effective date of this Order, Respondent shall

send a certified check or money order in that amount made payable to the Treasurer of the United States to the following address:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent's payment shall include a notation of the docket number of this proceeding.

This Order shall be final and effective thirty (30) days after the date of service of this Order on the Respondent unless there is an appeal to the Judicial Officer for the USDA, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISIONS

In re: MITCHEL KALMANSON.
Docket No. 13-0046.
Supplemental Decision and Order.
Filed April 17, 2013.

EAJA.

Petitioner, pro se.
Colleen A. Carroll, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

SUPPLEMENTAL DECISION AND ORDER

Preliminary Statement

This action involves an Application/Motion for Equal Access to Justice Act (EAJA) Fees & Expenses filed by the Petitioner following an entry on September 24, 2012 of a Decision and Order favorable to him in a case brought against him by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture.[1] I entered a Decision and Order on November 28, 2012 denying his Application/Motion finding that Petitioner had failed to demonstrate eligibility for an award of EAJA fees and expenses.

On December 26, 2012, Petitioner filed a Motion for Reconsideration of my November 28, 2012 Decision. The Respondent responded arguing that (a) the matter was at that time still premature and thus not ripe for disposition, (b) a petition for reconsideration is not permitted in EAJA fee cases, and (c) that the instant filing should either be denied or stayed pending final disposition of the allegations against the Petitioner (in that case a Respondent) in Docket No. 10-0416.

[1] The Decision and Order of September 24, 2012 resolved only the issues as to Mitchel Kalmanson, but not those concerning Jennifer Caudill, the only other Respondent then remaining in the case,

Although the Motion for Reconsideration could have been considered an appeal and accordingly referred to the Judicial Officer, I had been prepared to deny the Motion for Reconsideration on the same grounds as my Decision of November 28, 2012 in which I found that the Petitioner had yet to demonstrate that he was an individual eligible for an EAJA award. Instead, in light of the Complainant's request, by Order dated January 17, 2013 I deferred ruling on the Motion and stayed the proceedings pending issuance of a final decision as to Mr. Kalmanson.

Prior to the entry of my Decision and Order of November 28, 2012, Counsel for Complainant had requested an extension of time in which to file a Petition for Appeal of the Decision and Order as to Mitchel Kalmanson in Docket No. 10-0416. In that request, Counsel invoked the interest of judicial economy and the conservation of agency resources and asked that the time for filing a Petition for Appeal as to Kalmanson be extended to a date 30 days after service on her of the Decision and Order as to Respondent Caudill. By Order entered on October 10, 2012, the Judicial Officer granted the Motion.

On February 1, 2013 I entered a Decision and Order as to Jennifer Caudill and on February 27, 2013, Counsel for Complainant filed a second request for extension of time in which to file a Petition for Appeal of both decisions. While granting the extension of time for the filing of an appeal of the decision as to Jennifer Caudill, the Judicial Officer denied the request for extension as to Mitchel Kalmanson noting that the Administrator had already had more than 5 months in which to prepare and file an appeal of the September 24, 2012 Kalmanson decision.

No timely appeal was filed of the Kalmanson decision and on March 14, 2013, the Hearing Clerk filed a Notice of Effective Date of Decision and Order as to Mitchel Kalmanson indicating that the decision became final on November 2, 2012.

On April 1, 2013, Kalmanson filed a Renewed Application/Motion for EAJA Fees & Expenses ETC to be paid to Mitchel Kalmanson, an Individual. In the document that was filed, Kalmanson indicated "Kalmanson's income &/or worth must not be a consideration in such

that it would relive the above actions by the above individuals as being of no consequence." Paragraph 3, p. 2, Renewed Application/Motion.

The record indicates that no specific time for responding to the Renewed Application/Motion was given to Complainant; however, as the deficiencies in the application are readily apparent without the need for further input, disposition need not be delayed for a response.

In my initial decision, I discussed the "American Rule" generally requiring parties to bear the burden of their own attorney fees and the background and general requirements of the Equal Access to Justice Act (EAJA).[2] It thus would serve no useful purpose to repeat that discussion here. It is well settled that in the United States the federal government has sovereign immunity and may not be sued unless it has waived its immunity or consented to the type of suit that is being brought.[3] *See Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983). As with any other limited waiver of the doctrine of sovereign immunity, strict compliance with terms and conditions of the statute and the implementing regulations is required. As previously discussed, when the 1984 amendments to the EAJA were passed, included in the amendments was the net worth provision which the Petitioner is now seeking to evade. Absent a showing that Petitioner qualifies in all respects for an award, it simply cannot and will not be authorized or approved.

Examination and review of the record reflects that Petitioner failed to comply fully with sections 1.190, 1.191 and 1.192 of the Department's regulations. (7 C.F.R. §§ 1.190, 1.191 and 1.192). Section 1.190 requires demonstration that the applicant prevailed and identification of the position of the Department that the applicant alleges was not substantially justified together with a brief statement of the basis for the allegation as well as a declaration as to the applicant's compliance with the net worth provisions. 7 C.F.R. § 1.190. Section 1.191 requires inclusion of a net worth exhibit. 7 C.F.R. § 1.191. Section 1.192 set forth the documentation requirements for the requested fees and expenses. 7 C.F.R. § 1.192. Even were the contents of Petitioner's application given the benefit of doubt and generously read so as to filipendously comply

[2] 28 U.S.C. § 2412

[3] Examples include the Federal Tort Claims Act , 28 U.S.C. § 2674; the Tucker Act, 28 U.S.C. § 1491; and patent infringement claims, 28 U.S.C. § 1498(a).

(with the exception of the net worth declaration), the failure to comply and otherwise provide the necessary supporting documentation as required by the other provisions would nonetheless still be sufficient to require denial.

Accordingly, being sufficiently advised, it is **ORDERED** as follows:

1. The Motion for Reconsideration of the Decision and Order of November 28, 2012 is **DENIED** and except as modified herein that Decision and Order is **AFFIRMED.**

2. The Renewed Motion/Application for EAJA Fees and Expenses is **DENIED.**

3. No jurisdictional basis exists for entertaining any action for monetary sanctions or other relief before the Secretary for injuries to Petitioner's emotional state or professional reputation.

4. Pursuant to the applicable Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in sections 1.189(a) and 1.201 of the Rules of Practice (7 C.F.R. §§ 1.189 and 1.201).

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

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MISCELLANEOUS ORDERS

Editor's Note: This volume continues 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. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. 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: www.dm.usda.gov/oaljdecisions].

ADMINISTRATIVE WAGE GARNISHMENT

KATHY DODD.
Docket No. 13-0075.
Miscellaneous Order.
Filed January 7, 2013.

LONNIE A. MAXWELL.
Docket No. 13-0044.
Miscellaneous Order.
Filed January 8, 2013.

MATTHEW ARMSTRONG, F/K/A MATTHEW HART.
Docket No. 13-0095.
Miscellaneous Order.
Filed January 17, 2013.

TANTON GIBBS.
Docket No. 13-0106.
Miscellaneous Order.
Filed January 24, 2013.

DAVID MAIN.
Docket No. 13-0108.
Miscellaneous Order.
Filed January 29, 2013.

STEVEN CALDWELL.
Docket No. 13-0105.
Miscellaneous Order.
Filed January 30, 2013.

SARA N. STIMSON.
Docket No. 13-0132.
Miscellaneous Order.
Filed February 1, 2013.

DAVID TALLEY.
Docket No. 12-0589.
Miscellaneous Order.
Filed February 4, 2013.

HEATHER S. GABRIEL, F/K/A HEATHER BAKER.
Docket No. 13-0092.
Miscellaneous Order.
Filed February 7, 2013.

CHELSEA BARTON, F/K/A CHELSEA HOWELL.
Docket No. 13-0096.
Miscellaneous Order.
Filed February 11, 2013.

THIRD COAST PRODUCE COMPANY, LTD.
Docket No. 13-0067.
Miscellaneous Order.
Filed February 12, 2013.

LINDA KAYE MAGEE, N/K/A LINDA KAYE SARTIN.
Docket No. 13-0128.
Miscellaneous Order.
Filed February 12, 2013.

HENRY JACKSON.
Docket No. 13-0091.
Miscellaneous Order.
Filed February 21, 2013.

MISCELLANEOUS ORDERS

ROY J. DAWSON, III.
Docket No. 13-0094.
Miscellaneous Order.
Filed February 21, 2013.

JAMES P. SANCHEZ.
Docket No. 13-0073.
Miscellaneous Order.
Filed February 28, 2013.

BRANDIE JONES.
Docket No. 13-0158.
Miscellaneous Order.
Filed March 8, 2013.

JAVIER FUENTES.
Docket No. 13-0137.
Miscellaneous Order.
Filed March 13, 2013.

JULIA TIBBS, F/K/A JULIA KAMAR.
Docket No. 13-0168.
Miscellaneous Order.
Filed March 14, 2013.

NICOLE BRANTLEY.
Docket No. 13-0130.
Miscellaneous Order.
Filed March 15, 2013.

BRANDIE JONES.
Docket No. 13-0158.
Miscellaneous Order.
Filed March 20, 2013.

DENISE CHRISTOPHER.
Docket No. 12-0486.
Miscellaneous Order.
Filed March 25, 2013.

TERRY SMITH.
Docket No. 12-0501.
Miscellaneous Order.
Filed March 25, 2013.

DUSTIN LAGUNAS.
Docket No. 13-0043.
Miscellaneous Order.
Filed March 26, 2013.

LAURA KROPIDLOWSKI, N/K/A LARA F. BYLLS.
Docket No. 13-0004.
Miscellaneous Order.
Filed April 2, 2013.

MARTIN NAVARRETTE PEREZ.
Docket No. 12-0498.
Miscellaneous Order.
Filed April 4, 2013.

ANTONIO MCCORMICK.
Docket No. 13-0104.
Miscellaneous Order.
Filed April 4, 2013.

JOYCE WOODRUFF.
Docket No. 12-0571.
Miscellaneous Order.
Filed April 9, 2013.

ANNA K. STEWART, F/K/A ANNA K. FLETCHER.
Docket No. 13-0127.
Miscellaneous Order.
Filed April 9, 2013.

ANGELO CHITTO.
Docket No. 13-0169.
Miscellaneous Order.
Filed April 16, 2013.

MISCELLANEOUS ORDERS

JAMES MOORE.
Docket No. 12-0570.
Miscellaneous Order.
Filed May 9, 2013.

AGRICULTURAL COMMODITIES PROMOTION ACT

In re: RESOLUTE FOREST PRODUCTS.
Docket No. 12-0040.
Ruling on Certified Question.
Filed January 22, 2013.

ACPA – Disclosure of names – Subpoena duces tecum.

David R. Rivkin, Jr., Esq. for Complainant.
Frank Martin, Jr., Esq. for Respondent.
Certified Question by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING ON CERTIFIED QUESTION

The Certified Question

On July 27, 2012, Resolute Forest Products [hereinafter Resolute] filed an application requesting issuance of a subpoena duces tecum requiring David R. Shipman, or his representative, to produce documents showing the names of manufacturers, importers, and voters described in Resolute's application. On January 14, 2013, pursuant to Resolute's application, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a subpoena duces tecum requiring Mr. Shipman, or his representative, to appear before her and bring with him the following documents:

1. Documents showing the names of manufacturers and importers the Agricultural Marketing Service ("AMS") had considered potentially eligible to vote in the May/June 2011 referendum on the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Program ("Softwood Lumber Check-off");

2. Documents showing the names of voters whom AMS deemed eligible to receive ballots for the May/June 2011 referendum on the Softwood Lumber Check-off and the AMS rationale for their eligibility; [and]

3. Documents showing the names of voters who submitted ballots to AMS during the May/June 2011 referendum on the Softwood Lumber Check-off[.]

Subpoena Duces Tecum at 1-2.

On January 14, 2013, the ALJ certified the following question to the Judicial Officer:

Certified Question: Shall I be permitted to require that the **names** be disclosed at the Hearing, pursuant to the *Subpoena Duces Tecum* (attached)?

ALJ's Certification to Judicial Officer at 1 (emphasis in original)).[1]

Discussion

The Rules of Practice provide that an administrative law judge may issue a subpoena duces tecum upon written application, as follows:

§ 900.62 Subpoenas.

(a) *Issuance of subpoenas*. The attendance of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may, by subpoena, be required at any designated place of hearing. Subpoenas may be issued by the Secretary or by the judge, under the facsimile signature of the Secretary, upon a reasonable showing by the applicant of the grounds, necessity, and reasonable scope thereof.

[1] The ALJ certified the question to the Judicial Officer in accordance with the Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted from Research, Promotion and Information Programs (7 C.F.R. §§ 1200.50-.52) [hereinafter the Rules of Practice]. Section 1200.52(d) of the Rules of Practice incorporates 7 C.F.R. §§ 900.52(c)(2)-.71 and 7 C.F.R. § 900.59(b) authorizes administrative law judges to certify questions to the Judicial Officer.

(b) *Application for subpoena duces tecum*. Subpoenas for the production of documentary evidence, unless issued by the judge upon his own motion, shall be issued only upon a certified written application. Such application shall specify, as exactly as possible, the documents desired and shall show their competency, relevancy, and materiality and the necessity for their production.

7 C.F.R. § 900.62(a)-(b).

Resolute contends the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (7 C.F.R. §§ 1217.1-.108) [hereinafter the Softwood Order] is not in accordance with law because it is unconstitutional and premised upon an arbitrary and capricious decision to accept results of a referendum tainted by fraud and bias (First Am. Pet. at 1). Resolute contends referendum participants were misled as to the nature of the Softwood Order and the Secretary of Agriculture manipulated the voter pool in a manner that distorted results of the referendum such that the referendum was incapable of reflecting true industry preferences (First Am. Pet. at 1, 12-14, 24, 28).

Based upon a careful review of the record before me, I conclude Resolute's application does not show the relevancy of, the materiality of, or the necessity for the production of documents that show the names of manufacturers, importers, and voters described in Resolute's application. Resolute's application does not show how the documents sought are relevant to, material to, or necessary to prove the allegations in Resolute's First Amended Petition regarding the constitutionality of the Softwood Order, fraud, bias, or the Secretary of Agriculture's purported manipulation of the voter pool. I agree with the Administrator's suggestion that the names of manufacturers, importers, and voters described in Resolute's application might result in discovery of competent, relevant, material, and necessary evidence (Respondent's Memorandum in Opposition to Issuance of Subpoena Duces Tecum at second unnumbered page). However, the Rules of Practice do not allow discovery,[2] and, pursuant to 7 C.F.R. § 900.62(b), the applicant for a

[2] *See* Auvil Fruit Co., Docket No. F&V 923-1, 56 Agric. Dec. 1045, 1094, 1997 WL 458810, at *30 (U.S.D.A. Aug. 13, 1997) (stating the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders

subpoena duces tecum must show that the actual documents sought are themselves competent, relevant, material, and necessary not merely that the documents sought will result in the discovery of competent, relevant, material, and necessary evidence.

Response to the ALJ's Certified Question

1. The ALJ is not permitted to require Mr. Shipman, or his representative, to bring documents to the hearing in this proceeding that disclose the names of manufacturers, importers, and voters pursuant to the January 14, 2013, subpoena duces tecum attached to the ALJ's Certification to the Judicial Officer.

2. The ALJ must quash the January 14, 2013, subpoena duces tecum attached to the ALJ's Certification to the Judicial Officer.

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ANIMAL WELFARE ACT

JOHN REIFF ZIMMERMAN.
Docket No. 11-0156.
Miscellaneous Order.
Filed February 1, 2013.

In re: JENNIFER CAUDILL, A/K/A JENNIFER WALKER, A/K/A JENNIFER HERRIOTT WALKER, AN INDIVIDUAL; BRENT TAYLOR AND WILLIAM BEDFORD, INDIVIDUALS, D/B/A ALLEN BROTHERS CIRCUS; AND MITCHEL KALMANSON.
Docket No. 10-0416.
Miscellaneous Orders.
Filed January 24, 2013.

(7 C.F.R. §§ 900.50-.71) do not allow discovery). *But see* H. Naraghi, Docket No. F&V 981-1, 40 Agric. Dec. 1687, 1688, 1981 WL 32123, at *2 (U.S.D.A. May 5, 1981) (Order Dismissing Interlocutory Appeal) (stating the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) should be amended to expressly preclude the use of depositions for discovery purposes otherwise it is by no means certain that the position that depositions cannot be used for discovery purposes will be sustained).

AWA.

Colleen A. Caroll, Esq. for Complainant.
William J. Cook, Esq. for Respondents.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Rulings by William G. Jenson, Judicial Officer.

RULINGS DENYING: MOTION TO CONFIRM STATUS OF THE PROCEEDING; MOTION TO STRIKE; MOTION FOR FEES, COSTS, AND EXPENSES; MOTION FOR SANCTIONS; AND MOTION FOR A MONETARY ADVANCE

Preliminary Statement

On November 5, 2012, Mitchel Kalmanson filed "Respondent, Mitchel Kalmanson's Response and Motion to Strike Complainant's Request for Extension of Time to File Petition for Appeal & Sanction(s) and Fee(s) in Favor of Kalmanson" [hereinafter Kalmanson's November 5, 2012, Motions] in which Mr. Kalmanson requests that the Judicial Officer: (1) confirm the status of this proceeding; (2) strike the October 10, 2012, Order extending the time for filing an appeal of Chief Administrative Law Judge Peter M. Davenport's [hereinafter the Chief ALJ] Decision and Order as to Mitchell Kalmanson; (3) award Mr. Kalmanson fees, expenses, and costs; (4) sanction (a) the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], the official who instituted this proceeding; (b) Dr. Elizabeth Goldentyer, a witness called by the Administrator in this proceeding; and (c) Colleen Carroll, the attorney who represents the Administrator in this proceeding; and (5) advance money to Mr. Kalmanson which money would be used for Mr. Kalmanson's defense in this proceeding.

On November 16, 2012, the Administrator filed "Complainant's Response to Motions Filed by Respondent Mitchel Kalmanson" in which the Administrator opposes Kalmanson's November 5, 2012, Motions. On January 18, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for rulings on Kalmanson's November 5, 2012, Motions.

Ruling Denying Motion to Confirm Status of the Proceeding

Mr. Kalmanson requests that I confirm that this proceeding has been bifurcated and that he has been severed from the other respondents (Kalmanson's November 5, 2012, Motions at 3 ¶ 1). The record does not contain any order bifurcating the proceeding or any order severing Mr. Kalmanson from the other respondents; therefore, I deny Mr. Kalmanson's request that I confirm that this proceeding has been bifurcated and that Mr. Kalmanson has been severed from the other respondents.

Ruling Denying Motion to Strike

On October 4, 2012, the Administrator requested an extension of time within which to appeal the Chief ALJ's Decision and Order as to Mitchell Kalmanson. The Administrator requested that the time for filing the Administrator's appeal petition be extended to 30 days after service on the Administrator's counsel of an initial decision as to Jennifer Caudill (Complainant's Request for Extension of Time to File Petition for Appeal at 2). On October 10, 2012, I granted the Administrator's request (Order Extending Time for Filing Appeal Petition).

Mr. Kalmanson moves to strike the Order Extending Time for Filing Appeal Petition on the ground that he will be prejudiced by this extension of time because the Administrator will attempt to tie his appeal of the Chief ALJ's Decision and Order as to Mitchell Kalmanson to the initial decision and order that is issued as to Jennifer Caudill (Kalmanson's November 5, 2012, Motions at 3 ¶ 2).

Mr. Kalmanson's claim of prejudice is premature as the Chief ALJ has not yet issued a decision as to Jennifer Caudill and the Administrator has not yet appealed the Chief ALJ's Decision and Order as to Mitchell Kalmanson. Therefore, I deny Mr. Kalmanson's motion to strike the October 10, 2012, Order Extending Time for Filing Appeal Petition.

MISCELLANEOUS ORDERS

Ruling Denying Motion for Fees, Costs, and Expenses

Mr. Kalmanson requests that I award him fees, costs, and expenses incurred in connection with his November 5, 2012, filing (Kalmanson's November 5, 2012, Motions at 4 ¶ 4). This proceeding is a license termination proceeding to determine whether Mr. Kalmanson is unfit to be licensed as an exhibitor under the Animal Welfare Act. The issue of whether Mr. Kalmanson is entitled to fees, costs, and expenses is not before me. Therefore, I deny Mr. Kalmanson's motion for fees, costs, and expenses incurred in connection with Mr. Kalmanson's November 5, 2012, filing.

Ruling Denying Motion for Sanctions

Mr. Kalmanson requests that I assess monetary sanctions against the Administrator, Dr. Goldentyer, and Ms. Carroll for their purported fraud and fabrication of evidence (Kalmanson's November 5, 2012, Motions at 4 ¶ 5). This proceeding is a license termination proceeding to determine whether Mr. Kalmanson is unfit to be licensed as an exhibitor under the Animal Welfare Act. The issue of whether monetary sanctions should be assessed against the Administrator, Dr. Goldentyer, and Ms. Carroll is not before me. Therefore, I deny Mr. Kalmanson's motion for the assessment of monetary sanctions against the Administrator, Dr. Goldentyer, and Ms. Carroll.

Mr. Kalmanson also requests that I disbar Ms. Carroll and preclude Ms. Carroll from prosecuting any United States Department of Agriculture matter based upon Ms. Carroll's purported egregious behavior, abuse of process, abuse of her role as an officer of the court, and attempt to fabricate evidence (Kalmanson's November 5, 2012, Motions at 4 ¶ 7).

As an initial matter, I have no jurisdiction to disbar Ms. Carroll. However, the rules of practice applicable to this proceeding[1] do provide for debarment from United States Department of Agriculture proceedings (7 C.F.R. § 1.141(d)). This proceeding is a license termination

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

proceeding to determine whether Mr. Kalmanson is unfit to be licensed as an exhibitor under the Animal Welfare Act. The issue of whether Ms. Carroll is unfit to act as counsel in any proceeding before the United States Department of Agriculture is not before me. Therefore, I deny Mr. Kalmanson's motion to disbar Ms. Carroll and to preclude Ms. Carroll from prosecuting any United States Department of Agriculture matter.

Ruling Denying Motion for a Monetary Advance

Mr. Kalmanson requests that I provide him with a monetary advance to be used for his defense in this proceeding (Kalmanson's November 5, 2012, Motions at 4 ¶ 6). I deny Mr. Kalmanson's request for a monetary advance as I have no jurisdiction to provide Mr. Kalmanson a monetary advance from United States Department of Agriculture funds. Moreover, I am required to endeavor to avoid even the appearance of bias and a monetary advance to Mr. Kalmanson from my personal funds may result in my appearing to be biased.

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In re: SAFARI'S WILDLIFE SANCTUARY, INC.
Docket No. 13-0077.
Miscellaneous Order.
Filed February 25, 2013.

AWA.

Petitioner, pro se.
Colleen A. Carroll, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING AMENDING CAPTION

By letter dated October 11, 2012, Robert M. Gibbens, Regional Director - Animal Care, Animal and Plant Health Inspection Service, United States Department of Agriculture, denied an application for an Animal Welfare Act licence submitted by Safari's Wildlife Sanctuary, Inc. On November 6, 2012, Karri Murphy, the president of Safari's Wildlife Sanctuary, Inc., filed with the Office of the Hearing Clerk a

request for a hearing to show why Safari's Wildlife Sanctuary, Inc.'s application for an Animal Welfare Act license should not be denied. The proceeding was captioned, as follows:

In re:	)	AWA Docket No. 13-0077
	)	
Karri Murphy,	)	
	)	
Petitioner	)	

The applicable regulations make clear that an applicant whose Animal Welfare Act license application has been denied may request a hearing regarding the denial, as follows:

§ 2.11 Denial of initial license application.

. . . .

(b) An applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied.

9 C.F.R. § 2.11(b). The record establishes that Ms. Murphy is not an applicant whose Animal Welfare Act license application has been denied and that Ms. Murphy did not request a hearing in accordance with 9 C.F.R. § 2.11(b) on her own behalf. Instead, a review of the record establishes that Safari's Wildlife Sanctuary, Inc., is an applicant whose Animal Welfare Act license application has been denied and that Ms. Murphy requested a hearing in accordance with 9 C.F.R. § 2.11(b) on behalf of Safari's Wildlife Sanctuary, Inc. Therefore, I amend the caption of this proceeding to reflect Safari's Wildlife Sanctuary, Inc.'s status as the complainant in this proceeding:

In re:	)	AWA Docket No. 13-0077
	)	
Safari's Wildlife Sanctuary, Inc.,	)	
	)	
Complainant	)	

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In re: JENNIFER CAUDILL, A/K/A JENNIFER WALKER, A/K/A JENNFIER HERRIOTT WALKER, AN INDIVIDUAL; BRENT TAYLOR AND WILLIAM BEDFORD, INDIVIDUALS, D/B/A ALLEN BROTHERS CIRCUS; AND MITCHELL KALMANSON.
Docket No. 10-0416.
Miscellaneous Order.
Filed April 3, 2013.

AWA – Extension of time.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondents.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING MITCHELL KALMANSON'S MOTION TO STRIKE THE ADMINSITRATOR'S SECOND REQUEST FOR EXTENSION OF TIME

On February 27, 2013, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a second request for an extension of time to appeal Chief Administrative Law Judge Peter M. Davenport's September 24, 2012, Decision as to Mitchell Kalmanson.[1] On March 7, 2013, Mr. Kalmanson filed a motion to strike the Administrator's February 27, 2013, motion for an extension of time,[2] and on March 28, 2013, the Administrator filed a response to Mr. Kalmanson's March 7, 2013, motion to strike.[3] On April 2, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Kalmanson's March 7, 2013, motion to strike.

[1] Complainant's Second Req. for Extension of Time to File Pet. for Appeal.
[2] Resp't Mitchel Kalmanson's Resp. to Complainant's Second Req. for Extension of Time to File Pet. for Appeal and Motion to Strike Complainant's Second Req. for Extension of Time to File Pet. for Appeal & Sanction(s) and Fee(s) in Favor of Kalmanson.
[3] Complainant's Resp. to Motion to Strike Filed by Resp't Mitchel Kalmanson.

On March 4, 2013, I denied the Administrator's second request for an extension of time to appeal the September 24, 2012, Decision as to Mitchell Kalmanson;[4] therefore, I conclude Mr. Kalmanson's March 7, 2013, motion to strike is moot and I deny Mr. Kalmanson's March 7, 2013, motion to strike because it is moot.

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In re: JEFFREY W. ASH, AN INDIVIDUAL D/B/A ASHVILLE GAME FARM; AND ASHVILLE GAME FARM, INC., A NEW YORK CORPORATION.
Docket No. 12-0296.
Miscellaneous Order.
Filed May 3, 2013.

AWA – License revocation – Service of complaint.

Colleen A. Carroll, Esq. for Complainant.
Robert M. Winn, Esq. for Respondents.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

REMAND ORDER

Procedural History

On March 16, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. 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

[4] Order Den. Second Req. for Extension of Time to Appeal the Decision as to Mitchell Kalmanson and Rulings Den. Mr. Kalmanson's Motions for Fees, Costs, Expenses, Sanctions, and a Monetary Advance.

Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges: (1) from approximately June 2007 to January 2012, Ashville Game Farm, Inc., operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of 9 C.F.R. § 2.1(a); and (2) during the period July 3, 2007, through January 10, 2012, Jeffrey W. Ash and Ashville Game Farm, Inc., willfully violated the Regulations as specified in paragraphs 5 through 26 of the Complaint.[1] The Administrator seeks an order: (1) requiring Mr. Ash and Ashville Game Farm, Inc., to cease and desist from violating the Animal Welfare Act and the Regulations; (2) assessing civil penalties against Mr. Ash and Ashville Game Farm, Inc.; (3) suspending or revoking Animal Welfare Act license number 21-C-0256, which was allegedly held by Mr. Ash until February 18, 2010; and (4) suspending or revoking Animal Welfare Act license number 21-C-0359, which allegedly has been held by Mr. Ash since approximately April 2010.[2] On April 9, 2012, Mr. Ash and Ashville Game Farm, Inc., by and through their attorney, Robert M. Winn, filed an Answer and Request for Hearing in which they denied the material allegations of the Complaint.

On March 22, 2013, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Decision and Order: (1) dismissing the allegations against Ashville Game Farm, Inc., because the Hearing Clerk failed to serve Ashville Game Farm, Inc., with the Complaint; (2) finding the order of suspension or revocation of Animal Welfare Act license numbers 21-C-0256 and 21-C-0359 sought by the Administrator in the instant proceeding was rendered moot by the order issued in *Ash*, No. 11-0380, 71 Agric. Dec. ___, 2012 WL 10767598 (U.S.D.A. Sept. 14, 2012), terminating Animal Welfare Act license number 21-C-0359; (3) finding the order that Mr. Ash cease and desist violations of the Animal Welfare Act and the Regulations sought by the Administrator in the instant proceeding would appear to be of limited utility because Mr. Ash can no longer legally operate and is no longer in business as both his New York State license and his Animal Welfare Act licenses have been revoked; and (4) finding assessment of a civil penalty

[1] Compl. at 2-8 ¶¶ 4-26.
[2] Compl. at 1 ¶ 1 and at 9.

against Mr. Ash sought by the Administrator in the instant proceeding is not necessary to advance the purposes of the Animal Welfare Act as Mr. Ash has been precluded from exhibiting animals and effectively put out of business.[3]

On March 29, 2013, the Administrator filed Complainant's Petition for Appeal [hereinafter Appeal Petition] requesting that I vacate the Chief ALJ's Decision and Order and remand the case for further proceedings in accordance with the Rules of Practice. On April 24, 2013, Mr. Ash filed Response to Appeal by Complainant requesting that I deny the Administrator's Appeal Petition, and on April 26, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

Based upon a careful consideration of the record, I vacate the Chief ALJ's Decision and Order and remand this proceeding to the Chief ALJ for further proceedings in accordance with the Animal Welfare Act and the Rules of Practice.

The record establishes that the Hearing Clerk served Ashville Game Farm, Inc., with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter no later than April 26, 2012.[4] Therefore, I conclude the Chief ALJ's dismissal of the Complaint as to Ashville Game Farm, Inc., based upon the Hearing Clerk's purported failure to serve Ashville Game Farm, Inc., with the Complaint, is error.

Moreover, the order issued in *Ash*, No. 11-0380, 71 Agric. Dec. ___, 2012 WL 10767598 (U.S.D.A. Sept. 14, 2012), does not render the instant proceeding moot. The order issued in *Ash*, No. 11-0380, 71 Agric. Dec. ___, 2012 WL 10767598 (U.S.D.A. Sept. 14, 2012), terminating Animal Welfare Act license number 21-C-0359, merely invalidates Animal Welfare Act license number 21-C-0359 and does not prevent Mr. Ash from applying for and obtaining another Animal Welfare Act license.

[3] Chief ALJ's Decision and Order at 3.

[4] Mem. to File dated April 26, 2012, signed by L. Eugene Whitfield, Hearing Clerk.

In the instant proceeding, the Administrator seeks suspension or revocation of Mr. Ash's Animal Welfare Act licenses. Unlike termination of an Animal Welfare Act license, suspension of a person's Animal Welfare Act license bars that person from becoming licensed during the period of suspension and revocation of a person's Animal Welfare Act license bars that person from obtaining an Animal Welfare Act license at any time in the future.[5]

For the foregoing reasons, the following Order is issued.

ORDER

1. The Chief ALJ's Decision and Order, filed March 22, 2013, is vacated.

2. This proceeding is remanded to the Chief ALJ for further proceedings in accordance with the Animal Welfare Act and the Rules of Practice.

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In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND, INC., A MARYLAND CORPORATION; AND ROBERT L. CANDY, AN INDIVIDUAL.
Docket No. 11-0222.
Miscellaneous Order.
Filed May 13, 2013.

AWA – Animal welfare – Petition for reconsideration – Preponderance of the evidence – Sanctions.

Colleen A. Carroll, Esq. and Buren W. Kidd, Esq. for Complainant.
Respondents, pro se.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER GRANTING IN PART THE ADMINISTRATOR'S PETITION FOR RECONSIDERATION

On April 4, 2013, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture

[5] 9 C.F.R. §§ 2.10(a)-(b), .11(a)(3).

[hereinafter the Administrator], filed Complainant's Petition for Reconsideration requesting that I reconsider *Tri-State Zoological Park of Western Maryland, Inc.*, No. 11-0222, 72 Agric. Dec. ___, 2013 WL 8214620 (U.S.D.A. Mar. 22, 2013). On May 9, 2013, Tri-State Zoological Park of Western Maryland, Inc. [hereinafter Tri-State], and Robert L. Candy filed a response to the Administrator's petition for reconsideration, and on May 10, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, the Administrator's petition for reconsideration.

Discussion

The Administrator raises five issues in his petition for reconsideration. First, the Administrator contends Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] erroneously failed to find that Tri-State and Mr. Candy violated the Regulations as alleged in paragraphs 4, 5c, 12a, 15, 16b, 16c, 16d, 17a, 17b, 19, 20f, 21b, and 21d of the Complaint (Complainant's Pet. for Recons. at 6-8 ¶ 1).

The ALJ concluded that the Administrator failed to prove by a preponderance of the evidence the violations alleged in paragraphs 4, 5c, 12a (with respect to a cougar enclosure), 15, 16b, 16c, 16d, 17a, 17b, 19, 20f, 21b (with respect to cougar and bobcat enclosures), and 21d of the Complaint. Based upon a careful consideration of the record, I affirm the ALJ's conclusion that the Administrator failed to prove these alleged violations of the Regulations by a preponderance of the evidence.

Second, the Administrator contends the ALJ erroneously found three violations of the Regulations that were not alleged in the Complaint and asserts, while I corrected the ALJ's error, I did not comment on the correction in *Tri-State Zoological Park of Western Maryland, Inc.*, No. 11-0222, 72 Agric. Dec. ___, 2013 WL 8214620 (U.S.D.A. Mar. 22, 2013) (Complainant's Pet. for Recons. at 8 ¶ 2).

I agree with the Administrator's assertion that I did not comment on my failure to find violations that the Administrator did not allege in the Complaint; however, I reject the Administrator's contention that my failure to comment on violations that are not alleged in the Complaint, is error.

Third, the Administrator asserts I erroneously failed to refer to paragraph 16e of the Complaint in the list of alleged violations that the ALJ concluded the Administrator proved by a preponderance of the evidence and I erroneously failed to refer to paragraph 21d of Complaint in the list of alleged violations that the ALJ concluded the Administrator failed to prove by a preponderance of the evidence (Complainant's Pet. for Recons. at 8-9 ¶ B).

I agree with the Administrator that I did not properly reference paragraph 16e of the Complaint and failed to reference paragraph 21d of Complaint in the description of the ALJ's Decision and Order which I set forth in *Tri-State Zoological Park of Western Maryland, Inc.*, No. 11-0222, 72 Agric. Dec. ___, 2013 WL 8214620, at *2-3 (U.S.D.A. Mar. 22, 2013). Therefore, I amend the description of the ALJ's Decision and Order by adding a reference to paragraph 16e of the Complaint in the list of alleged violations of the Regulations that the ALJ concluded the Administrator proved by a preponderance of the evidence and by adding a reference to paragraph 21d of the Complaint in the list of alleged violations that the ALJ concluded the Administrator failed to prove by a preponderance of the evidence, as follows:

On August 1, 2012, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order in which the ALJ: (1) concluded Tri-State and Mr. Candy willfully violated the Regulations as alleged in paragraphs 5a, 5b, 5d, 5e, 6, 7, 8a, 8d, 8e, 9a, 9b, 9c, 11, 12a (with respect to a lion enclosure), 12b, 13, 14, 16a, 16e, 18, 20b, 20c, 20d, 20e, 21b (with respect to a lion enclosure), 22, 23a, 24a, 24b, 25, 26a, and 26c of the Complaint; (2) concluded the Administrator failed to prove by a preponderance of the evidence that Tri-State and Mr. Candy violated the Regulations as alleged in paragraphs 4, 5c, 5f, 8b, 8c, 10, 12a (with respect to a cougar enclosure), 15, 16b, 16c, 16d, 17a, 17b, 19, 20a, 20f, 21a, 21b (with respect to cougar and bobcat enclosures), 21c, 21d, 23b, 23c, and 26b of the Complaint; (3) ordered Tri-State and Mr. Candy to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) suspended Tri-State's Animal Welfare Act license (Animal Welfare Act license number 51-C-0064) for a period of 45 days (ALJ's Decision and Order at 67-72).

Fourth, the Administrator contends I did not address his sanction recommendation (Complainant's Pet. for Recons. at 9-10 ¶ C).

I specifically rejected the Administrator's sanction recommendation, as follows:

The Animal and Plant Health Inspection Service has recommended that Tri-State's Animal Welfare Act license be suspended for a period of 6 months. I find that recommendation overly harsh, considering that many of the conditions on which violations were based have been corrected by Tri-State and Mr. Candy. Considering the remedial nature of the Animal Welfare Act and the fact that no violations resulted in harm to the animals or to the public, I find a 45-day suspension of Tri-State's Animal Welfare Act license and a cease and desist order should be sufficient to deter Tri-State, Mr. Candy, and others from future violations of the Animal Welfare Act and the Regulations.

Tri-State Zoological Park of Western Maryland, Inc., No. 11-0222, 72 Agric. Dec. ___, 2013 WL 8214620, at *78 (U.S.D.A. Mar. 22, 2013). Therefore, I reject the Administrator's contention that I erroneously failed to address his sanction recommendation.

Fifth, the Administrator, citing CX 15a-CX 15d, asserts Tri-State and Mr. Candy continue to violate the Animal Welfare Act and the Regulations. The Administrator contends, based upon this continued non-compliance, suspension of Tri-State's Animal Welfare Act license, until Tri-State and Mr. Candy comply with the Animal Welfare Act and the Regulations, is necessary. (Complainant's Pet. for Recons. at 10 ¶ C).

The evidence cited by the Administrator, CX 15a-CX 15d, relates to violations of the Animal Welfare Act and the Regulations in 2011. The record contains no evidence to support the Administrator's assertion that Tri-State and Mr. Candy continued to violate the Animal Welfare Act and the Regulations on April 4, 2013, the date the Administrator filed Complainant's Petition for Reconsideration.

For the foregoing reasons, the following Order is issued.

ORDER

The Administrator's petition for reconsideration, filed April 4, 2013, is granted in part, as discussed in this Order Granting in Part the Administrator's Petition for Reconsideration, *supra*.

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CIVIL RIGHTS

LAURANCE KRIEGEL AND KRIEGEL, INC. v. USDA, RISK MANAGEMENT AGENCY, FARM SERVICE AGENCY, AND OFFICE OF THE SECRETARY FOR CIVIL RIGHTS.
Docket No. 12-0363.
Decision and Order.
Filed

Civil Rights.

Plaintiffs, pro se.
J. Carlos Alarcon, Esq. for Defendants.
Initial Memorandum Opinion and Order of Dismissal by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DISMISSING APPEAL

Procedural History

On April 11, 2012, Laurance Kriegel and Kriegel, Inc. [hereinafter Plaintiffs], filed a pleading entitled "Civil Rights Violations Equal Rights Opportunity Violation 2009 FCIC EEO Review 2010W000084" with the Office of the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [hereinafter the Hearing Clerk]. The Plaintiffs: (1) assert they were discriminated against on the basis of religion; (2) request that all previous administrative decisions be set aside and the programs be reviewed since 2003; (3) request a correct lawful program benefit payment; (4) request that the yields on Farm 893 be raised to 1,500 pounds per acre for cotton, 200 bushels per acre for corn, 100 bushels per acre for wheat, and 130 bushels per acre for grain sorghum; and (5) request damages of four times the amount of program benefit payments not received.

On January 10, 2013, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a "Memorandum Opinion and Order of Dismissal" in which he dismissed the Plaintiffs' action based upon the ALJ's lack of jurisdiction to hear the action. On February 19, 2013, the Plaintiffs filed a "Notice of Appeal from the Administrative Law Judges Memorandum Opinion and Order of Dismissal" [hereinafter Appeal Petition]. On February 19, 2013, the Office of the Secretary filed an "Agency Response to Notice of Appeal" requesting that the Office of the Administrative Law Judges deny the Plaintiffs' Appeal Petition based upon lack of jurisdiction over this action. On February 21, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Decision

The Secretary of Agriculture has delegated authority to the Judicial Officer to act as final deciding officer in the adjudicatory proceedings identified in 7 C.F.R. § 2.35. The Plaintiffs do not assert that this proceeding is an adjudicatory proceeding identified in 7 C.F.R. § 2.35, and, after a careful review of the record, I find the action instituted by the Plaintiffs is not one of the proceedings identified in 7 C.F.R. § 2.35. Therefore, I have no jurisdiction to hear Plaintiffs' Appeal Petition and the Appeal Petition must be dismissed for lack of jurisdiction.

For the foregoing reasons, the following Order is issued.

ORDER

Plaintiffs' Appeal Petition filed February 19, 2013, is dismissed. This Order shall be effective upon service on the Plaintiffs.

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LAURANCE KRIEGEL AND KRIEGEL, INC. v. USDA, RISK MANAGEMENT AGENCY, FARM SERVICE AGENCY, AND OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS.
Docket No. 12-0363.
Memorandum Opinion and Order of Dismissal.
Filed January 10, 2013.

Civil Rights.

Plaintiffs, pro se.
Carlos Alarcon, Esq. for Defendants.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

MEMORANDUM OPINION AND ORDER OF DISMISSAL

On April 11, 2012, Laurance Kriegel and Kriegel, Inc., the Plaintiffs in this action, acting *pro se,* filed a pleading entitled "Civil Rights Violations, Equal Rights Opportunity Violations, 2009 FCIC EEO Review 2010W000084" with the Hearing Clerk's Office of the Office of Administrative Law Judges. The pleading (a) asserts that the Plaintiffs were discriminated against on the basis of religion;[1] (b) requests that all previous administrative decisions be set aside and the programs be reviewed since 2003; (c) seeks a "correct" lawful program benefit payment; (d) requests that the yields on Farm 893 be raised to 1500 lbs for cotton, 200 bu. for corn, 100 bu. for wheat, 130 bu. for grain sorghum; and (e) asks for damages to be paid at four times the amount of program benefit payments not received.

A copy of the initial and subsequent pleadings were served upon the Assistant Secretary for Civil Rights (ASCR) and were advised to file a Response; however, despite the passage of significant time, no Response has been forthcoming.

The Plaintiffs filed additional submissions which were received by the Hearing Clerk on April 13, 2012 and July 26, 2012.[2] On August 7, 2012, Plaintiffs moved for Partial Summary Judgment specifically noting

[1] Although Kriegel, Inc. has joined as a Plaintiff, it is difficult to comprehend how a corporation would have standing to claim religious discrimination.
[2] Docket entries 3 and 4. Docket entry 4 is entitled Fiduciary Duty Violations.

the failure on the part of the Department to respond to the action. Additional Fiduciary Violations were also submitted by the Plaintiffs and were received by the Hearing Clerk on September 4, 2012.

While I find the Government's failure to respond in this action both inappropriate and disturbing, a Response from the ASCR is not essential as the record is nonetheless sufficient to proceed to disposition without his input.

Provisions similar to those contained in the Federal Rules of Civil Procedure requiring articulation of grounds for the court's jurisdiction,[3] are found in § 1.135(a) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings before the Secretary of Agriculture, 7 C.F.R. § 1.135(a). That section requires a complaint (or other pleading initiating an action) to "state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, **the legal authority and jurisdiction under which the proceeding is instituted**, the allegations of fact and provisions of law which constitute a basis for proceeding, and the nature of the relief sought" (emphasis added).

Part 15d of 7 C.F.R. sets forth the nondiscrimination policy of USDA regarding programs or activities in which agencies of USDA provide benefits directly to persons, and establishes the process for administrative review of complaints of discrimination. 7 C.F.R. § 15d.1. Individuals who believe that they have been subjected to discrimination on the grounds of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or financial status may file a written complaint with the Director of the Office of Civil Rights, USDA, within 180 calendar days from the date of the discrimination. 7 C.F.R. §§ 15d.2, and 4(a) and (b). The Director is authorized to investigate complaints and make final determinations as to the merits of the complaint and to order corrective actions arising from the complaints. 7 C.F.R. § 15d.4(b).

Plaintiffs' allegations arguably fall within the scope of Part 15d, as their allegations of discrimination concern eligibility for benefit programs and intentional discriminatory practices by FSA and RMA

[3] *See* FED. R. CIV. P. 8(a)(1).

employees. The prevailing regulations however do not provide the right to a hearing regarding the ASCR's conclusions, as the rules specifically state that the Office of Civil Rights "will make final determinations as to the merits of complaints. . .and as to the corrective actions required to resolve program complaints." 7 C.F.R. § 15d.4(b). Congress may authorize agencies to promulgate such regulations deemed necessary to implement a statute. U.S. CONST., art. I, § 8, cl. 18. In the instant circumstances, USDA's regulations specifically vest the ASCR and not OALJ with authority to make the final determination regarding complaints of program discrimination.

Some of Petitioners' allegations may be construed to fall within the auspices of USDA's regulations implementing title VI of the Civil Rights Act of 1964 ("the Act"), as the complaints ostensibly involve programs or activities. Part 15 Subpart A prohibits discrimination against a participant in a USDA-assisted program or activity[4]. 7 C.F.R. § 15.3. However, the rules that apply to discrimination in federal assistance programs do not automatically provide Petitioners with the right to a hearing. The regulations authorize the ASCR to determine the manner in which complaints under this Subpart shall be investigated, and whether remedial action is warranted. 7 C.F.R. § 15.6.

Nearly fifty statutes exist which expressly afford an individual or entity a hearing before an Administrative Law Judge under specific proceedings brought before the Secretary of Agriculture. *See* § 1.131 of the Rules of Practice, 7 C.F.R. § 1.131. As no action may be brought unless authorized, jurisdiction cannot be assumed absent express statutory or regulatory grant. *See Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 590 (1941); *Munro v. United States*, 303 U.S. 36, 41 (1938); *Reid v. United States*, 211 U.S. 529, 538 (1909). In this instance, no such statutory jurisdictional basis has been identified which would entitle the Plaintiffs to the hearing they request.

In Title VII cases, Courts have generally applied the shifting burden analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a

[4] "Program" and "activity" are described at 7 C.F.R. § 15.2(k)(1)-(4) and a list of Federal Financial Assistance from USDA is set forth at Appendix A to Subpart A of Part 15.

three-part, burden-shifting test, to determine whether there has been unlawful discrimination in a disparate treatment case. The Plaintiff bears the initial burden of making a *prima facie* showing of discrimination. The establishment of a *prima facie* case creates a presumption of discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802. At the next stage, the Agency may rebut the presumption of discrimination with a legitimate, non-discriminatory reason for its actions. At the third stage, the Complainant must persuade the fact finder that the Agency's explanation was a pretext for unlawful discrimination.

Although the Plaintiffs suggest that Section 741 provides jurisdiction, reliance upon that provision is also misplaced. While the Plaintiffs may well have observed that a number of Section 741 cases have been heard by Administrative Law Judges;[5] in such instances, those cases were "eligible complaints" brought under a limited waiver of the statute of limitations which were then referred to OALJ by the Assistant Secretary of Administration for USDA under 7 C.F.R. § 2.24(a)(1)(F)(ix). No such referral has been made in the instant action and the ASCR retains jurisdiction of this action following any action taken by the National Appeals Division (NAD).[6]

In order to be eligible for consideration under § 741, a complaint must meet the following requirements:

1. Be a non-employment complaint

2. Be filed prior to July 1, 1997

[5] Over 100 discrimination cases were heard by Administrative Law Judges from the U.S. Department of Housing and Urban Development. More recently, USDA Administrative Law Judges have heard such cases. *See: In re: Wilbur Wilkinson, ex rel. Ernest and Mollie Wilkerson*, 67 Agric. Dec. 241 (2008), *reversed by ASCR, In re Wilbur Wilkinson, et al. v. USDA*, 67 Agric. Dec. 1126 (2008); Pet. For Mandamus dismissed *sub nom. Wilkerson v. Vilsack*, 666 F. Supp 2d 118 (D.D.C. 2009); *In re: Robert A. Schwerdfeger*, 67 Agric. Dec. 244 (2008); and *Charles McDonald v. Vilsack*, 70 Agric. Dec. ____ (2010).

[6] In the past, the ASCR has reviewed Administrative Law Judge's decisions in discrimination cases. See, eg. *In re Wilbur Wilkinson, et al. v. USDA*, 67 Agric. Dec. 1126 (2008).

3. Allege discrimination by USDA occurring between January 1, 1981 and December 31, 1996

4. Allege:

   (a) A violation of the Equal Credit Opportunity Act (ECOA) in the administration of:

      i. Farm Ownership Loan,
      ii. Farm Operating Loan,
      iii. Emergency Loan, or
      iv. Rural Housing Loan; or

   (b) Discrimination in the administration of a Commodity Program or Disaster Assistance Program. Eligible status areas of discrimination under § 741 are race, color, religion, national origin, sex or marital status, age.

Summary Judgment is appropriate if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The allegations in this action fulfill the initial threshold § 741 requirement of being a non-employment claim as well as the requirement of seeking relief under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, *et seq.* on the basis of religion, which is a protected basis; however, aside from the conclusory allegation of religious discrimination; there is no evidence which would support a *prima facie* showing of such discrimination. Rather than providing information which might meet the required burden of proof, Plaintiffs suggest that the fact finder check with the Parmer County Sheriff Office and the USDA Office of Civil Rights and Adjudication for information about any employee who may be involved in occult practices or in the practice of witchcraft.

More importantly, examination of the allegations of acts of discrimination fails to reveal any alleged discrimination within the period of time specified by § 741 of being between January 1, 1981 and

December 31, 1996. Accordingly, the allegations cannot be considered under § 741 and will be dismissed.

There being no jurisdictional grant of authority to hear the action, the pleading entitled "Civil Rights Violations, Equal Rights Opportunity Violations, 2009 FCIC EEO Review 2010W000084" will be found to be jurisdictionally deficient and this action will be **DISMISSED**.

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

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EQUAL ACCESS TO JUSTICE ACT

In re: CRAIG PERRY, AN INDIVIDUAL, D/B/A PERRY'S EXOTIC PETTING ZOO; AND PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION.
Docket No. 12-0645.
Miscellaneous Order.
Filed February 1, 2013.

EAJA.

Colleen A. Carroll, Esq., for Complainant.
Larry J. Thorson, Esq. for Respondents.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING GRANTING MOTION TO AMEND CAPTION

On November 5, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested that I amend the caption of this proceeding to make clear that the only applicants for attorney fees and other expenses in this Equal Access to Justice Act proceeding are Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., and that Larry Thorson, counsel for Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., is not eligible for an award of attorney fees and other expenses in the proceeding (Agency's Pet. for Appeal; and Request to Amend Caption at 11-12).

The Equal Access to Justice Act provides that fees and other expenses shall be awarded to a prevailing party in an adversary adjudication, as follows:

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). Similarly, the rules of practice applicable to this Equal Access to Justice Act proceeding[1] provide the applicant must be a party to the adversary adjudication for which the applicant seeks attorney fees and other expenses under the Equal Access to Justice Act, as follows:

§ 1.184 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under EAJA, the applicant must meet one of the following conditions:

(1) The applicant must be a prevailing party to the adversary adjudication for which it seeks an award; or

(2) The applicant must be a party to an adversary adjudication arising from an agency action to enforce the party's compliance with statutory or regulatory requirement in which the demand by the agency was substantially in excess of the decision of the adjudicative officer and the demand is unreasonable when compared with such decision under the facts and circumstances of the case.

7 C.F.R. § 1.184(a).

[1] The rules of practice applicable to this Equal Access to Justice Act proceeding are the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203).

The adversary adjudication for which the applicants in this proceeding seek attorney fees and other expenses under the Equal Access to Justice Act is *Terranova Enterprises, Inc.*, AWA Docket No. 09-0155. A cursory review of that adversary adjudication reveals that Mr. Thorson was not a party, but, rather, served as counsel to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., who were parties in that adversary adjudication. Thus, I find Mr. Thorson is not eligible for an award of attorney fees and other expenses in this Equal Access to Justice Act proceeding, and I grant the Administrator's request to amend the caption of this Equal Access to Justice Act proceeding to reflect the fact that Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., are the only applicants in this proceeding:

In re:	)	EAJA Docket No. 12-0645
	)	
Craig Perry, an individual, d/b/a	)	
Perry's Exotic Petting Zoo; and	)	
Perry's Wilderness Ranch & Zoo,	)	
Inc., an Iowa corporation,	)	
	)	
Applicants	)	

In re: CRAIG PERRY, AN INDIVIDUAL, D/B/A PERRY'S EXOTIC PETTING ZOO; AND PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION.
Docket No. 12-0645.
Miscellaneous Order.
Filed February 22, 2013.

EAJA.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Respondents.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

SECOND REMAND ORDER

Procedural History

On January 17, 2012, Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. [hereinafter Applicants], instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter EAJA Rules of Practice] by filing an Application for Award of Attorney's Fees and Expenses [hereinafter First EAJA Application]. On February 3, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a motion to strike the Applicants' First EAJA Application as premature because it was filed before *Terranova Enterprises, Inc.*, 71 Agric. Dec. ___ (U.S.D.A. July 19, 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), had become final and unappealable (Compl.'s Motion to Strike Appl. Filed by Resp'ts Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc., for Award of Att'y Fees and Expenses).

Terranova Enterprises became final and unappealable on September 17, 2012. On September 27, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] granted the Applicants' First EAJA Application and awarded attorney fees and other expenses in the amount of $16,548.83 to Larry Thorson (Miscellaneous Decision and Order Am. Caption and Granting Att'y Fees and Costs to Larry Thorson, Esq., Counsel for Perry Resp'ts) [hereinafter ALJ's Decision as to the First EAJA Application].

On October 11, 2012, the Applicants filed Renewed Application for Award of Attorney's Fees and Expenses [hereinafter Second EAJA Application].[1] On November 2, 2012, the ALJ dismissed the Second EAJA Application because she had previously granted the First EAJA

[1] The Second EAJA Application is not merely a renewal of the First EAJA Application. The Applicants request an award of $17,648 for attorney fees and $603.83 for other expenses in the First EAJA Application. The Applicants request an award of $18,540 for attorney fees and $603.83 for other expenses in the Second EAJA Application.

Application (Miscellaneous Decision and Order Dismissing Renewed Appl. for Att'y Fees and Costs) [hereinafter ALJ's Decision as to the Second EAJA Application].

On November 5, 2012, the Administrator appealed the ALJ's Decision as to the First EAJA Application (Agency's Pet. for Appeal; and Req. to Amend Caption). On November 30, 2012, the Applicants filed a response to the Administrator's appeal of the ALJ's Decision as to the First EAJA Application (Applicant's Resp. and Resistance to Agency's Pet. for Appeal and Mem. of Points and Authorities) and appealed the ALJ's Decision as to the Second EAJA Application (Applicant's Pet. for Appeal from Miscellaneous Decision and Order Dismissing Renewed Appl. for Att'y Fees and Costs). On December 18, 2012, the Administrator filed a response to the Applicants' appeal of the ALJ's Decision as to the Second EAJA Application (Agency Resp. to Pet. for Appeal).

On December 28, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The Equal Access to Justice Act sets forth the time during which an application for fees and other expenses may be submitted to an agency, as follows:

§ 504. Costs and fees of parties

(a) . . . .

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section . . . .

5 U.S.C. § 504(a)(2). Similarly, the EAJA Rules of Practice provide that an application for fees and expenses may be filed whenever the applicant has prevailed in an adversary adjudication, but no later than 30 days after final disposition of the adversary adjudication, as follows:

§ 1.193 Time for filing application.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after final disposition of the proceeding by the Department.

(b) For purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(a)-(b).

The adversary adjudication for which the Applicants seek attorney fees and other expenses, *Terranova Enterprises, Inc.*, 71 Agric. Dec. ___ (U.S.D.A. July 19, 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), did not become final and unappealable until September 17, 2012. Therefore, the Applicants' First EAJA Application, which was filed on January 17, 2012, 8 months before *Terranova Enterprises* became final and unappealable, was prematurely filed and is dismissed.[2] The Applicants' Second EAJA Application, which was filed on October 11, 2012, 24 days after *Terranova Enterprises* became final and unappealable, was timely filed. Therefore, the ALJ's Decision as to the First EAJA Application in which the ALJ granted the Applicants' premature First EAJA Application is vacated, the ALJ's Decision as to the Second EAJA Application in which the ALJ

[2] *See* Knapp, No. 09-0175, 71 Agric. Dec. ___, 2012 WL 441417 (U.S.D.A. Jan. 31, 2012) (Ruling Granting Administrator's Mot. To Strike Mr. Knapp's Pet. for Att'y Fees and Other Expenses) (stating the Equal Access to Justice Act and the EAJA Rules of Practice provide that a party to an adversary adjudication may only request attorney fees and other expenses within 30 days after final disposition of the adversary adjudication and striking the applicant's Equal Access to Justice Act application filed before final disposition of the adversary adjudication); Asakawa Farms, Nos. F&V 916-7, F&V 916-8, 50 Agric. Dec. 1144, 1164, 1991 WL 333616, at *14 (U.S.D.A. Nov. 27, 1991) (stating a prevailing party may only request attorney fees under the Equal Access to Justice Act within 30 days after final disposition of an adversary adjudication and a request filed prior to final disposition of the adversary adjudication is premature), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993).

dismissed the Applicants' timely filed Second EAJA Application is vacated, and the proceeding is remanded to the ALJ to consider the Applicants' Second EAJA Application.

For the foregoing reasons the following Order is issued.

ORDER

1. The Applicants' First EAJA Application, filed January 17, 2012, is dismissed.

2. The ALJ's Decision as to the First EAJA Application, filed September 27, 2012, is vacated.

3. The ALJ's Decision as to the Second EAJA Application, filed November 2, 2012, is vacated.

4. This proceeding is remanded to the ALJ for further proceedings regarding the Applicants' Second EAJA Application in accordance with the Equal Access to Justice Act and the EAJA Rules of Practice.

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In re: APPLICATION FOR ATTORNEY'S FEES AND COSTS OF LARRY THORSON, ESQ., COUNSEL FOR RESPONDENTS CRAIG PERRY, AN INDIVIDIUAL D/B/A PERRY'S EXOTIC PETTING ZOO; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION.
Docket No. 12-0645.
Miscellaneous Order.
Filed February 28, 2013.

EAJA.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Respondents.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON REMAND GRANTING ATTORNEY FEES AND COSTS TO LARRY THORSON, ESQ., COUNSEL FOR PERRY RESPONDENTS

On February 22, 2013 the Judicial Officer for the Secretary of Agriculture issued a second remand Order vacating my Order awarding fees and my Order dismissing a second petition for fees. Accordingly, upon consideration of the second petition for attorney fees, which the Judicial Officer deemed to be timely filed, I hereby enter the following findings regarding Attorney Thorson's application for fees under the Equal Access to Justice Act.

Discussion

An award of attorney fees for the successful prosecution of claims is governed by the Equal Access to Justice Act ("EAJA") section of the Administrative Procedures Act ("APA"). 5 U.S.C. § 504. A prevailing party must file an application for fees within thirty (30) days after the final disposition of a proceeding. 5 U.S.C. § (a)(2); 7 C.F.R. § 1.193. The date of a final disposition is "the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding…becomes final and unappealable, both within the Department and to the courts." 7 C.F.R. § 1.193(b). In addition, "days" is defined by prevailing regulations as "calendar days", and therefore intervening weekends or holidays are not excluded from the computation of time. 7 C.F.R. § 1.180(a).

An award of attorney's fees against the Government is appropriate if (1) the applicant is a prevailing party; (2) the Government's position was not "substantially justified; and (3) an award would not be rendered unjust due to special circumstances. *See Davidson v. U.S. Dep't of Agric.*, 62 Agric. Dec. 49 (U.S.D.A. 2003), citing *Sims v. Apfel*, 238 F.3d 597, 699-700 (5th Cir. 2000). An applicant for attorney fees may be said to be a prevailing party if the applicant succeeded on any significant issue. *Id.*

In order to be deemed a "prevailing party", a party must "receive at least some relief on the merits of his claim . . ." *Buckhannon B. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598,

604 (2001) (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). No award of fees may be granted if the position of the United States was substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A).

The Judicial Officer substantially upheld my findings that dismissed the majority of the government's allegations against the Perry Respondents. USDA charged the Perry Respondents with liability for violations involving the care and exhibition of animals owned by other licensed exhibitors. I rejected that argument, and so did the Judicial Officer. Accordingly, I find that the position of the government was not substantially justified, and that the Perry Respondents were prevailing parties.

I find no circumstances that would make an award of fees "unjust". I credit the affidavits accompanying the application that attest that Respondent Craig Perry's net worth did not exceed two million dollars at the time of the adjudication and that the business Respondents did not have a net worth in excess of seven million dollars.

Considering all of the evidence, an award of attorneys' fees and costs is warranted. I find that the number of hours charged by Mr. Thorson is reasonable. I note that Mr. Thorson's total charges would likely have been more modest but for the government's unsuccessful attempt to impute the actions of other Respondents to his client. Mr. Thorson's documented expenses of $603.83 appear to be reasonable.

It is generally appropriate to exclude from an award for fees and costs those that can be attributed to services rendered on issues that were unsuccessful. Since my finding that the Perry Respondents had violated the Act by not having a responsible individual on site to allow inspection by APHIS officials was upheld by the Judicial Officer, it is appropriate to calculate and exclude the costs of Mr. Thorson's services for that defense. At the hearing, a witness testified about the circumstances that led to Mr. Perry's absence from his establishment. Mr. Thorson consulted the witness before the hearing, as evidenced by his itemized time records. Mr. Thorson made argument on that issue in his written closing argument. I estimate a total of four hours of Mr. Thorson's services were devoted exclusively to this defense, and therefore adjust his claimed total of 110.30 hours to 106.30 hours.

In addition, I must reduce Mr. Thorson's hourly rate for services. Although Mr. Thorson's rate is objectively reasonable, an award of fees under EAJA is limited to an hourly rate of $150.00, pursuant to 7 C.F.R. § 1.186 (March 3, 2011). Accordingly, a total of $16,548.83 ($150.00 X 106.30 hours + 603.83 costs) is hereby awarded to Larry Thorson, Esq.

ORDER

For the reasons set forth herein, *supra*, the application for attorney fees by Larry Thorson, Esq., counsel for the Perry Respondents is GRANTED.

Attorney fees and costs in the amount of $16,548.83 are hereby awarded to Larry Thorson, Esq.

This Decision and Order shall become effective and final 35 days from its service upon Respondents' counsel unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

The Hearing Clerk shall serve copies of this Miscellaneous Order upon the parties.

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FEDERAL MEAT INSPECTION ACT

DOUBLE H SLAUGHTERING, INC., D/B/A THE BEEF SHOP, ARNOLD N. HUGUENIN, AND GENE HUGUENIN.
Docket No. 12-0629.
Miscellaneous Order.
Filed March 5, 2013.

HORSE PROTECTION ACT

BRICE EDWIN "EDDIE" BAUCOM AND CARL PROCTOR DEAN.
Docket No. 12-0604.
Miscellaneous Order.
Filed April 15, 2013.

MISCELLANEOUS ORDERS

JEFFREY SCOTT WIDNER, A/K/A SCOTTY WIDNER, AND FREIDA RENE WIDNER.
Docket No. 13-0050.
Miscellaneous Order.
Filed May 7, 2013.

DAVID BLAKE SIMS AND MICHAEL CHIAPPARI.
Docket No. 13-0022.
Miscellaneous Order.
Filed May 13, 2013.

GREGG A. HOLLAND.
Docket No. 13-0027.
Miscellaneous Order.
Filed May 21, 2013.

SALARY OFFSET ACT

FRANCES SPILLER.
Docket No. 13-0085.
Miscellaneous Order.
Filed January 25, 2013.

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BARBARA KISSEL v. SCHWARTZ & MAINES & RUBY CO., LPA, et al.
Case No. 09-CI-00165.
Miscellaneous Court Order.
Filed July 19, 2011.

Miscellaneous Order of Literary Significance. [*]

Ruling by Martin J. Sheehan, Kenton Circuit Judge.

[*] Although this case did not involve the U.S. Department of Agriculture ("USDA"), the USDA Office of Administrative Law Judges has decided to publish the case as a matter of interest to demonstrate the value of settlement.

Commonwealth of Kentucky,
Kenton Circuit Court,
First Division.

ORDER

The herein matter having been scheduled for trial by jury commencing July 13, 2011, and numerous pre-trial motions having yet to be decided and remaining under submission;

And the parties having informed the Court that the herein matter has been settled amicably[7] and that there is no need for a Court ruling on the remaining motions and also that there is no need for a trial;

And such news of an amicable settlement having made this Court happier than a tick on a fat dog because it is otherwise busier than a one legged cat in a sand box and, quite frankly, would have rather jumped naked off a twelve foot step ladder into a five gallon bucket of porcupines than have presided over a two week trial of the herein dispute, a trial which, no doubt, would have made the jury more confused than a hungry baby in a topless bar and made the parties and their attorneys madder than mosquitoes in a mannequin factory;

IT IS THEREFORE ORDERED AND ADJUDED by the court as follows:

1. The jury trial scheduled herein for July 13, 2011 is hereby CANCELED.

2. Any and all pending motions will remain under submission pending the filing of an Agreed Judgment, Agreed Entry of Dismissal, or other pleadings consistent with the parties' settlement.

3. The copies of various correspondence submitted for in camera review by the Defendant, SMRS, shall be sealed by the Clerk until further orders of the Court.

[7] The Court uses the word "amicably" loosely.

4. The Clerk shall engage the services of a structural engineer to ascertain if the return of this file to the Clerk's office will exceed the maximum structural load of the floors of said office.

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DEFAULT DECISIONS

Editor's Note: This volume continues 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. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. 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: www.dm.usda.gov/oaljdecisions].

ANIMAL WELFARE ACT

CASH WILEY, AN INDIVIDUAL D/B/A WILEY EXOTICS AND SHARKAROSA EXOTICS; AND ERIC JOHNS DROGOSCH, AN INDIVIDUAL.
Docket No. 12-0586.
Default Decision and Order.
Filed March 28, 2013.

DAVID STILL AND GLORIA STILL.
Docket No. 12-0653.
Default Decision and Order.
Filed May 22, 2013.

JAMES HOLTKAMP.
Docket No. 12-0566.
Default Decision and Order.
Filed May 29, 2013.

CONSENT DECISIONS

ANIMAL WELFARE ACT

Kole Clapsaddle, D/B/A Chief Saunooke Bear Park.
Docket No. 12-0504.
Filed January 15, 2013.

City of Topeka, a municipal agency D/B/A Topeka Zoological Park and Topeka Zoo.
Docket No. 12-0109.
Filed February 1, 2013.

Richard L. Miller, D.V.M.
Docket No. 12-0356.
Filed February 1, 2013.

Hugo Tommy Liebel, A/K/A Hugo T. Liebel, an individual D/B/A Florida State Family Entertainment, LLC, Liebel Brothers Circus, and Liebel Brothers Family Circus.
Docket No. 12-0103.
Filed March 18, 2013.

Alaska Airlines, Inc.
Docket No. 13-0109.
Filed April 16, 2013.

Cindy Bardin, an individual D/B/A Jungle Experience.
Docket No. 12-0445.
Filed April 19, 2013.

Rhonda Louise Gear.
Docket No. 12-0623.
Filed June 13, 2013.

FEDERAL MEAT INSPECTION ACT

Kaczor Ravioli Co. and John Paul Kaczor.
Docket No. 13-0160.
Filed February 7, 2013.

Abner Snack Foods, Inc. and Benjamin D. Abner.
Docket No. 13-0192.
Filed March 13, 2013.

Camacho's Food Processing and Oscar Camacho, Sr.
Docket No. 13-0078.
Filed March 19, 2013.

HORSE PROTECTION ACT

Lloyd Sebastian.
Docket No. 13-0113.
Filed February 7, 2013.

James Thomas Olds.
Docket No. 12-0038.
Filed February 22, 2013.

Jeanette Baucom.
Docket No. 12-0624.
Filed April 4, 2013.

Brice Edwin "Eddie" Baucom.
Docket No. 13-0019.
Filed April 4, 2013.

ORGANIC FOODS PRODUCTION ACT

Lindsey Citrus Management, Inc., D/B/A BEC AG Services, Inc.; Robert Lindsey, Sr.; and Lynn B. Lindsey.
Docket No. 12-0395.
Filed February 21, 2013.

CONSENT DECISIONS

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Docket No. 13-0122.
Filed May 23, 2013.

Guillermo de la Vega Canelos, D/B/A Avance Regional Agroindustrial, S.A. de C.V., and Agrozucar, S.A. de C.V.
Docket No. 13-0038.
Filed June 21, 2013.

AGRICULTURE DECISIONS

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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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PACKERS AND STOCKYARDS ACT

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PACKERS AND STOCKYARDS ACT

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MARK KASMIERSKY.
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PACKERS AND STOCKYARDS ACT

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In re: DOUGLAS BUTLER.
Docket No. D-12-0033.
Decision and Order.
Filed January 16, 2013.

PS-D – Cease and desist order – Civil penalty – Dealer – Sanction policy.

Jonathan D. Gordy, Esq. for Complainant.
Peter F. Langrock, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on October 19, 2011. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Deputy Administrator alleges: (1) Douglas Butler, in six transaction which occurred on May 16, 2009, May 17, 2009, May 28, 2009, July 12, 2009, and July 22, 2009, and in the summer of 2009, failed to pay M.R. Pollock & Sons, Inc., for livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b; and (2) Mr. Butler failed to keep records that fully and correctly disclose transactions between himself and M.R. Pollock & Sons, Inc., in violation of 7 U.S.C. § 221.[1] On November 18, 2011, Mr. Butler filed an Answer in which he admitted the jurisdictional allegations of the Complaint, denied the material allegations of the Complaint, and raised two affirmative defenses.

[1] Compl. ¶¶ II-IV.

PACKERS AND STOCKYARDS ACT

On June 5th and 6th, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a hearing in Burlington, Vermont. Jonathan D. Gordy, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Deputy Administrator. Peter F. Langrock, Langrock Sperry & Wool, LLP, Middlebury, Vermont, represented Mr. Butler. The Deputy Administrator called four witnesses. Mr. Butler testified on his own behalf and called his son, McGregor Butler, as a witness.[2] The Deputy Administrator introduced 12 exhibits identified as CX 1-CX 12. Mr. Butler introduced three exhibits identified as RX 1-RX 3. In addition, on January 15, 2013, I reopened the proceeding and received in evidence a jury verdict form entered in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11.[3]

On August 31, 2012, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order: (1) concluding that in six transactions which occurred on May 16, 2009, May 17, 2009, May 28, 2009, July 12, 2009, and July 22, 2009, and at the end of July 2009, Mr. Butler failed to pay M.R. Pollock & Sons, Inc., the purchase price of $92,750 for 107 cattle, when due, in willful violation of 7 U.S.C. §§ 213(a) and 228b; (2) concluding that Mr. Butler failed to keep adequate records of transactions between M.R. Pollock & Sons, Inc., and himself, in willful violation of 7 U.S.C. § 221; (3) ordering Mr. Butler to cease and desist from violations of the Packers and Stockyards Act; (4) suspending Mr. Butler as a registrant under the Packers and Stockyards Act for a period of 5 years; and (5) assessing Mr. Butler a $66,000 civil penalty.[4]

On September 26, 2012, Mr. Butler filed Respondent's Appeal Petition. On October 25, 2012, the Deputy Administrator filed Response to Respondent's Appeal Petition. On November 19, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

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[2] References to the transcript of the June 5th and 6th, 2012, hearing are indicated as "Tr." with the page reference.

[3] Butler, No. D-12-0033, 72 Agric. Dec. ___, 2013 WL 8208300, at *1 (U.S.D.A. Jan. 15, 2013) (Order Granting in Part Pet. to Reopen).

[4] Chief ALJ's Decision and Order at 8-9.

Based upon a careful review of the record that was before the Chief ALJ, I agree with the Chief ALJ's Decision and Order; however, on January 15, 2013, I reopened the proceeding and received in evidence a jury verdict form entered in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11.[5] The jury verdict form establishes that the jury in *Pollock v. Butler* found the May 17, 2009, May 28, 2009, and July 12, 2009, transactions that are at issue in this proceeding involve Mr. Butler's purchase of cattle from M.R. Pollock & Sons, Inc. The jury verdict raises some doubt regarding the nature of the May 16, 2009, July 22, 2009, and end of July 2009 transactions between M.R. Pollock & Sons, Inc., and Mr. Butler. Therefore, I give Mr. Butler the benefit of the doubt raised by the jury verdict in *Pollock v. Butler* and modify the Chief ALJ's Decision and Order. I conclude Mr. Butler failed to pay M.R. Pollock & Sons, Inc., the purchase price for cattle, when due, in willful violation of 7 U.S.C. §§ 213(a) and 228b, only with respect to those transactions which both the Chief ALJ and the jury in *Pollock v. Butler* found involve Mr. Butler's purchase of cattle from M.R. Pollock & Sons, Inc. I also reduce the Chief ALJ's period of suspension of Mr. Butler as a registrant under the Packers and Stockyards Act and the amount of the civil penalty assessed against Mr. Butler by the Chief ALJ.

DECISION

Discussion

The purpose of the Packers and Stockyards Act, as expressed in connection with a 1958 amendment to the Packers and Stockyards Act is, as follows:

The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of the Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and

[5] *See Butler*, *supra* note 3.

meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.

H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213. Included in the major provisions of the Packers and Stockyards Act are a prohibition against any unfair, unjustly discriminatory, or deceptive practice;[6] record keeping requirements;[7] and requirements for the prompt payment of the full amount of the purchase price for livestock purchased by a dealer.[8]

The record establishes that in late August 2010, Ronald Pollock contacted Packers and Stockyards Program officials and complained that Mr. Butler had not paid for cattle purchases that had been negotiated on Ronald Pollack's behalf by Mike Lane, an individual who worked with Ronald Pollack (Tr. 20-21). Jaime Ziem, a Packers and Stockyards Program resident agent, investigated the matter, collecting copies of sales invoices from Ronald Pollock; taking statements from Mike Lane (CX 3), Ronald Pollock (CX 4), Milton Pollock (CX 5), and Mr. Butler (CX 6); and reviewing Mr. Butler's records (Tr. 21-37). At the June 5th and 6th, 2012, hearing, Ms. Ziem identified the records produced during the course of the investigation, as well as the statements that had been given to her (Tr. 13-50).

The characterization of the transactions which are the subject of this proceeding, as reflected in the testimony adduced during the June 5th and 6th, 2012, hearing, is in sharp conflict. The Deputy Administrator's witnesses testified that the transactions were all cattle sales and Mr. Butler testified that in each case a form of joint venture was established whereby he would care for the cattle and retain any milk that was produced, and, when the cattle were sold to third parties, he would get half of the sale proceeds.

Mike Lane, the individual who negotiated cattle transactions on Ronald Pollock's behalf (Tr. 52-53, 123-24), testified that on May 17, 2009, he delivered 33 cattle from the Lovewell farm to Mr. Butler (Tr. 58-60). Mr. Butler told Mr. Lane that he had a buyer for the cattle

[6] 7 U.S.C. § 213(a).
[7] 7 U.S.C. § 221.
[8] 7 U.S.C. § 228b.

and that payment would be forthcoming once the cattle were resold (Tr. 58-60). Mr. Lane prepared an invoice reflecting a purchase price of $22,300 and gave the invoice to Mr. Butler (Tr. 59-60, 113-14; CX 8).

Another transaction occurred on May 28, 2009, when Mr. Lane delivered six cattle (five bred Holsteins and a bull) to Mr. Butler's farm (Tr. 60-61). The invoice prepared and delivered to Mr. Butler reflected a purchase price of $6,950 (CX 9).

On July 12, 2009, Mr. Lane met Mr. Butler at Santa Claus Village in New Hampshire where eight cattle were unloaded from Mr. Lane's trailer onto Mr. Butler's trailer (Tr. 62-63). Mr. Butler told Mr. Lane he needed some cheaper animals for a neighbor who was going to buy them (Tr. 62-63). An invoice reflecting a purchase price of $5,600 was prepared and given to Mr. Butler (CX 10).

Although the evidence reflected that Mr. Butler sold to third parties a number of the cattle that had been sold to him by M.R. Pollock & Sons, Inc., without remitting to M.R. Pollock & Sons, Inc., any portion of the price paid by third parties (Tr. 68-69, 132-33, 146), Mr. Butler maintained that he and Ronald Pollock had a deal as partners (Tr. 210).[9] Mr. Butler testified that, as part of that deal, Ronald Pollock provided the cattle and Mr. Butler furnished the feed and labor (Tr. 210). Ronald Pollock disputed Mr. Butler's testimony. Throughout his testimony, Ronald Pollock took the position that all of the transactions were sales and he still expects to be paid (Tr. 121-67).

Having read the testimony, I find Mr. Butler's testimony that the May 17, 2009, May 28, 2009, and July 12, 2009, transactions were part of a partnership arrangement or joint venture incredible and unworthy of belief. Not only is there no evidence of a written agreement between the parties, the evidence is clear that many of the cattle purchased were subsequently resold or otherwise disposed of without any remittance to M.R. Pollock & Sons, Inc. (Tr. 69, 133, 146, 155).

[9] Mr. Butler admitted that he had not been able to settle up with Ronald Pollock and Mr. Lane (Tr. 210).

The Deputy Administrator seeks a cease and desist order, a 5-year suspension of Mr. Butler as a registrant under the Packers and Stockyards Act, and a $66,000 civil penalty (Tr. 240).

The Secretary of Agriculture's sanction policy is 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.

S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497, No. 89-03, 1991 WL 290584 (U.S.D.A. Feb. 8, 1991) (Decision as to James Joseph Hickey and Shannon Hansen), *aff'd*, 991 F.2d 803 (9th Cir. 1993). Pursuant to 7 U.S.C. § 213(b), when determining the amount of any civil penalty, the Secretary of Agriculture must also consider "the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." The maximum civil penalty that the Secretary of Agriculture may assess for each of Mr. Butler's violations of 7 U.S.C. § 213(a) is $11,000.[10]

Mr. Butler, in three transactions, purchased 47 cattle for $34,850 from one livestock seller and failed to pay, when due, the full purchase price of the cattle. These three transactions occurred within 2 months of each other; namely, on May 17, 2009, May 28, 2009, and July 12, 2009. As for the size of Mr. Butler's business, in 2009 and 2010, Mr. Butler's livestock purchases totaled almost $1,000,000 (Tr. 241; CX1-CX 2). Peter Jackson, a sanction witness called by the Deputy Administrator,

[10] The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) is $10,000 (7 U.S.C. § 213(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of Agriculture. In 2009, when Mr. Butler violated the Packers and Stockyards Act, the maximum civil penalty for each violation of 7 U.S.C. § 213(a) was $11,000 (7 C.F.R. § 3.91(b)(6)(iv) (2009)).

testified that he could not determine Mr. Butler's ability to continue in business, but, instead, testified that, based upon Mr. Butler's livestock purchases, a civil penalty of "$66,000 is reasonable." (Tr. 241.)

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is "to assure fair trade practices in the livestock marketing . . . industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock." *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1337 (8th Cir. 1971), *cited in Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978). The requirement that a livestock purchaser make timely payment effectively prevents livestock sellers from being forced to finance transactions.[11] Mr. Butler contravened the timely payment requirement and his violations directly thwart one of the primary purposes of the Packers and Stockyards Act.[12] In addition, Mr. Butler failed to keep records which fully and correctly disclose all the transactions involved in his business as a dealer, as required by 7 U.S.C. § 221. Mr. Butler's failure to keep complete and accurate records of all transactions involved in his business as a dealer is egregious because that failure thwarts the Secretary of Agriculture's ability to ensure that the purposes of the Packers and Stockyards Act are accomplished.[13]

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.

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[11] *See* Van Wyk v. Bergland, 570 F.2d 701, 704 (8th Cir. 1978) (stating timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction); Robert Morales Cattle Co., No. D-11-0406, 71 Agric. Dec. ___, slip op. at 19 (U.S.D.A. Mar. 6, 2012) (same); Reece, 70 Agric. Dec. ___, slip op. at 7 (U.S.D.A. Nov. 4, 2011) (Order Den. Pet. to Recons.) (same); Hines & Thurn Feedlot, Inc., No. D-96-0046, 57 Agric. Dec. 1408, 1429, 1998 WL 1806401, at *11 (U.S.D.A. Aug. 24, 1998 (same).

[12] *See* Mahon v. Stowers, 416 U.S. 100, 111 (1974) (per curiam) (dictum) (stating that regulation requiring prompt payment supports policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for their own purposes); Bowman v. U.S. Dep't of Agric., 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

[13] Hyatt v. United States, 276 F.2d 308, 312 (10th Cir. 1960).

However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[14] While Mr. Butler's violations of the Packers and Stockyards Act warrant a severe sanction, I reject the administrative officials' sanction recommendation because it is based upon a conclusion that Mr. Butler committed all of the violations alleged in the Complaint (Tr. 243). As discussed in this Decision and Order, *supra*, I do not find that Mr. Butler committed all of the violations alleged in the Complaint.

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. Based upon the record before me, I find a cease and desist order, a 2-year suspension of Mr. Butler as a registrant under the Packers and Stockyards Act, and assessment of a $25,000 civil penalty against Mr. Butler necessary to accomplish the remedial purposes of the Packers and Stockyards Act.

On the basis of the entire record, the following findings of fact and conclusions of law are entered.

Findings of Fact

1. Mr. Butler is an individual residing in the State of Vermont who operates a dairy and cattle farm and is also a "dealer" as that term is defined in the Packers and Stockyards Act (Tr. 196).[15]

2. Mr. Butler was, at all times material to this proceeding:

   (a) Engaged in the business of buying and selling livestock, in commerce, as a dealer for his own account; and

[14] Syverson, No. D-05-0005, 69 Agric. Dec. 1500, 1508-09, 2010 WL 10078382, at *6-7 (U.S.D.A. Nov. 16, 2010) (Decision on Remand), *aff'd*, 666 F.3d 1137 (8th Cir. 2012).
[15] 7 U.S.C. § 201(d).

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account and as a market agency buying livestock on commission.

3. On May 17, 2009, May 28, 2009, and July 12, 2009, Mr. Butler purchased 47 cattle from M.R. Pollock & Sons, Inc., and failed to pay the purchase price of $34,850 for the cattle, when due (CX 8-CX 10; RX 2).

4. Mr. Butler failed to keep adequate records of the transactions between M.R. Pollock & Sons, Inc., and himself in that Mr. Butler had no invoices or records of cattle purchased.

Conclusions of Law

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

2. Mr. Butler willfully violated 7 U.S.C. §§ 213(a), 221, and 228b.

Mr. Butler's Request for Oral Argument

Mr. Butler's request for oral argument, which the Judicial Officer may grant, refuse, or limit,[16] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Mr. Butler's Appeal Petition

Mr. Butler raises four issues on appeal. First, Mr. Butler contends "[t]his case does not fall into the protection sought by the 1958 Amendment to the Packers & Stockyards Act. No farmer or rancher has been hurt; no unfair, deceptive, unjustly discrimination or monopolistic practices are alleged." (Respondent's Brief at 1 (footnote omitted).)

The Deputy Administrator alleges that Mr. Butler failed to pay M.R. Pollock & Sons, Inc., for livestock in willful violation of 7 U.S.C. §§ 213(a) and 228b.[17] As a matter of law, a dealer's failure to make prompt payment for livestock is an unfair practice:

[16] 7 C.F.R. § 1.145(d).
[17] Compl. ¶¶ II, IV(b).

§ 228b. Prompt payment for purchase of livestock

. . . .

(c) Delay in payment or attempt to delay deemed unfair practice

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 chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

7 U.S.C. § 228b(c).[18] Therefore, I reject Mr. Butler's contention that the Deputy Administrator has not alleged that Mr. Butler engaged in an "unfair practice" as that term is used in the Packers and Stockyards Act.

Moreover, Mr. Butler's contention that the prompt payment requirement of the Packers and Stockyards Act does not apply to his purchases of livestock from M.R. Pollock & Sons, Inc., because M.R. Pollock & Sons, Inc., is a livestock dealer, has no merit. The prompt payment requirement of the Packers and Stockyards Act protects all livestock sellers (7 U.S.C. § 228b(a)).

Second, Mr. Butler asserts the Chief ALJ's finding that the transactions in question between Mr. Butler and M.R. Pollock & Sons, Inc., were bona fide sales as opposed to a series of consignment arrangements between two cattle dealers, is error (Respondent's Appeal Pet. at 1 ¶ 1).

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[18] *See also* Tiemann, No. 6780, 47 Agric. Dec. 1573, 1588, 1998 WL 247015, at *12 (U.S.D.A. Oct. 20, 1998) (stating it is well-settled that failure to pay, in whole or in part, is an unfair and deceptive practice); Farmers & Ranchers Livestock Auction, Inc., No. 6438, 44 Agric. Dec. 1973, 1986-87, 1985 WL 63831, at *9-10 (U.S.D.A. Sept. 13, 1985) (stating the failure to pay, when due, the full purchase price of livestock constitutes an unfair and deceptive practice); Sklar, 31 Agric. Dec. 872, 882 (U.S.D.A. 1972) (stating it has long been held that a person subject to the Packers and Stockyards Act who fails to make payment fully and promptly for livestock engages in or uses an unfair and deceptive practice).

The Chief ALJ's finding that the May 17, 2009, May 28, 2009, and July 12, 2009, transactions at issue in this proceeding were sales is supported by the record. The invoices prepared by Mike Lane (CX 8-CX 10), the handwritten summary of the transactions (RX 2), and Mike Lane and Ronald Pollock's testimony all support the Chief ALJ's finding that Mr. Butler purchased cattle from M.R. Pollock & Sons, Inc. Moreover, the Chief ALJ's finding with respect to the May 17, 2009, May 28, 2009, and July 12, 2009, transactions is confirmed by the jury's findings in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11. Therefore, I reject Mr. Butler's assignment of error to the Chief ALJ's finding that the May 17, 2009, May 28, 2009, and July 12, 2009, transactions at issue in this proceeding were sales.

Third, Mr. Butler contends the Chief ALJ's failure to find when and if a bill or demand to pay was ever given or made to Mr. Butler, is error (Resp't's Appeal Pet. at 1 ¶ 2).

As an initial matter, the evidence establishes that M.R. Pollock & Sons, Inc., did demand payment from Mr. Butler (CX 7-CX 11; RX 2; Tr. 57-69, 81-82, 94, 97, 113-14, 151-52). Moreover, demand for payment is not relevant in this administrative disciplinary proceeding. The Packers and Stockyards Act requires that each dealer pay for livestock purchases, as follows:

> **§ 228b. Prompt payment for purchase of livestock**
>
> **(a) Full amount of purchase price required; methods of payment**
>
> Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price[.]

7 U.S.C. § 228b(a). A failure to pay for livestock purchases, when due, is an unfair practice under the Packers and Stockyards Act[19] even if the livestock sellers have acquiesced to late payments.[20] Therefore, even if I were to find that M.R. Pollock & Sons, Inc., never demanded payment from Mr. Butler (which I do not so find), that finding would not change the disposition of this proceeding.

Fourth, Mr. Butler contends the Chief ALJ erroneously based the mitigation of the assessed civil penalty on Mr. Butler's payment of a debt, the amount of which has not been determined in this proceeding (Resp't's Appeal Pet. at 1-2 ¶ 3).

The issue of the Chief ALJ's mitigation of the civil penalty is moot as I reduce the civil penalty assessed by the Chief ALJ from $66,000 to $25,000 and eliminate the Chief ALJ's mitigation provision.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Butler, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

   a. Failing to pay the full purchase price of livestock, when due, as required by 7 U.S.C. § 228b; and

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[19] 7 U.S.C. §§ 213(a) and 228b(c).

[20] *See* Bott, No. D-11-0438, 71 Agric. Dec. ___, slip op. at 8-9 (U.S.D.A. May 8, 2012) (holding a failure to pay for livestock purchases, when due, is an unfair practice in violation of the Packers and Stockyards Act, even if the livestock sellers fail to complain about late payments); San Jose Valley Veal, Inc., 34 Agric. Dec. 966, 981-82 (U.S.D.A. 1975) (holding the existence of a course of dealing allowing for delayed payment did not excuse the packing company from its delay of payments beyond the close of the next business day and holding the delayed payments to be in violation of the Packers and Stockyards Act); Sebastopol Meat Co., Inc., 28 Agric. Dec. 435, 441 (U.S.D.A. 1969) (rejecting the argument that no violation of the Packers and Stockyards Act occurred as the livestock sellers acquiesced in the late payments by continuing to do business with the livestock purchaser), *aff'd*, 440 F.2d 983 (9th Cir. 1971).

b. Failing to keep records that fully and correctly disclose all transactions in Mr. Butler's business, as required by 7 U.S.C. § 221.

Paragraph 1 of this Order shall become effective on the day after service of this Decision and Order on Mr. Butler.

2. Mr. Butler is suspended as a registrant under the Packers and Stockyards Act for a period of 2 years.

Paragraph 2 of this Order shall become effective on the 60th day after service of this Decision and Order on Mr. Butler.

3. Mr. Butler is assessed a $25,000 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:

USDA-GIPSA
P.O. Box 790335
St. Louis, MO 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Decision and Order on Mr. Butler. Mr. Butler shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0033.

Right to Judicial Review

Mr. Butler 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. Butler must seek judicial review within 60 days after entry of the Order in this Decision and Order.[21] The date of entry of the Order in this Decision and Order is January 16, 2013.

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[21] 28 U.S.C. § 2344.

In re: RONALD RYAN SHEPARD, JR., A/K/A RONALD RYAN SHEPPARD, JR., A/K/A RON SHEPARD; JEREMY E. PIERCE; AND BROOKFIELD CATTLE CO., LLC.
Docket No. D-12-0357.
Decision and Order.
Filed January 29, 2013.

PS-D – Answer – Rules of Practice – Service.

Krishna G. Ramaraju, Esq. for Complainant.
Timothy Capps, Esq. for Respondents.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO RONALD RYAN SHEPARD, JR.

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 12, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges: (1) Ronald Ryan Shepard, Jr., on or about the dates and in the transactions set forth in Appendix A attached to the Complaint, issued checks in payment for livestock purchases which were returned unpaid by the bank upon which the checks were drawn because Mr. Shepard did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented, in willful violation

of 7 U.S.C. §§ 213(a) and 228b; (2) Mr. Shepard, on or about the dates and in the transactions set forth in Appendices A and B attached to the Complaint, purchased livestock and failed to pay, when due, the full purchase price of the livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b; (3) Mr. Shepard, on or about the dates and in the transactions set forth in Appendix C attached to the Complaint, purchased livestock and failed to pay for the livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b; and (4) Mr. Shepard, beginning in April 2011, and on the dates and in the transactions set forth in Appendices A, B, and C attached to the Complaint and in other transactions on other dates, engaged in the business of a dealer buying and selling livestock in commerce without maintaining a bond or bond equivalent, in willful violation of 7 U.S.C. §§ 204 and 213(a) and 9 C.F.R. §§ 201.29-.30.[1]

The Hearing Clerk served Mr. Shepard with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on April 24, 2012.[2] Mr. Shepard failed to file an answer to the Complaint, and on July 6, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Show Cause Order in which the Chief ALJ provided the parties 15 days within which to show cause why a default decision should not be entered.

On July 17, 2012, the Deputy Administrator filed "Complainant's Response to Show Cause Order; Motion for Adoption of Proposed Default Decision and Order" [hereinafter Motion for Default Decision] and a "Proposed Default Decision and Order" [hereinafter Proposed Default Decision]. Mr. Shepard did not file a response to the Chief ALJ's Show Cause Order.

On August 13, 2012, the Hearing Clerk served Mr. Shepard with the Deputy Administrator's Motion for Default Decision and Proposed Default Decision and the Hearing Clerk's service letter.[3] Mr. Shepard failed to file objections to the Deputy Administrator's Motion for Default Decision and Proposed Default Decision.

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[1] Compl. at 4-6, ¶¶ III-V.

[2] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7836 1287.

[3] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7836 1706.

On October 25, 2012, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order as to Ronald Ryan Shepard, Jr. [hereinafter the Chief ALJ's Decision]: (1) concluding Mr. Shepard willfully violated 7 U.S.C. §§ 204, 213(a), and 228b and 9 C.F.R. §§ 201.29-.30, as alleged in the Complaint; (2) ordering Mr. Shepard to cease and desist from violations of the Packers and Stockyards Act and the Regulations; (3) prohibiting Mr. Shepard from being registered and engaging in activities for which registration is required under the Packers and Stockyards Act for a period of 10 years; and (4) assessing Mr. Shepard a $582,000 civil penalty.[4]

On December 26, 2012, Mr. Shepard appealed the Chief ALJ's Decision to the Judicial Officer. On January 15, 2013, the Deputy Administrator filed Complainant's Response to Respondent's Appeal of Default Decision and Order. On January 18, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Decision as the final agency decision.

DECISION

Statement of the Case

Mr. Shepard failed to file a timely answer to the Complaint. Pursuant to 7 C.F.R. § 1.136(c), the failure to file a timely answer is deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order as to Ronald Ryan Shepard, Jr., pursuant to 7 C.F.R. § 1.139.

Findings of Fact

[4] Chief ALJ's Decision at 4-5.

1. Ronald Ryan Shepard, Jr., also known as Ronald Ryan Sheppard, Jr., and also known as Ron Shephard, is an individual whose home address is in the State of Illinois.

2. At all times material to this proceeding, Mr. Shepard was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce;

(b) Not registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce;

(c) Responsible for the direction, management, and control of buying activities for Brookfield Cattle Co., LLC; and

(d) The alter ego of Brookfield Cattle Co., LLC.

3. On or about April 11, 2011, the Midwestern Regional Office, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration [hereinafter GIPSA], sent Mr. Shepard a Notice of Default by certified mail, which Mr. Shepard received on or about April 13, 2011. The Notice of Default stated GIPSA had information indicating that Mr. Shepard was engaged in the business of buying and selling livestock in commerce. The Notice of Default informed Mr. Shepard that buying and selling livestock in commerce without being properly registered with GIPSA and without filing a bond or bond equivalent are violations of the Packers and Stockyards Act and the Regulations. The Notice of Default warned Mr. Shepard that failure to comply with registration and bonding requirements would result in appropriate corrective action. Relevant provisions, forms, and instructions for registration and bonding were enclosed with the Notice of Default.

4. During the period August 4, 2011, through March 15, 2012, Mr. Shepard issued checks in payment for livestock purchases which were returned unpaid by the bank upon which the checks were drawn because Mr. Shepard did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

5. During the period August 4, 2011, through March 15, 2012, Mr. Shepard purchased livestock and failed to pay, when due, the full purchase price of the livestock.

6. During the period August 6, 2011, through March 22, 2012, Mr. Shepard purchased livestock and failed to pay for the livestock.

7. During the period April 2011 through March 2012, Mr. Shepard engaged in the business of a dealer buying and selling livestock in commerce without maintaining a bond or bond equivalent.

Conclusions of Law

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

2. Mr. Shepard was the alter ego of Brookfield Cattle Co., LLC.

3. Mr. Shepard willfully violated 7 U.S.C. §§ 204, 213(a), and 228b and 9 C.F.R. §§ 201.29-.30.

Mr. Shepard's Appeal Petition

Mr. Shepard raises two issues in his Appeal of Default Decision and Order as to Ronald Ryan Shepard [hereinafter Appeal Petition]. First, Mr. Shepard contends he was not served with the Complaint on April 24, 2012. Mr. Shepard asserts he was in Mexico at the time the United States Postal Service delivered the Complaint (Appeal Pet. at 1, 7.)

The Rules of Practice provide that a complaint shall be deemed to be received by a party on the date of delivery of the complaint by certified mail to the last known residence of that party.[5] The record establishes

[5] 7 C.F.R. § 1.147(c)(1). *See also* Harrington, No. 07-0036, 66 Agric. Dec. 1061, 1067-68, 2007 WL 7278316, at *5-6 (U.S.D.A. Aug. 28, 2007) (stating proper service of a complaint is made under the Rules of Practice when the complaint is delivered by certified mail to the respondent's last known address and someone signs for the complaint); Ow Duk Kwon, No. 95-41, 55 Agric. Dec. 78, 93, 1996 WL 367078, at *10 (U.S.D.A. June 6, 1996) (Order Den. Late Appeal) (stating proper service by certified mail is made when a respondent is served with a certified mailing at his or her last known address and someone signs for the document); Kaplinsky, No. 191, 47 Agric. Dec. 613,

that the Hearing Clerk, by certified mail, sent the Complaint to Mr. Shepard's last known residence, where, on April 24, 2012, "Janet Shepard" signed United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7836 1287, which contained the Complaint. Thus, I reject Mr. Shepard's contention that he was not served with the Complaint on April 24, 2012. Instead, I find Mr. Shepard was served with the Complaint on April 24, 2012, and Mr. Shepard's answer was required by 7 C.F.R. § 1.136(a) to be filed with the Hearing Clerk no later than 20 days after service of the Complaint, namely, May 14, 2012.

Moreover, I find the Hearing Clerk's manner of service meets the requirement of due process of law. To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[6]

As held in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344, 1346 (Ohio Ct. App. 1982):

It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized

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619, 1998 WL 242933, at *5 (U.S.D.A. Mar. 30, 1988) (stating the excuse, occasionally given in an attempt to justify the failure to file a timely answer, that the person who signed the certified receipt card failed to give the complaint to the respondent in time to file a timely answer has been and will be routinely rejected); Bejarano, No. 292, 46 Agric. Dec. 925, 929, 1987 WL 1153350, at *4 (U.S.D.A. June 22, 1987) (stating a default order is proper where the respondent's sister signed the certified receipt card as to a complaint and forgot to give it to the respondent when she saw him 2 weeks later).

[6] *See also* Trimble v. U.S. Dep't of Agric., 87 F. App'x 456, 458 (6th Cir. 2003) (holding that sending a complaint to the respondent's last known business address by certified mail is a constitutionally adequate method of notice and lack of actual receipt of the certified mailing does not negate the constitutional adequacy of the attempt to accomplish actual notice); Weigner v. City of New York, 852 F.2d 646, 649-51 (2d Cir. 1988) (stating the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated), *cert. denied*, 488 U.S. 1005 (1989); NLRB v. Clark, 468 F.2d 459, 463-65 (5th Cir. 1972) (stating due process does not require receipt of actual notice in every case).

to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co*. (1950), 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

I find the Hearing Clerk's mailing the Complaint by certified mail to Mr. Shepard's last known residence (where it was received by "Janet Shepard") was reasonably calculated, under all the circumstances, to apprise Mr. Shepard of the pendency of this proceeding and to afford Mr. Shepard an opportunity to respond to the Complaint.

Second, Mr. Shepard contends the findings of fact in the Chief ALJ's Decision are "materially false" and, because the Chief ALJ's conclusions of law and the Chief ALJ's order are based upon these "materially false" facts, the Chief ALJ's conclusions of law and the Chief ALJ's order, are error (Appeal Pet. at 1-7).

The Rules of Practice provide that an answer to a complaint must be filed within 20 days after service of the complaint.[7] Failure to file an answer within the time provided in 7 C.F.R. § 1.136(a) is deemed an admission of the allegations in the complaint. The record establishes that the Hearing Clerk served Mr. Shepard with the Complaint on April 24, 2012.[8] Mr. Shepard's answer to the Complaint was required to be filed with the Hearing Clerk no later than May 14, 2012. Mr. Shepard's first and only filing was his Appeal Petition filed with the Hearing Clerk on December 26, 2012, 7 months 12 days after his answer was required to be filed; thus, Mr. Shepard is deemed to have admitted the allegations in the Complaint. The Chief ALJ adopted as findings of fact the allegations in the Complaint which Mr. Shepard is deemed to have admitted.[9] Mr. Shepard's contention that the Chief ALJ's findings of fact are "materially false" is tantamount to a denial of the allegations in the Complaint. Mr. Shepard's denial of the allegations in the Complaint, which he has been deemed to have admitted, comes far too late to be considered. Therefore, I reject Mr. Shepard's contention that the Chief

[7] 7 C.F.R. § 1.136(a).
[8] *See supra* note 2.
[9] Chief ALJ's Decision at 2.

ALJ's findings of fact are "materially false" and the Chief ALJ's conclusions of law and the Chief ALJ's order, are error.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Shepard, his agents and employees, directly or indirectly through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

(a) Failing to pay and failing to pay, when due, the full purchase price of livestock, as required by 7 U.S.C. § 228b;

(b) Failing to have and maintain sufficient funds on deposit and available in the account upon which checks are drawn to pay the checks when presented;

(c) Buying and selling livestock in commerce without maintaining an adequate bond or bond equivalent; and

(d) Engaging in any business subject to the Packers and Stockyards Act without being registered with the Packers and Stockyards Program.

Paragraph 1 of this Order shall become effective upon service of this Decision and Order as to Ronald Ryan Shepard, Jr., on Mr. Shepard.

2. Mr. Shepard is prohibited from being registered and engaging in any activity for which registration is required under the Packers and Stockyards Act for a period of 10 years. After the expiration of this 10-year time period, Mr. Shepard may submit an application for registration to the Packers and Stockyards Program along with the required bond or bond equivalent.

Paragraph 2 of this Order shall become effective upon service of this Decision and Order as to Ronald Ryan Shepard, Jr., on Mr. Shepard.

3. Mr. Shepard is assessed a $582,000 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:

USDA-GIPSA
P.O. Box 790335
St. Louis, MO 63197-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Decision and Order as to Ronald Ryan Shepard, Jr., on Mr. Shepard. Mr. Shepard shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0357.

Right to Judicial Review

Mr. Shepard has the right to seek judicial review of the Order in this Decision and Order as to Ronald Ryan Shepard, Jr., in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Shepard must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Ronald Ryan Shepard, Jr.[10] The date of entry of the Order in this Decision and Order as to Ronald Ryan Shepard, Jr., is January 29, 2013.

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[10] 28 U.S.C. § 2344.

In re: BRUCE MEDLEY, D/B/A B & M LIVESTOCK.
Docket No. 12-0169.
Decision and Order.
Filed January 30, 2013.

PS-D.

Lisa Jabaily, Esq. for Complainant.
Paul E. Jennings, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

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 Bruce Medley, doing business as B & M Livestock, (hereinafter "Respondent") by filing a disciplinary complaint on January 10, 2012.

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 $59,610.47[1] as of January 10, 2012, in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

On February 7, 2012, Respondent filed an Answer that admitted the jurisdictional allegations of the Complaint. (*See* Answer ¶¶ I, II). The

[1] The Complainant later updated the alleged unpaid amount to $43,555.66 owed to Peoples Stockyards.

Answer also admitted the purchase of livestock from Peoples Stockyards and Browing's Livestock Market. (Answer ¶ II(a)). However, the Answer did not admit or deny that Respondent continued to owe money for such livestock purchases. The Answer also denied that the failure to make payments to the sellers of the livestock was a willful violation of the Act.

During a conference call with Chief Administrative Law Judge Davenport on October 17, 2012, the parties agreed that there were no material facts in dispute, no hearing was necessary, and that the only issues to be resolved are whether Respondent acted willfully and what sanction would be appropriate. On October 25, 2012, the parties filed a Joint Stipulation Regarding Admissible Documentary Evidence, Facts, and Legal Conclusions. In the Joint Stipulation, the parties stipulated that Complainant's exhibits CX-1 through CX-21, which were pre-marked and exchanged, are admissible evidence and may be submitted into the record of this proceeding by Complainant. The parties also stipulated to the jurisdictional facts in the complaint and to the factual conclusions that Respondent failed to pay, when due, for all twelve livestock purchases stated in the complaint that there remains an unpaid balance to Peoples Stockyards for such livestock purchases. The parties further stipulated to the legal conclusions that Respondent violated sections 312(a) and 409 of the act for failing to pay and failing to pay, when due, the full purchase price for the livestock transactions listed in the Complaint. The parties agreed that the only remaining issues to be addressed are whether Respondent acted willfully and what sanction is appropriate under the Act. On November 15, 2012, Complainant filed a Motion for Decision Without a Hearing, setting forth its position concerning the unresolved issues.

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). *See*, *e.g.*, *Hines*, No. D-96-0046, 57 Agric Dec. 1408, 1428-29, 1998 WL 1806401 (U.S.D.A. Aug. 24, 1998); *Syracuse Sales Co.*, No. 92-52, 52 Agric. Dec. 1511, 1524, 1993 WL 459887 (U.S.D.A. Nov. 5, 1993); *Palmer*, No. D-89-28, No. D-89-74, 50 Agric. Dec. 1762, 1772-73, 1991 WL 337381 (U.S.D.A. July 18, 1991); *Hennessey*, No. 6717, No. 6851, 48 Agric. Dec. 320, 324, 1989 WL 265397 (U.S.D.A. Feb. 15, 1989); *Garver*, No. 6449, 45 Agric. Dec.

1090, 1094-95, 1986 WL 74928 (U.S.D.A. June 19, 1986), *aff'd sub nom. Garver v. United States*, 846 F.2d 1029 (6th Cir. 1988), *cert. denied* 488 U.S. 820 (1988). Respondent has admitted that all twelve of the livestock purchases listed in the Complaint were not paid when due in accordance with the requirements of the Act, and Respondent has not raised a valid defense to the late payments. Respondent has also admitted that there remains an unpaid balance to Peoples Stockyards for such livestock purchases. Because Respondent has admitted that he has failed to pay, when due, for the livestock he purchased from Peoples Stockyards and Browning's Livestock Market, 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." *Marysville Enterprises, Inc.*, No. D-98-0027, 59 Agric. Dec. 299, 309 & n.5, 2000 WL 123137 (U.S.D.A. Jan. 4, 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." *Hines*, 57 Agric. Dec. at 1414. Here, willfulness is established because of Respondent's decades of experience in the business, his violations of express provisions of the Act, the six-month span during which Respondent committed the violations, the number of Respondent's violative transactions, and the prior notice Respondent received in writing of the violations with opportunity to demonstrate or achieve compliance. *Palmer*, 50 Agric. Dec. at 1780.

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." *Wooton*, No. D-97-0021, 58 Agric. Dec. 944, 980, 1999 WL 1327401 (U.S.D.A. Oct. 29, 1999); *see also Garver*, 846 F.2d at 1100. In this case, Respondent has failed to pay, when due, two different markets on multiple occasions, and he still owes Peoples Stockyards $43,555.66, 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); *Powell*, No. 6248, 46 Agric. Dec. 49, 53, 1985 WL 62902 (U.S.D.A. Mar. 7, 1985).

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. *See, e.g.*, *Marysville Enters.*, 59 Agric. Dec. at 321 & n.14, 323; *Hines*, 57 Agric. Dec. at 1429 & n.9.[2] The requested civil penalty is warranted, based on the circumstances this case, *Middlebury Packing Co.*, No. D-92-46, 53 Agric. Dec. 639, 652, 1993 WL 724712 (U.S.D.A. Dec. 16, 1993). *Id.* 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. *Holmes*, No. D-02-0022, 62 Agric. Dec. 254, 259, 2003 WL 23341034 (U.S.D.A. May 5, 2003).

Findings of Fact

1. Respondent Bruce Medley, doing business as B & M Livestock, is an individual whose mailing address is in the State of Tennessee.

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 livestock dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

[2] 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." S.S. Farms Linn Cnty., Inc., No. 89-03, 50 Agric. Dec. 476, 497, 1991 WL 290584 (U.S.D.A. Feb. 8, 1991); *see also* Marysville Enterprises, Inc., No. D-98-0027, 59 Agric. Dec. 299, 318, 2000 WL 123137 (U.S.D.A. Jan. 4, 2000).

3. The amounts alleged not paid when due by Complainant and admitted not paid when due by Respondent are as follows:

Purchase Date	Seller	Purchase Amount
9/7/10	Peoples Stockyards	$6,689.30
10/12/10	Peoples Stockyards	$3,831.20
10/19/10	Peoples Stockyards	$4,759.60
10/26/10	Peoples Stockyards	$5,021.45
11/9/10	Peoples Stockyards	$3,784.60
11/16/10	Peoples Stockyards	$4,768.01
11/23/10	Peoples Stockyards	$8,042.90
11/30/10	Peoples Stockyards	$6,658.60
1/19/11	Browning's Livestock Market	$12,016.45
2/2/11	Browning's Livestock Market	$7,813.62
2/16/11	Browning's Livestock Market	$9,569.06
3/2/11	Browning's Livestock Market	$3,474.63

4. Respondent continues to owe $43,555.66 to Peoples Stockyards for the purchases listed above.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

1. Respondent Bruce Medley, doing business as B & M livestock, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from cease and desist from failing to pay and failing to pay, when due, the full amount of the purchase price for livestock in accordance with the Act or in accordance with the terms of a credit agreement that complies

with the requirements of the Act.

2. Respondent is hereby suspended as a registrant under the Act for a period of five (5) years and continuing thereafter until he demonstrates to the Packers and Stockyards Program that he is in full compliance with the Act and the regulations promulgated thereunder, including payment of the civil penalty.

3. Respondent is assessed a civil penalty of $20,000.00. The civil penalty will become due and payable 365 days after the effective date of this Order. At Respondent's option, the civil penalty amount will be offset dollar-for-dollar by restitution payments to Peoples Stockyards. The civil penalty payment and proof of any offsetting restitution payments to Peoples Stockyards should be sent to S. Brett Offutt, Director of Policy and Litigation Division, Packers and Stockyards Program at the following address: 1400 Independence Ave., Washington, DC 20250-3646. Proof of restitution payments may include, but would not be limited to, a statement from the bank holding an account created by Respondent to pay Peoples Stockyards or an affidavit or declaration from Respondent or an administrator tasked with managing payments to Peoples Stockyards. Such statement, affidavit, or declaration should reflect the seller's name (Peoples Stockyards), the payment check numbers, the check amounts, and the dates that each check was cashed. The Packers and Stockyards Program shall have the option of verifying any restitution payments claimed by Respondent and Respondent shall provide and execute any necessary document or release to allow such verification.

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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In re: TYSON FARMS, INC.
Docket No. 12-0123.
Decision and Order.
Filed March 8, 2013.

PS-D.

Jonathan D. Gordy, Esq.; Krishna G. Ramaraju, Esq.; Brian P. Sylvester, Esq.; and Ciarra A. Toomey, Esq. for Complainant.
L. Bryan Burns, Esq.; Robert W. George, Esq.; Gordon D. Todd, Esq.; and Brian P. Morrissey, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

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, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA) initiated this proceeding against Respondent Tyson Farms, Inc. (Tyson) by filing a disciplinary complaint on December 20, 2012.

Copies of the Complaint and the Rules of Practices were served upon Respondent by certified mail. The Complaint alleged that Respondent violated section 410 of the Act and committed an unfair and deceptive practice under section 202 of the Act. (7 U.S.C. §§ 192, 228b-1).

After seeking and being granted an extension of time in which to answer, Respondent filed its Answer, accompanied by a Petition for Determination of the Secretary's Jurisdiction and Statutory Authority and Memorandum in Support on January 27, 2012.[1] On February 16, 2012, Counsel for Complainant filed a Motion for Hearing and Response to Respondent's Petition. Tyson responded and Complainant replied to the

[1] Docket Entries 3, 4, & 5.

Response.[2] On March 28, 2012, I directed that the parties exchange exhibits, exhibit and witness lists with counsel, to file copies of the exhibit and witness lists with the Hearing Clerk, and to consult with each other and file a status report concerning the expected duration of any hearing on the issues, the preferred location for trial, and a list of mutually agreeable dates.[3] Complainant's exchange was filed with the Hearing Clerk on April 26, 2012. Tyson sought and was granted an extension and filed their exchange on June 25, 2012. Prior to completing its exchange, on May 24, 2012, Tyson filed Motions to Divide the Hearing to Separate Jurisdictional Issues from Merits of the Secretary's Complaint and to Expedite Response to Motion.[4] The Complainant objected to the Motion to Expedite a Response and an Order was entered on June 1, 2012 denying the Motion to Expedite Response and deferring ruling on the Motion to Divide.[5] Complainant responded to the Motion to Divide on June 7, 2012 and on June 19, 2012, in view of the procedural provisions contained in our Rules of Practice precluding Motions to Dismiss even on jurisdictional grounds, I certified the Motion to Divide to the Departmental Judicial Officer.[6]

On July 6, 2012, the Judicial Officer filed his Ruling on [the] Certified Question, concluding that the Secretary of Agriculture has statutory jurisdiction to proceed. Following the filing of a joint status report setting forth mutually agreeable dates, the matter was set for oral hearing to commence on December 10, 2012 in the United States Department of Agriculture Court Room, in Washington, DC.[7] Pre-hearing briefs were filed by both parties.[8]

During the course of the two day hearing, the Complainant called five witnesses and Respondent called two.[9] Twenty-four Government exhibits

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2 Docket Entries 7, 9, & 13.
3 Docket Entry 15.
4 Docket Entry 22.
5 Docket Entries 24 & 25.
6 Section 1.143(b)(1), 7 C.F.R. §1.143(b)(1). Oral argument before the Judicial Officer was requested by the Respondent; however, Complainant objected and the request was denied. Docket Entries 28, 31 & 32.
7 Docket Entries 35 & 36.
8 Docket Entries 48 & 50.
9 References to the transcript of the proceeding will be indicated as Tr. and the page number. An original and corrected transcript appear in the record; however, all references will be to the corrected transcript.

and nine Tyson exhibits were admitted.[10] Following the hearing, post-hearing briefs were submitted by both sides and the matter is now ripe for disposition.

The Positions of the Parties

In this action, the Complainant alleges that Tyson failed to pay its contract poultry growers in full, in violation of sections 410 and 202 of the Act, because Tyson failed to account for the performance differences of the two different breeds of chickens (Cobb 500 chickens and Cobb 700 chickens) in the payments made to the growers under the tournament settlement system used to compensate the growers. Implicit in the Complainant's position is an assumption that growers with whom the Cobb 700 birds were placed were underpaid because "as a general rule Cobb 500 birds grew faster than the Cobb 700 breed."

Tyson takes the position that no violation of section 410 of the Act occurred as its contract poultry growers were paid in full and on time in accordance with their contract which expressly contemplates the practices at issue in the case. Tyson, moreover, asserts that its practice of including different breeds of birds in the same settlement groups at issue in this action is identical to practices which the Department sought to have prohibited through a proposed rulemaking. That proposed rule was never implemented as Congress prohibited the expenditure of any federal funds to implement that policy. Tyson accordingly argues that the Department was stripped of any authority to prosecute this matter and its actions in doing so in this action are *ultra vires*. *See* Consolidated and Further Continuing Appropriations Act of 2012 (Agric. App. Act) § 721, P.L. 112-55, 125 Stat. 552, 583 (Nov. 18, 2011).

Background

This disciplinary proceeding involves a single poultry production complex (the complex) operated by Tyson located in Oglethorpe, Georgia. Tyson processes broiler chickens at the complex for sale to various consumers, with the breast filets going almost exclusively to Wendy's, and other parts going to Applebee's, Hooters and other

[10] Complainant's exhibits are indicated by number with the prefix CX; Respondent's are indicated by the number and the prefix RX.

restaurant chains. Tr. 260-262. Although the processing, sale, and distribution of its chicken products is handled by Tyson, it contracts with independent growers to raise newborn chicks which Tyson purchases from a variety of entities to be raised by the growers for the 44-48 day maturing process until the birds reach the weight desired by Tyson's customers. Tr. 72-73, 84, 293-294.

As is common throughout the poultry industry, growers are compensated for their services through tournament style competitions. Tr. 39, 70. The tournament competition rules and compensation formula are spelled out in detail in uniform broiler production contracts which Tyson enters into with each contract grower. CX-3, 4; RX-1, 2. Productivity is measured under the contract by calculating Tyson's cost of placing the flock with the grower (chick cost, feed, medicines, and other expenses) and dividing that cost by the weight of the mature birds delivered to Tyson. Tyson then ranks the productivity of each flock to the average of all flocks settled that week, with flocks outperforming the average receiving an upward adjustment and those that underperform receiving a downward adjustment, capped by a minimum amount. *Id.*

Although the Complainant asserts that Tyson's contracts have an implied term requiring payment other than what was received by the growers, examination of the terms of Tyson's contracts forces a conclusion to the contrary. The contracts expressly authorize Tyson to provide their growers with any "type" of bird breed.[11] CX-3, 4; RX-1, 2. Under the contract's terms, Tyson determined the amount, type, frequency, and time of delivery to and pick-up from the Producer of chickens. RX-1, 2. An express disclaimer of the "quality, merchantability, or fitness for purpose of" provides further amplification of Tyson's discretion over breed type and any related characteristics. RX-1, 2. Moreover, the contracts contain explicit language expressly rejecting any unwritten terms. *Id.* Tyson provides a significant amount of information concerning best practices for raising the chicks; however, it is up to the individual grower as to whether that information and guidance is followed. Tr. 299-302.

Prior to the fall of 2009, Tyson had placed a single breed, the Cobb

[11] "Company will determine the amount, *type*, frequency, and time of delivery to and pick-up from Producer of chickens…." Para 2A of cited exhibits (emphasis added).

500, with its growers to be processed at the Georgia complex. Tr. 262-263. Believing it would be advantageous for the company to shift to a breed of bird with a larger percentage of breast meat that might better meet the needs of its primary consumer, in September of that year Tyson decided to shift its production from the Cobb 500 to the Cobb 700. Tr. 263-264. Due to the requirements to both acquire sufficient numbers of Cobb 700 chicks to make the conversion and to avoid the costs inherent with the immediate retirement of the Cobb 500 hens prior to their normal replacement date, it was not economically or operationally feasible to make the conversion at one time, but rather the transition was phased in over time as the flocks of Cobb 500 hens producing the chicks were retired. Tr. 271-272, 418, 419. As the Cobb 500 hens were retired and replaced with Cobb 700 hens, the percentage of Cobb 700 chicks placed with the growers increased. Tr. 109, 271, 287- 288, 429, 432, 456-457. Throughout the period that both breeds were placed with growers, Tyson placed birds of both breeds with growers on a random basis. Id. Chicks were hatched together in the same machines on the same days and hatched at the same rate. Tr. 281. As the new chicks were born, Tyson delivered them to growers in the order they were hatched. Accordingly, no grower stood any greater chance of receiving one breed over the other, and over time, it appears that all growers received flocks of both. Tr. 432-433.

Tyson's expectations of the Cobb 700 breed were not achieved as mid way through the transition process, Tyson reluctantly concluded that the Cobb 700 breast filets—although as large as expected—were not as desirable as anticipated. Tr. 264. The complex's largest customer's specifications required a smaller breast than was being produced with the Cobb 700 breed, requiring Tyson to substantially trim the filets, resulting in both waste and additional costs not previously encountered. Tr. 264. The transition process was accordingly reversed with a shift back to the Cobb 500 breed and the target weight of delivered birds was reduced from 6 pounds down to 5.5 pounds. Tr. 186, 294. In all, although the Department's investigation focused on a 46 week period, the complex processed a varied mix of Cobb 500 and 700 birds for a total of 74 weeks, from September 19, 2009 to February 26, 2011.[12] Tr. 186.

[12] The Complainant's investigation examined 542 flocks produced by 115 growers during the 46 week period of September 26, 2009 through August 7, 2010. Compl. ¶ II(b).

Acting upon a hot line complaint from an anonymous grower in June of 2010 who felt that he was being financially harmed by the introduction of the Cobb 700 into flocks that he was raising, an investigation into Tyson's operation at the Georgia complex was initiated and assigned to Resident Agent Nilsa Ramos Taylor. Tr. 101-105. As part of the investigation Taylor and Meghan Flynn, a student economist with the Eastern Regional Office visited Tyson's Oglethorpe complex from August 16 through August 19, 2010 to review records, interview employees and gather information. Tr. 107-111, 131-142. Upon completion of the on-site portion of the investigation, Ms. Flynn took copies of most of the documents they had collected back to the Atlanta Office for her analysis. Tr. 111.

Evaluation of the Evidence

The underpinning of the Department's case against Tyson is based upon assumptions and conclusions drawn from the analysis of the data collected by Taylor and Flynn. According to her testimony, Flynn analyzed each transaction, reviewing electronic flock data and written information on the flocks, reconciling any discrepancies with the help of Tyson's bookkeeper and written data that was available. Tr. 134-142, 145-150. Organizing the data into files (CX-14-15, 18-19), her preliminary analysis indicated to her that the Cobb 700 breed had an average weight that was approximately a half a pound less than the Cobb 500 breed at the time of settlement.[13] Tr. 158.

Flynn's analysis was then reviewed by Gary McBryde, Ph.D., the Director of the Business and Economic Analysis Division in the Packers and Stockyards Program. Tr. 194, 200-222. Using Flynn's data, McBryde applied ordinary averages and graphic analysis of the pure Cobb 500 and Cobb 700 flocks and concluded that the difference in relative performance of the two breeds resulted in a difference of less than $.04 per bird in the payments made to growers. McBryde then went on to calculate a projected deficiency of $834,707 in the payment to

[13] Data from Cobb-Vantress in their Broiler Management Guides however reflects that the two breeds have virtually identical weights at harvest age. CX-21, 27, Tr. 88, 179. On cross examination, Ms. Flynn admitted that had she been aware of that information, it might have caused her to question her conclusions. Tr. 180.

growers raising the Cobb 700 chicks. CX-16. Using regression analysis, McBryde concluded that growers with a high concentration of Cobb 700 birds should have been compensated an additional $1,540 per flock had Tyson placed a uniform ratio of Cobb 500 and 700 with the growers or, alternatively all Cobb 700 birds in each grower's settlement group flocks. Tr. 200-222.

Contrary to operational feasibility and the actual facts of Tyson's transition, McBryde's analysis assumed that Tyson could have and should have placed an equal ratio of 59% Cobb 700 birds and 41% Cobb 500 birds with each grower each week. Tr. 214. Due to the fact that his model was based upon a flock-by-flock basis rather than a bird-by-bird basis, the impact of the smaller flocks was exaggerated thereby further skewing the data. Tr. 471-475. Most significantly however, the analysis completely failed to account for grower skill and effectiveness, a factor obviously indicated by the fact that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups. Tr. 459-471, CX-15.

As the evidence indicates the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups, the selection of the breed mix was expressly addressed in the contracts entered into between Tyson and its growers, and Tyson paid its contract poultry growers in full and on time in accordance with the terms of those contracts,[14] I will conclude that the Cobb 700 were not disadvantaged and there is no violation of section 410. It accordingly will be unnecessary for me to address whether the Department's prosecution of this action was *ultra vires*.

Statement of Facts

1. Respondent Tyson Farms, Inc., a subsidiary of Tyson Foods, Inc., is a corporation organized under the laws of and registered in the state of North Carolina, with offices in Raleigh, North Carolina.

[14] Complainant's position that Tyson's contracts contain an "implied term" that would require Tyson to pay growers something other than what they received is clearly contrary to the terms of the contract.

2. Tyson operates a poultry production complex (the complex) located in Oglethorpe, Georgia where Tyson processes broiler chickens for sale to various consumers, primarily Wendy's, with other parts going to Applebee's, Hooters and other restaurant chains. Tr. 260-262.

3. Although the processing, sale, and distribution of the chicken products is handled by Tyson, it contracts with independent growers to raise newborn chicks which Tyson purchases from a variety of entities to be raised by the growers for the 44-48 day maturing process until the birds reach the weight desired by Tyson's customers. Tr. 72-73, 84, 293-294.

4. The contract growers are compensated for their services through tournament style competitions. Tr. 39, 70. The competition rules and compensation formula are spelled out in detail in uniform broiler production contracts which Tyson enters into with each contract grower. CX-3, 4; RX-1, 2.

5. Ranking in the tournament system is determined by the grower's productivity under the contract relative to that of other growers in the same settlement by calculating Tyson's cost of placing the flock with the grower (chick cost, feed, medicines, and other expenses) and dividing that cost by the weight of the mature birds delivered to Tyson. Tyson then ranks the productivity of each flock in relation to the average of all flocks settled that week, with flocks outperforming the average receiving an upward adjustment and those that underperform receiving a downward adjustment, capped by a minimum amount. *Id.*

6. Prior to the fall of 2009, Tyson had placed a single breed of chicken, the Cobb 500, with its growers to be processed at the Georgia complex. Tr. 262-263.

7. In September of 2009 Tyson decided to shift its production from the Cobb 500 to the Cobb 700. Tr. 263-264. In making the change, Tyson believed that the Cobb 700 bird's characteristics of having a larger breast would better suit its primary customer.

8. While both breeds possess low feed conversion rates, i.e. produces more meat using less feed than other broiler breeds, the Cobb 500 and

Cobb 700 birds have different characteristics, with industry literature suggesting that the Cobb 700 grows more slowly than the Cobb 500, but produces a larger percentage of breast meat.[15] Tr. 45, 263, CX-21, 27.

9. For both economic and operational reasons the transition from the Cobb 500 bird to the Cobb 700 bird was phased in over time due to the requirements to both acquire sufficient numbers of Cobb 700 chicks to make the conversion and to avoid disruption of the retirement cycle and the additional costs inherent with retirement of the Cobb 500 hens prior to their normal replacement date. Tr. 271-272, 418, 419.

10. As each cycle of Cobb 500 hens was replaced with Cobb 700 hens, the percentage of Cobb 700 chicks placed with the growers increased and Tyson's Georgia complex processed a varied mix of Cobb 500 and 700 birds for a total of 74 weeks, from September 19, 2009 to February 26, 2011. Tr. 186.

11. Throughout the transition period during which mixed flocks of birds were processed, placement of the chicks was done on a random basis and no pattern of placement discrimination against any individual grower was established.

12. Although industry literature concerning the characteristics of the two breeds of bird indicates that the Cobb 700 bird typically grows more slowly than the Cobb 500, the evidence of record clearly establishes that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups. CX-15, Complainant's Post Hr'g Br. at 9.

13. Complainant's statistical analysis was flawed in that it failed to account for differences in grower expertise.

[15] The evidence of record however suggests that the most significant drivers of flock performance are growing practices and the skill and expertise of individual growers. Tr. 75-77. Management of such factors such as temperature, feed, ventilation and litter management are critical to the success of the operation. Tr. 76-83, 206, 299-310. Failure to manage flocks in accordance with the best practices can and will lead to less successful flocks regardless of the breed. *Id.*

PACKERS AND STOCKYARDS ACT

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Tyson, at all times pertinent to the Complaint was:

   a. Engaged in the business of obtaining live poultry by purchase or under poultry growing arrangements for the purpose of slaughter,

   b. Shipping processed poultry products in commerce, and

   c. Operating as a live poultry dealer subject to the provisions of the Act.

3. Tyson's contracts with its growers authorize Tyson to provide their growers with any "type" of bird breed.[16] CX-3, 4; RX-1, 2. Its terms allow Tyson to determine the amount, type, frequency, and time of delivery to and pick-up from the Producer of chickens. CX-3,4; RX-1, 2. An express disclaimer of the "quality, merchantability, or fitness for purpose of" provides further amplification of Tyson's discretion over breed type and any related characteristics. CX-3, 4: RX-1, 2.

4. Tyson's contracts contain an integration clause with explicit language expressly rejecting imposition of any implied or unwritten terms. *Id.*

5. The evidence of record establishes that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups; accordingly, placement of the Cobb 700 birds did not result in those growers being disadvantaged.

6. Tyson's contract poultry growers were paid in full and on time in accordance with their contract.

7. No violation of section 410 of the Act by Tyson was established.

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[16] "Company will determine the amount, *type*, frequency, and time of delivery to and pick-up from Producer of chickens…." Para 2A of cited exhibits (emphasis added).

ORDER

1. No violation of the Act having been established, the relief sought in the Complaint is DENIED.

2. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties.

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In re: PERKINS LIVESTOCK, LLC AND ROBB TAYLOR.
Docket No. 13-0134.
Decision and Order.
Filed April 24, 2013.

PS-D.

Leah C. Battaglioli, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

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*.) (Act) and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. §§ 1.130-1.151) (Rules of Practice). Complainant, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), initiated this proceeding against Perkins Livestock, LLC (Respondent Perkins)

and Robb Taylor (jointly, Respondents) by filing a disciplinary complaint on December 26, 2012.

Copies of the Complaint and the Rules of Practice were served upon Respondents by certified mail. The Complaint alleged that Respondent Perkins, under the direction, management, and control of Respondent Robb Taylor, failed to properly maintain its custodial account for shippers' proceeds (custodial account) by operating with custodial account shortages in violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations issued under the Act (9 C.F.R. § 201.42) (Regulations).

By letter dated January 29, 2013, the Hearing Clerk's Office informed Respondents that as of the date of the letter, an Answer had not been filed within the time allotted by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). On February 1, 2013, Amanda Hickman, Office Manager for Respondent Perkins, sent a multi-page fax to the Hearing Clerk's Office. The fax included an Answer to the Complaint entitled Response to P&S Docket No. 13-0134. In the Answer, Respondents admitted the allegations in the Complaint.

In response to Respondents' Answer, Complainant moved for a Decision Without Hearing By Reason of Admissions pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). After considering the record, Complainant's motion will be granted and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Discussion

Respondents filed an Answer admitting the allegations in the Complaint including admission that as of May 26, 2011 and October 6, 2011, Respondents had custodial account shortages in the amounts of $97,999.98 and $74,913.03, respectively. In their defense, Respondents claim that (1) the shortages were caused by the failure of others to pay Respondents and (2) no one went unpaid during the time periods of the shortages.

While the fact that the custodial account shortages may have been largely attributable to the failure of a buyer to pay for livestock purchases, that fact does not excuse Respondents' violation of the Act and the Regulations. "When the market agency chooses to sell to a type of buyer who might pose a greater than normal risk of not paying, it is the market agency who must bear the risk of non-payment." *Cobb*, No. 6587, 48 Agric. Dec. 234, 255, 1989 WL 265394 (U.S.D.A. Feb. 13, 1989), *aff'd sub nom. Cobb v. Yeutter* 889 F.2d 724 (6th Cir. 1989). If the proceeds receivable from livestock sales cannot be collected and deposited into a market's custodial account by the close of the seventh day after the sale, then the market must make up the shortfall and reimburse the custodial account. *See* 9 C.F.R. § 201.42(c). By failing to timely reimburse the custodial account, Respondents impermissibly shifted the risk of non-payment to the livestock consignors. *See Cobb*, 889 F.2d at 730. The fact that a buyer may have failed to pay the market for purchases is no defense to this regulatory requirement. *See Simmons*, No. D-05-0018, 66 Agric. Dec. 731, 2007 WL 5971724 (U.S.D.A. Apr. 18, 2007) (rejecting similar buyer nonpayment defense).

Similarly, Respondents' second defense, "[t]he argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required." *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir. 1957), *cert. denied*, 354 U.S. 939 (1957); *see also Wooton*, No. D-97-0021, 58 Agric. Dec. 944, 975, 1999 WL 1327401 (U.S.D.A. Oct. 29, 1999); *George Cnty. Stockyard, Inc.*, 45 Agric. Dec. 2342, 2349 (U.S.D.A. 1986). "The fact that Respondents caused no harm to consignors by issuing insufficient funds checks does not relieve Respondents from the responsibility for maintaining and operating their custodial account in strict conformity with the Act and the Regulations." *Wooton*, 58 Agric. Dec. at 976.

Respondents' operation subject to the Act with custodial account shortages is a willful violation of the Act and the Regulations. 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." *Marysville Enterprises., Inc.*, No. 98-0027, 59 Agric. Dec. 299, 309 &

n.5, 2000 WL 123137 (U.S.D.A. Jan. 4, 2000). Operating with custodial account shortages, is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42). *Porter*, No. 6538, 47 Agric. Dec. 656, 672, 1988 WL 247536 (U.S.D.A. Apr. 28, 1988); *Blackfoot Livestock Comm'n Co*., No. 6107, 45 Agric. Dec. 590, 604, 1986 WL 74695 (U.S.D.A. Mar. 7, 1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *Powell*, No. 5876, 41 Agric. Dec. 1354, 1361, 1982 WL 37335 (U.S.D.A. July 7, 1982). Respondents admitted that they operated with custodial account shortages on more than one occasion. This admission alone is sufficient to demonstrate that Respondents' violation of the Act and the Regulations was willful.

The Fourth and Tenth Circuits require a more stringent standard of willfulness requiring that there must be "such gross neglect of a known duty as to be the equivalent" of an intentional misdeed. *Capital Produce Co. v. U.S. Dep't of Agric.*, 930 F.2d 1077, 1079-80 (4th Cir. 1991); *Capitol Packing Co. v. U.S. Dep't of Agric.*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even applying the more stringent standard, Respondents' violation of the Act and the Regulations was willful. Respondents admitted that they received a Notice of Violation (NOV) letter from GIPSA in November 2008 notifying them that Respondent Perkins had custodial account shortages in June, August, and September of 2008 and that operating with a custodial account shortage was a violation of sections 307 and 312(a) and the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42). Respondents also admitted that they entered a Civil Penalty Stipulation Agreement with GIPSA in September 2010 to resolve, among other things, additional findings of custodial account shortages in November 2009 and January 2010. Based on these admissions, Respondents were familiar with the requirements of the Act and Regulations regarding custodial accounts and had a history of operating with custodial account shortages and therefore, Respondents knew or should have known that they were operating with custodial account shortages in May and October of 2011.

It is the policy of the Department to impose sanctions for violations of any of the regulatory programs administered by the Department that are serious and repeated in order to serve as an effective deterrent not only to the named respondents, but to future violators as well. *See Wooton*, 58 Agric. Dec. at 980. The Act authorizes the Secretary to suspend a

registrant under the Act "for a reasonable specified period." *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 805 (8th Cir. 2010) (quoting 7 U.S.C. § 204). In determining the length of the suspension, it is the Secretary's policy to: "(1) to examine the nature of the violations in relation to the remedial purposes of the PSA, (2) to consider all relevant circumstances, and (3) to give appropriate weight to the recommendations of the administrators of the PSA." *Id.* at 804 (citing *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991), *aff'd sub nom., Hickey v. U.S. Dep't of Agric.*, 991 F.2d 803 (9th Cir. 1993)). Applying these guidelines to the circumstances of this case, Complainant's requested sanction of a cease and desist Order, an Order suspending Respondent Perkins for a period of 21 days and thereafter until Respondents demonstrate that the custodial account shortages have been corrected, and an Order prohibiting Respondent Taylor from registering under the Act during the time period of Respondent Perkins' suspension is warranted and entirely appropriate.

Although it was Respondents' "duty and obligation under the Act and regulations to see to it that there were funds in the custodial account at all times in an amount sufficient to cover all outstanding obligations," Respondents operated with custodial account shortages on May 26, 2011 and again on October 6, 2011 in violation of these requirements. *Lufkin Livestock Exch., Inc.*, 27 Agric. Dec. 596, 606-07 (U.S.D.A. 1968). Operating with custodial account shortages is a serious violation of the Act and the Regulations. *See, e.g.*, *Cobb*, No. 6587, 48 Agric. Dec. 234, 255, 1989 WL 265394 (U.S.D.A. Feb. 13, 1989), *aff'd*, 889 F.2d 724 (6th Cir. 1989)); *George Cnty. Stockyard*, 45 Agric. Dec. at 2351. Suspending Respondent Perkins is consistent with the sanction that has been imposed in past cases involving custodial account violations. *See, e.g., Barnesville Livestock, LLC*, No. 10-0058, 71 Agric. Dec. 518, 527, 2012 WL 441415, at *6 (U.S.D.A. Jan. 22, 2012); *Fowler Livestock Auction, Inc.*, No. D-92-21, 52 Agric. Dec. 558, 571-72, 1993 WL 124886 (U.S.D.A. Feb. 26, 1993); *Finger Lakes Livestock Exch., Inc.*, No. 6793, 48 Agric. Dec. 390, 407-08, 1989 WL 265405 (U.S.D.A. Mar. 14, 1989); *Powell*, 41 Agric. Dec. at 1366; *Miller*, 33 Agric. Dec. 53, 87-88 (U.S.D.A. 1974).

Respondents claim in their Answer that it would be a hardship to shut their business down or to even fine them. Nevertheless, the Judicial Officer has

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.

Syverson, *supra* at *2 (decision on reconsideration) (footnote omitted), *aff'd,* 666 F.3d 1137 (8th Cir. 2012); *see also Barnesville*, 2012 WL 441415, *6; *Marysville,* 59 Agric. Dec. at 328. Accordingly, this argument is rejected.

An Order prohibiting Respondent Taylor from registering under the Act during the time period of Respondent Perkins' suspension is also warranted and appropriate. The Secretary "routinely issues orders applicable to the owners and officers of corporations when the evidence shows that these individuals were responsible for the corporate violations, including orders prohibiting the registration . . . of the responsible owners and officers." *Chatham Area Auction Coop., Inc.*, No. D-88-88, 49 Agric. Dec. 1043, 1076, 1990 WL 321403 (U.S.D.A. Sept. 28, 1990). In addition, "the corporate device cannot immunize individual [respondents] from liability" once they are found to be market agencies, dealers, or packers under the Act. *See Fillippo v. S. Bonaccurso & Sons, Inc*., 466 F. Supp. 1008, 1018 (E.D. Pa. 1978). By Respondent Taylor's own admissions, he is liable for the violations of the Act and the Regulations because he was both the sole member and owner exerting direction, management, and control over Respondent Perkins and a market agency under the Act.

A s the Respondents' Answer presents no *bona fide* dispute as to the material facts, no hearing is required in this matter and the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Perkins Livestock, LLC is a limited liability company organized under the laws of the State of Oklahoma with a mailing address in Perkins, Oklahoma.

2. Respondent Perkins, under the direction, management, and control of Respondent Robb Taylor, is, and at all times material to the Complaint was:

(a) Engaged in the business of conducting and operating Perkins Livestock, LLC, a stockyard posted under and subject to the provisions of the Act;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Robb Taylor is an individual with a mailing address in Perkins, Oklahoma.

4. Respondent Robb Taylor is, and at all times material to the Complaint was:

(a) Sole member of Respondent Perkins;

(b) Owner of 100% of Respondent Perkins;

(c) Registered agent of Respondent Perkins; and

(d) Responsible for the direction, management, and control of Respondent Perkins.

5. Respondent Robb Taylor is, and at all times material to the Complaint was:

(a) Engaged in the business of conducting and operating Perkins Livestock, LLC, a stockyard posted under and subject to the provisions of the Act; and

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis.

6. On November 25, 2008, GIPSA sent an NOV via certified mail to Respondents. The NOV was delivered on or about December 1, 2008. The NOV informed Respondents, among other things, that Respondent Perkins had a shortage in its custodial account of $7,195.17, $34,350.06, and $37,736.86 as of June 30, 2008, August 29, 2008, and September 30, 2008, respectively. The NOV informed Respondents that the shortage was caused, in part, by Respondents' failure to timely reimburse the custodial account for unpaid buyer payments. The NOV further informed Respondents that operating with a custodial account shortage is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42), and that failure to comply with the Act and the Regulations would result in appropriate disciplinary action.

7. On September 13, 2010, Respondents and GIPSA entered into a Civil Penalty Stipulation Agreement (Agreement) to resolve, among other things, additional findings that Respondents had custodial account shortages on November 15, 2009, and January 24, 2010. The Agreement assessed a civil penalty against Respondents in the amount of $5,750.00.

8. Respondent Perkins, under the direction, management, and control of Respondent Robb Taylor, failed to properly use and maintain its custodial account.

9. As of May 26, 2011, Respondents had outstanding checks drawn on their custodial account in the amount of $186,785.27, and had, to offset such checks, a bank balance in the custodial account of $33,352.79, current proceeds receivable in the amount of $55,432.50, with no deposits in transit, resulting in a custodial account shortage in the amount of $97,999.98.

10. As of October 6, 2011, Respondents had outstanding checks drawn on their custodial account in the amount of $444,858.44, and had, to offset such checks, a bank balance in the custodial account of $63,491.89, deposits in transit of $36,703.12, and current proceeds receivable in the amount of $269,750.40, resulting in a custodial account shortage in the amount of $74,913.03.

11. The custodial account shortages were due, in part, to Respondents' failure to reimburse the custodial account for Respondent Robb Taylor's purchases and for livestock purchases made by buyers who had not paid by the close of the seventh business day following the sale of the livestock.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondents willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42) by operating with custodial account shortages.

ORDER

1. Respondent Perkins and Respondent Robb Taylor, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from failing to properly maintain their custodial account in strict conformity with the Act and section 201.42 of the Regulations (9 C.F.R. § 201.42).

2. Respondent Perkins is suspended as a registrant under the Act for a period of twenty-one (21) days and thereafter until Respondents demonstrate to the satisfaction of the Packers and Stockyards Program that their custodial account shortages have been corrected. After the expiration of the initial twenty-one (21) day suspension period, and provided that Respondents have demonstrated that their custodial account shortages have been corrected, upon application to the Packers and Stockyards Program, a supplemental order may be issued terminating the suspension. Respondent Robb Taylor is prohibited from

registering under the Act during the time period of Respondent Perkins' suspension in accordance with section 201.11 of the Regulations (9 C.F.R. § 201.11).

3. The provisions of this Order shall become effective on the sixth day after service of this Decision and Order on Respondents.

4. This Decision and Order shall become final without further proceedings thirty-five (35) days after service on Respondents, 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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MISCELLANEOUS ORDERS

Editor's Note: This volume continues 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. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. 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: www.dm.usda.gov/oaljdecisions].

PACKERS AND STOCKYARDS ACT

MARSHALL M. CHERNIN.
Docket No. 13-0117.
Miscellaneous Order.
Filed January 11, 2013.

In re: DOUGLAS BUTLER.
Docket No. D-12-0033.
Miscellaneous Order.
Filed January 15, 2013.

PS-D – Reopen hearing.

Jonathan D. Gordy, Esq. for Complainant.
Peter F. Langrock, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER GRANTING IN PART PETITION TO REOPEN

On November 26, 2012, Douglas Butler filed Respondent's Petition to Reopen requesting remand of this proceeding to Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] for a new hearing in light of the jury's November 1, 2012, findings in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11 (Resp't's Pet. to Reopen at 2 ¶ 12). Mr. Butler attached the jury verdict form entered in *Pollock v. Butler* to Respondent's Petition to Reopen, which form contains the jury findings.

On December 17, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed Complainant's Response to Petition to Reopen. The Deputy Administrator opposes Mr. Butler's request to remand this proceeding to the Chief ALJ for a new hearing.

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151), which are applicable to the instant proceeding, set forth the requirements for a petition to reopen, 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.

7 C.F.R. § 1.146(a)(2). Mr. Butler filed Respondent's Petition to Reopen prior to the issuance of the decision of the Judicial Officer. Respondent's Petition to Reopen identifies the nature and purpose of the evidence to be adduced. Moreover, the evidence to be adduced is not merely cumulative and could not have been adduced at the hearing as the jury in *Pollock v. Butler* did not return a verdict until November 1, 2012, after the June 5th and 6th, 2012, hearing conducted by the Chief ALJ in the instant proceeding.

Under these circumstances, I reopen this proceeding and receive in evidence the November 1, 2012, jury verdict form entered in *Pollock v. Butler*. However, the jury verdict form entered in *Pollock v. Butler*

contains the jury's findings that are relevant to the instant proceeding; therefore, I decline to remand the proceeding to the Chief ALJ for a new hearing.

For the foregoing reasons, the following Order is issued.

ORDER

Respondent's Petition to Reopen filed November 26, 2012, is granted in part. The proceeding is reopened and the jury verdict form entered in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11, is received in evidence.

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GARY FULTON.
Docket No. 12-0542.
Miscellaneous Order.
Filed January 23, 2013.

In re: TODD SYVERSON, D/B/A SYVERSON LIVESTOCK BROKERS.
Docket No. D-05-0005.
Miscellaneous Order.
Filed April 23, 2013.

PS-D – Suspension order.

Charles Spicknall, Esq. for Complainant.
E. Lawrence Oldfield, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER GRANTING MOTION TO MODIFY SUSPENSION ORDER TO PERMIT TODD SYVERSON'S SALARIED EMPLOYMENT

Discussion

In *Syverson*, No. D-05-0005, 69 Agric. Dec. 1500, 2010 WL 10078382 (U.S.D.A. Nov. 16, 2010) (Decision on Remand), I suspended

Todd Syverson as a registrant under the Packers and Stockyards Act, as amended and supplemented (7 U.S.C. §§ 181-229b), for a period of 16 months. The suspension order, which became effective on June 1, 2012, allowed for modification "to permit the salaried employment of Mr. Syverson by another registrant or packer after the expiration of 8 months of the suspension term." *Syverson*, No. D-05-0005, 71 Agric. Dec. ___, slip op. at 3 (U.S.D.A. May 21, 2012) (Order Lifting Stay Order). On March 25, 2013, after the initial 8 months of the suspension period had passed, Mr. Syverson applied to Packers and Stockyards Program to work as a salaried employee of Minneola Farms, LLC, Zumbrota, Minnesota. Packers and Stockyards Program concluded an investigation of the proposed employment arrangement on April 8, 2013, and, on April 15, 2013, moved for modification of the suspension order to permit Mr. Syverson's salaried employment by Minneola Farms, LLC. On April 23, 2013, the Hearing Clerk transmitted Packers and Stockyard Program's Motion to Modify Suspension Order to Permit Respondent's Salaried Employment [hereinafter Motion to Modify Suspension Order] to the Office of the Judicial Officer for consideration and a ruling.

Packers and Stockyards Program's April 15, 2013, Motion to Modify Suspension Order is granted and the following Order is issued:

ORDER

The suspension provision in *Syverson*, No. D-05-0005, 71 Agric. Dec. ___, 2012 WL 1909338 (U.S.D.A. May 21, 2012) (Order Lifting Stay Order), is modified to permit the salaried employment of Mr. Syverson by Minneola Farms, LLC, Zumbrota, Minnesota, with the Order in *Syverson*, No. D-05-0005, 71 Agric. Dec. ___, 2012 WL 1909338 (U.S.D.A. May 21, 2012) (Order Lifting Stay Order), remaining in effect in all other respects. This Order Granting Motion to Modify Suspension Order to Permit Todd Syverson's Salaried Employment shall become effective upon filing with the Office of the Hearing Clerk.

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In re: PIEDMONT LIVESTOCK, INC. AND JOSEPH RAY JONES.
Docket No. 13-0087.
Miscellaneous Order.

Filed April 29, 2013.

PS – Appeal, untimely.

Thomas N. Bolick, Esq. for Complainant.
Joseph R. Jones for Respondents.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyard Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on November 19, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Deputy Administrator alleges, during the period October 10, 2011, through November 21, 2011, Piedmont Livestock, Inc., and Joseph Ray Jones, in 16 transactions, purchased 342 cattle from 10 different sellers for a total purchase price of $255,077.31 and failed to pay, when due, the full amount of the purchase price, in willful violation of 7 U.S.C. §§ 213(a) and 228b and 9 C.F.R. § 201.43.[1]

The Hearing Clerk served Piedmont Livestock, Inc., and Mr. Jones with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on November 26, 2012.[2] Neither Piedmont Livestock, Inc., nor Mr. Jones filed an answer to the Complaint, and on December 20, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter

[1] Compl. at second unnumbered page, ¶¶ II-III.
[2] United States Postal Service Domestic Return Receipts for article numbers 7005 1160 0002 7836 2307, 7005 1160 0002 7836 3540, and 7005 1160 0002 7836 3557.

the Chief ALJ] issued a Show Cause Order in which the Chief ALJ provided the parties 15 days within which to show cause why a default decision should not be entered.

On January 4, 2013, the Deputy Administrator filed a response to the Chief ALJ's Show Cause Order in the form of a Motion for Decision Without Hearing by Reason of Default [hereinafter Motion for Default Decision] and a Proposed Decision Without Hearing by Reason of Default. Neither Piedmont Livestock, Inc., nor Mr. Jones filed a response to the Chief ALJ's Show Cause Order.

On January 9, 2013, the Hearing Clerk served Piedmont Livestock, Inc., and Mr. Jones with the Deputy Administrator's Motion for Default Decision and the Hearing Clerk's service letter.[3] Neither Piedmont Livestock, Inc., nor Mr. Jones filed objections to the Deputy Administrator's Motion for Default Decision.

On March 7, 2013, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order [hereinafter Decision]: (1) concluding Piedmont Livestock, Inc., and Mr. Jones willfully violated 7 U.S.C. §§ 213(a) and 228b and 9 C.F.R. § 201.43, as alleged in the Complaint; (2) ordering Piedmont Livestock, Inc., and Mr. Jones to cease and desist from failing to pay the full amount of the purchase price for livestock before the close of the next business day following each purchase of livestock, as required by 7 U.S.C. §§ 213(a) and 228b; and (3) assessing Piedmont Livestock, Inc., and Mr. Jones a $14,000 civil penalty.[4] On March 11, 2013, the Hearing Clerk served Piedmont Livestock, Inc., with the Chief ALJ's Decision and the Hearing Clerk's service letter,[5] and on March 13, 2013, the Hearing Clerk served Mr. Jones with the Chief ALJ's Decision and the Hearing Clerk's service letter.[6]

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[3] United States Postal Service Domestic Return Receipts for article numbers 7005 1160 0002 7836 3212, 7005 1160 0002 7836 3229, and 7005 1160 0002 7836 3236.

[4] Chief ALJ's Decision at 3.

[5] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7837 4584.

[6] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7837 4577.

On April 18, 2013, Piedmont Livestock, Inc., and Mr. Jones appealed the Chief ALJ's Decision to the Judicial Officer. On April 24, 2013, the Deputy Administrator filed Complainant's Response to Respondents' Appeal of Default Decision and Order. On April 26, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.[7] The Hearing Clerk served Piedmont Livestock, Inc., with the Chief ALJ's Decision on March 11, 2013, and served Mr. Jones with the Chief ALJ's Decision on March 13, 2013;[8] therefore, Piedmont Livestock, Inc., was required to file its appeal petition with the Hearing Clerk no later than April 10, 2013, and Mr. Jones was required to file his appeal petition with the Hearing Clerk no later than April 12, 2013. Instead, Piedmont Livestock, Inc., and Mr. Jones filed their appeal petition with the Hearing Clerk on April 18, 2013. Therefore, I find Piedmont Livestock, Inc., and Mr. Jones' appeal petition is late-filed.

Moreover, 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.[9] The Chief ALJ's Decision became final 35 days after the

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[7] 7 C.F.R. § 1.145(a).

[8] *See supra* notes 5 and 6.

[9] *See, e.g.*, Custom Cuts, Inc. Nos. D-12-0443, D-12-0444, 72 Agric. Dec. ___, 2013 WL 8213598 (U.S.D.A. Feb. 20, 2013) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed 1 month 27 days after the chief administrative law judge's decision became final); Self, No. D-12-0167, 71 Agric. Dec. ___, 2012 WL 10767600 (U.S.D.A. Sept. 24, 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); Mays, No. 08-0153, 69 Agric. Dec. 631, 2010 WL 10079822 (U.S.D.A. Feb. 5, 2010) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 week after the administrative law judge's decision became final); Noble, No. 09-0033, 68 Agric. Dec. 1060, 2009 WL 8382895 (U.S.D.A. Dec. 17, 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Edwards, No. D-06-0020, 66 Agric. Dec. 1362, 2007 WL 7277763 (U.S.D.A. Oct. 30, 2007) (Order Den. Late Appeal)

Hearing Clerk served Piedmont Livestock, Inc., and Mr. Jones with the Chief ALJ's Decision.[10] Thus, the Chief ALJ's Decision became final as to Piedmont Livestock, Inc., on April 15, 2013, and final as to Mr. Jones on April 17, 2013. Piedmont Livestock, Inc., and Mr. Jones filed their appeal petition on April 18, 2013. Therefore, I have no jurisdiction to hear Piedmont Livestock, Inc., and Mr. Jones' 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 Piedmont Livestock, Inc., and Mr. Jones' filing an appeal petition after the Chief ALJ's Decision became final.

Accordingly, Piedmont Livestock, Inc., and Mr. Jones' appeal petition must be denied. For the foregoing reasons, the following Order is issued.

ORDER

(dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); Tung Wan Co., No. D-06-0019, 66 Agric. Dec. 939, 2007 WL 1378158 (U.S.D.A. Apr. 25, 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); Gray, No. 01-D022, 64 Agric. Dec. 1699, 2005 WL 2994262 (U.S.D.A. Oct. 17, 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); Mokos, No. 03-0003, 64 Agric. Dec. 1647, 2005 WL 2251945 (U.S.D.A. Sept. 6, 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); Blackstock, No. 02-0007, 63 Agric. Dec. 818, 2004 WL 1842435 (U.S.D.A. July 13, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); Gilbert, No. 04-0001, 63 Agric. Dec. 807, 2004 WL 2823368 (U.S.D.A. Nov. 30, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Nunez, No. 03-0002, 63 Agric. Dec. 766, 2004 WL 2031430 (U.S.D.A. Sept. 8, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

[10] *See* 7 C.F.R. § 1.139; Chief ALJ's Decision at 3.

1. Piedmont Livestock, Inc., and Joseph Ray Jones' appeal petition, filed April 18, 2013, is denied.

2. The Chief ALJ's Decision, filed March 7, 2013, is the final decision in this proceeding.

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DEFAULT DECISIONS

Editor's Note: This volume continues 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. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. 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: www.dm.usda.gov/oaljdecisions].

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Docket No. 12-0597.
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Filed January 30, 2013.

PIEDMONT LIVESTOCK, INC. AND JOSEPH RAY JONES.
Docket No. 13-0087.
Default Decision and Order.
Filed March 7, 2013.

JAMES EMANUEL MOWERY.
Docket No. 13-0007.
Default Decision and Order.
Filed March 20, 2013.

DAVID BYRD, D/B/A DB CATTLE CO., D/B/A AD BYRD CATTLE.
Docket No. 12-0550.
Default Decision and Order.
Filed March 21, 2013.

MARK KASMIERSKY.
Docket No. 12-0600.
Default Decision and Order.
Filed March 21, 2013.

ABE CUESTA, A/K/A ABRAM CUESTA, D/B/A QUALITY CATTLE.
Docket No. 12-0533.
Default Decision and Order.
Filed May 8, 2013.

CAMBRIDGE VALLEY LIVESTOCK MARKET, INC.
Docket No. 13-0162.
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Filed May 15, 2013.

TONY E. LYON, D/B/A LYON FARMS.
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Nathan Lewis.
Docket No. 12-0534.
Filed January 9, 2013.

Clint Sicking, D/B/A Flying C Cattle Company.
Docket No. 13-0086.
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Anderson Livestock Auction Co. and Jerry Anderson.
Docket No. 12-0516.
Filed January 18, 2013.

Billy Tackett.
Docket No. 12-0616.
Filed January 24, 2013.

Robin Olson, D/B/A American Cattle Services.
Docket No. 13-0124.
Filed January 24, 2013.

Well Bred Farms, Inc.
Docket No. 13-0110.
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JLA, LLC, D/B/A Marshall Livestock Auction, Carey Jones, and Martha Jones.
Docket Nos. 12-0188, 12-1089, 12-0243.
Filed February 1, 2013.

Gary Thompson.
Docket No. D-12-0028.
Filed February 11, 2013.

Monte Clark.
Docket No. 13-0060.
Filed February 11, 2013.

Randy R. Wientjes, D/B/A Brookport Cattle Company.
Docket No. 13-0156.
Filed February 14, 2013.

Central Beef Industries, LLC.
Docket No. 13-0117.
Filed February 20, 2013.

Wing & Sing Poultry Market, Inc., D/B/A New Wing and Sing and Poultry, Inc., and D/B/A Wing and Sing Poultry; Island Farm Meat Corp., D/B/A Al-Noor Live Chicken Market, D/B/A Alnoor Halal Live Poultry Market, D/B/A Al-Noor Live Poultry, D/B/A Al-Noor Halal Poultry, Inc., and D/B/A Al-Noor Halal Meat Chicken and Fish Market; and Mohammed Yasser Aldeen, A/K/A Mohammed Bader, A/K/A Mohammad Badereldeen, A/K/A Mohammed Eldeen, and A/K/A Yesser M. Eldeen.
Docket No. 13-0141.
Filed February 21, 2013.

New Wilmington Livestock Auction, Inc. and Thomas R. Skelton.
Docket No. D-12-0241.
Filed February 28, 2013.

Daniel R. Froman, D/B/A R&K Real Estate, Inc.
Docket No. 12-0539.
Filed March 7, 2013.

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Thomas Kinderknecht, Barbara Kinderknecht, and Quinter Livestock, Inc.
Docket No. D-12-0250.
Filed March 26, 2013.

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Filed March 27, 2013.

Martin D. Yoder, D/B/A Martin D. Yoder Livestock, Ltd.
Docket No. 12-0584.
Filed March 28, 2013.

John Michael Loy, D/B/A Loy's Sale Barn.
Docket No. 13-0166.
Filed March 29, 2013.

T&M Cattle, Inc. and Travis Witt.
Docket No. 13-0064.
Filed April 3, 2013.

Pilgrim's Pride Corporation.
Docket No. 12-0386.
Filed April 9, 2013.

Milan Livestock Auction, Inc., also D/B/A Brookfield Sales Co., Wendell Fleshman, and Linda Fleshman.
Docket No. 12-0404.
Filed April 11, 2013.

Atlantic Veal and Lamb, LLC, D/B/A Atlantic Veal and Lamb, Inc., and Philip Peerless.
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Filed April 12, 2013.

Keith Robertson, Charlene Robertson, and Farmington Livestock, LLC.
Docket No. 13-0170.
Filed April 22, 2013.

TW Cattle Co., LLC and Thomas J. Witt.
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Filed May 10, 2013.

Don Harris Buying Station, Inc., Don Harris, and Nancy Harris.
Docket No. 13-0183.
Filed May 13, 2013.

John C. Howard.
Docket No. 13-0191.
Filed May 16, 2013.

Jimmy Springer.
Docket No. 13-0058.
Filed June 4, 2013.

Farmer Grown Poultry, LLC.
Docket No. 13-0066.
Filed June 17, 2013.

M&L Farms, LLC; Jamil Jallaq, A/K/A Sam Jallaq; and Majdi Jallaq, A/K/A Mike Jallaq.
Docket No. 13-0188.
Filed June 21, 2013.

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PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

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Errata

The Editor regrets having overlooked the timely inclusion of nine (9) Reparations Decisions, specifically:

(1) *Corona Fruit & Veggies, Inc. v. Produce Alliance LLC*, PACA Docket No. S-R-2009-428, Decision and Order, filed July 12, 2011;

(2) *DiMare Homestead, Inc. v. Yzaguirre Farms LLC*, PACA Docket No. S-R-2010-412, Decision and Order, filed on December 22, 2011;

(3) *L&M Companies, Inc. v. Panama Banana Distribution Company*, PACA Docket No. R-09-046, Decision and Order, filed January 12, 2012;

(4) *M & M Packaging, Inc. v. Casa de Campo, Inc.*, PACA Docket No. E-R-2010-288, Decision and Order, Order on Reconsideration, filed March 9, 2012;

(5) *Froerer Farms, Inc., D/B/A Owyhee Produce v. Select Onion LLC*, PACA Docket No. W-R-2007-433, Decision and Order, Order on Reconsideration, filed March 30, 2012;

(6) *Interfresh, Inc. v. B. Sayers, Inc.*, PACA Docket No. W-R-2011-535, Decision and Order, filed July 11, 2012;

(7) *DiMare Homestead, Inc. v. Yzaguirre Farms LLC*, PACA Docket No. S-R-2010-412, Order on Reconsideration, filed August 1, 2012;

(8) *Coastal Marketing Service, Inc. v. Vibo Produce LLC*, PACA Docket No. W-R-2011-118, Decision and Order filed October 17, 2012; and

(9) *Westberry Farms Ltd. v. Sungate Marketing LLC*, PACA Docket No. W-R-2011-192, Decision and Order, filed December 20, 2012.

These decisions follow this page with special pagination for citation guidance.

A list of these decisions was previously posted on the above OALJ website via a link to the Agricultural Marketing Service ("AMS") website.[1] The listing provided the case number and business entities involved in each decision.

[1] Recent Reparation Decisions, USDA.GOV, http://www.dm.usda.gov/oaljdecisions/ (follow "Recent PACA Formal Reparation Decisions" hyperlink under "Other Related Links"; then follow "listing of Recent Decisions and Orders" hyperlink). The Editor notes that although as of January 2015 these eight (8) decisions were listed on the AMS website, "[t]he files' contents are for educational purposes, and due to the volume of cases will be available online for a limited period of time." *Id.*

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(6) *Interfresh, Inc. v. B. Sayers, Inc.*, PACA Docket No. W-R-2011-535, Decision and Order, filed July 11, 2012;

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(8) *Coastal Marketing Service, Inc. v. Vibo Produce LLC*, PACA Docket No. W-R-2011-118, Decision and Order filed October 17, 2012; and

(9) *Westberry Farms Ltd. v. Sungate Marketing LLC*, PACA Docket No. W-R-2011-192, Decision and Order, filed December 20, 2012.

These decisions follow this page with special pagination for citation guidance.

A list of these decisions was previously posted on the above OALJ website via a link to the Agricultural Marketing Service ("AMS") website.[1] The listing provided the case number and business entities involved in each decision.

[1] Recent Reparation Decisions, USDA.GOV, http://www.dm.usda.gov/oaljdecisions/ (follow "Recent PACA Formal Reparation Decisions" hyperlink under "Other Related Links"; then follow "listing of Recent Decisions and Orders" hyperlink). The Editor notes that although as of January 2015 these eight (8) decisions were listed on the AMS website, "[t]he files' contents are for educational purposes, and due to the volume of cases will be available online for a limited period of time." *Id.*

ERRATA

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

70 Agric. Dec.
July – Dec. 2011

CORONA FRUIT & VEGGIES, INC. v. PRODUCE ALLIANCE LLC.
PACA Docket No. S-R-2009-428.
Decision and Order.
Filed July 12, 2011.

[Cite as: 70 Agric. Dec. A (U.S.D.A. 2011), *published in* 72 Agric. Dec. A (U.S.D.A. 2013).]

PACA-R.

Damages – Cover

The remedy of cover is not available to a buyer who has accepted the goods and has not revoked his acceptance.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
McCarron & Diess for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as "the Act." A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $4,941.00 in connection with two (2) truckloads of strawberries and mixed squash 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 Set Off in the amount of $4,104.08 for damages allegedly incurred in connection with the strawberries at issue in the Complaint.

Neither the amount claimed in the Complaint nor the Set Off exceeds $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement. Respondent filed an Answering Statement.[1] Neither party submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is P.O. Box 1106, Santa Maria, CA 93456. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a limited liability company whose post office address is 100 Lexington Drive, Suite 201, Buffalo Grove, IL 60089. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about July 7, 2009, Complainant, by oral contract, sold to Respondent one (1) truckload of strawberries and mixed squash. Complainant issued invoice number 907087 billing Respondent for 240 8/1 lb. flats of strawberries at $4.10 per flat, or $984.00, 56 1-1/9 bu. cartons of medium zucchini at $7.05 per carton, or $394.80, 112 1-1/9 bu. cartons of large straight neck squash at $2.10 per carton, or $235.20, 132 cartons of fancy zucchini at $1.60 per carton, or $211.20, and 44 cartons of fancy straight neck squash at $7.05 per carton, or $310.20, plus $26.00 for a temperature recorder, $60.00 for Tectrol, and $1,109.60

[1] Respondent's Answering Statement consists of affidavits from its produce buyer, Dale S. Jensen, and Ron Foncello, buyer/salesperson for Air Stream Foods.

for cooling and palletization, for a total invoice price of $3,331.00 (ROI Ex. A at 17).

4. The strawberries and squash billed on invoice number 907087 were shipped on July 7, 2009, from loading point in the state of California, to Air Stream Foods, in Oceanside, New York (ROI Ex. C at 19).

5. On or about July 11, 2009, Complainant, by oral contract, sold to Respondent one (1) truckload of strawberries.[2] Complainant issued invoice number 907191 billing Respondent for 240 8/1 lb. flats of strawberries at $4.45 per flat, or $1,068.00, plus $60.00 for Tectrol, $26.00 for a temperature recorder, and $456.00 for cooling and palletization, for a total invoice price of $1,610.00 (ROI Ex. A at 23).

6. The strawberries billed on invoice number 907191 were shipped on July 11, 2009, from loading point in the state of California, to Air Stream Foods, in Oceanside, New York (ROI Ex. A at 25).

7. On July 14, 2009, at 6:54 a.m., a USDA inspection was performed on 200 flats of the strawberries billed on invoice number 907087. At the time of the inspection, the strawberries were stored in the cooler at Air Stream Foods, in Oceanside, New York. The inspection disclosed thirty-seven percent (37%) average defects, including twenty-one percent (21%) overripe, fourteen percent (14%) bruising, and two percent (2%) decay. Pulp temperatures at the time of the inspection ranged from thirty-six (36) to thirty-seven (37) degrees Fahrenheit (ROI Ex. A at 15).

8. On July 14, 2009, at 11:50 a.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating: "Attached are photos of your rejected straws, please advise as to what you are going to do with them. Air Stream cannot work them. Need to know something ASAP!!" (ROI Ex. A at 10).

[2] Although the invoice prepared by Complainant states the strawberries were sold and shipped on July 13, 2009 (ROI Ex. A at 23.), the bill of lading shows the load was shipped on July 11, 2009 (ROI Ex. A at 25). Based on the assumption that the sale of the strawberries occurred on or before the date of shipment, we are using the date of shipment as the date of sale for the transaction.

9. On July 14, 2009, at 3:26 p.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating:

> Per PACA guidelines (Brian – PACA) Produce Alliance is rejecting the 240 8/1# Clamshell Strawberries on Corona #908087 back to Corona Marketing for Breach of Contract. Please advise as to where you would like your product placed, all costs incurred due to this breach of contract will be determined at a later date once the product has been moved and any and all charges have been totaled. (ROI Ex. A at 9.)

10. At 3:40 p.m. on July 14, 2009, Complainant's Uriel Barbosa sent Respondent's Dale Jensen an e-mail message stating:

> On Bill of lading destination was for Salinas, at no point in time did you confirm these were going to New York. The Strawberries shipped were supposed to go to Salinas, not New York. If we had confirmed that these berries were going to New York, these berries would not have been loaded. There is no adjustment on this product, and we expect payment in full. (ROI Ex. A at 8.)

11. On July 15, 2009, at 8:34 a.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating:

> I am appalled that Uriel (Corona Marketing) is suggesting that these rejected Strawberries were destined for Produce Alliance Salinas, Ca, our buying office is located in Salinas, Ca (we are not a receiver). These strawberries were bought and destined for Air Stream Foods in Oceanside, NY who in fact Uriel (Corona) contacted to sell directly but since PA (Dale Jensen) buys for Air Stream Foods PA contacted Uriel to buy Corona's product for Air Stream Foods.
>
> PA does not buy Corona product for any other PA member besides Air Stream Foods, so for Uriel to

> suggest that these strawberries were going to PA Salinas is completely deceptive, in fact Uriel made several mistakes to this order before Ron & I figured out exactly what Corona shipped (confirmation was correct, initial passing was different than the confirmation, passing was revised to what the confirmation read, but ultimately it wasn't what was received at Air Stream Foods so it was revised yet again).
>
> The pattern of mistakes by Uriel is on record: several mistakes to initial order, called directly to Air Stream saying he couldn't find someone to take the straws (obviously accepting responsibility but since he couldn't find anyone to take the rejected product he tried other angles to shirk his responsibility), then tried the approach that it wasn't a timely inspection (didn't wash with PACA) and to now say the product was not suppose to go to Air Stream Foods in Oceanside, NY is a blatant disregard for the truth.
>
> Once again Produce Alliance will clarify our position regarding the rejected strawberries on this order – PA is rejecting the 240 8/1# clamshell strawberries back to Corona Marketing for them to determine where to place their rejected product, until such time that they decide what to do with their rejected product any and all costs accrued will be the complete and sole responsibility of Corona Marketing. (ROI Ex. A at 4.)

12. On July 15, 2009, at 8:34 a.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating:

> Due to Corona Marketing's many attempts to circumvent responsibility and complete lack of acceptance for their rejected strawberries said product will be moved for Corona Marketing's account and any and all losses incurred by Air Stream Foods & Produce Alliance will be billed to Corona Marketing. If Corona Marketing does not provide relocation information by

> noon pst Air Stream Foods & Produce Alliance will attempt to locate someone to work the 240 8/1# clamshell strawberries for Corona Marketing's account to try to minimize any further damages. (ROI Ex. A at 7.)

13. On July 15, 2009, at 12:12 a.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating:

> To whom it may concern – Jose Corona, Gerry Corona, Steve Ruiz & Uriel Barbosa,
>
> Before you hang your hat on the destination Salinas, Ca theory you may want to rethink that due to the fact that you (Uriel) have already admitted to Ron & I both that you made several input errors on the confirmation, the initial passing & revised passing too, but not only that I have a passing that disputes your position of the ship to on your passing showing the ship to of Buffalo Grove, Ill., there goes the destination Salinas theory.
>
> This will not be a favorable outcome for Corona Marketing if you decide to let PACA rule on it not to mention all the money that will be spent to go through this process. Produce Alliance has many facts not theories that will discredit your position. Uriel do the right thing and move your rejected strawberries so that you can minimize yours & your grower's losses while you still have a chance to. (ROI Ex. A at 7.)

14. Respondent prepared a trouble report for the strawberries billed on invoice number 907087 that reads, in pertinent part, as follows:

> Air Stream foods [sic] found trouble with the 240 8/1# clamshell strawberries when the truck arrived on 7/12/09, called for an inspection on 7/13/09, inspection was completed on 7/14/09 @ 7:18am – product failed to make good delivery per PACA guideline – Rejected back to shipper. Corona marketing wil [sic] be

> responsible for any and all losses incurred due to this breach of contract. Product was moved to J Margiotti – Hunts Point Market for Corona Marketing's account – Air Stream foods located the destination to help minimize Corona Marketing's losses and PA agreed that this was the proper and correct thing to do so that the losses might be minimized rather than letting the strawberries get dumped. (ROI Ex. A at 21.)

15. On July 17, 2009, at 6:32 a.m., a USDA inspection was performed on the 240 flats of strawberries billed on invoice number 907191, which were stored in the cooler at Air Stream Foods, in Oceanside, New York. The inspection disclosed forty-three percent (43%) average defects, including nineteen percent (19%) bruising, seventeen percent (17%) soft, and seven percent (7%) decay. Pulp temperatures at the time of the inspection ranged from thirty-seven (37) to thirty-eight (38) degrees Fahrenheit (ROI Ex. C at 22).

16. On July 17, 2009, at 11:35 a.m., Respondent's Dale Jensen sent correspondence to Complainant's Uriel Barbosa and Jose Corona stating: "It's to [sic] late to take your rejected strawberries to the Hunts Point Market today so the earliest that your rejected strawberries can possibly be moved will be Sunday evening. PA will advise as to when & where your rejected strawberries went to be worked for your account." (ROI Ex. C at 26). On the same date, Mr. Jensen sent additional correspondence to Mr. Barbosa and Mr. Corona stating, in pertinent part, as follows:

> Once again I will refresh your memories – I placed 3 orders with Uriel to be delivered to Air Stream Foods in Oceanside, NY, whom Uriel solicited business with and knew full well where these orders where being delivered, this was discussed at length, besides the fact that I have never talked to or let alone place an order with Uriel before – Uriel obviously has an issue with correctly inputting information and this will easily be proven when necessary, (I have numerous copies of paperwork with error after error on them, this will lend itself to credibility) (ROI Ex. C at 28.)

17. On July 20, 2009, Respondent's Dale Jensen sent correspondence to Complainant's Uriel Barbosa and Jose Corona stating:

> The inspected and rejected strawberries on Corona Marketing #'s 907087 & 907191 will have a follow up USDA condition inspection done due to the severe condition defects for the purpose of dumping the severely distressed product.
>
> J Margiotti has been unsuccessful in selling the distressed strawberries (Corona#907087) that were sent to him to be worked for the account of Corona Marketing because they were and are in such poor condition they were not saleable, this is also the same issue with the strawberries (Corona#907191) that were inspected on 7/17/09 @ Air Stream Foods in Oceanside, NY, Air Stream has not found anyone that would work these strawberries for Corona Marketing's account because the condition of the strawberries is so poor, not saleable.
>
> Unless Corona Marketing has an alternative plan for their rejected strawberries they will be dumped due to the fact that they were not saleable. (ROI Ex. C at 30.)

18. On July 21, 2009, at 7:30 a.m., a second USDA inspection was performed on the 240 flats of the strawberries billed on invoice number 907191, which were stored in the cooler at Air Stream Foods, in Oceanside, New York. The inspection disclosed fifty percent (50%) average defects, including twenty-one percent (21%) soft, fifteen percent (15%) bruising, and fourteen percent (14%) decay. Pulp temperatures at the time of the inspection ranged from forty-one (41) to forty-two (42) degrees Fahrenheit. Under the remarks section of the certificate, the inspector noted: "APPLICANT STATES THIS LOT TO BE DUMPED. APPLICANT STATES THIS LOT WAS PREVIOUSLY INSPECTED ON 7/17/09 AND REPORTED ON CERTIFICATE T-072-0253-04667." (ROI Ex. C at 23).

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19. On July 21, 2009, at 3:06 p.m., J. Margiotta faxed Air Stream Foods a dump ticket covering 164 flats of the strawberries billed on invoice number 907087 (ROI Ex. C at 13-14).

20. Respondent has not paid Complainant for the strawberries and mixed squash billed on invoice numbers 907087 and 907191.

21. The informal complaint was filed on August 13, 2009, which is within nine (9) months from the date the cause of action accrued (ROI Ex. A at 1).

Conclusions

Complainant brings this action to recover the agreed purchase price for two (2) truckloads of strawberries and mixed squash sold to Respondent. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling $4,941.00 (Compl. ¶ 8). In response to Complainant's allegations, Respondent admits purchasing the commodities in question but denies that the prices stated in the Complaint are accurate (Answer & Set Off ¶ 2). In addition, Respondent asserts a breach on the part of Complainant based on its alleged failure to ship the kind, quality, and size of strawberries called for in the contracts of sale (Answer & Set Off ¶ B). As a result of the alleged breach, Respondent states it suffered damages equal to the difference between the $2,964.00 (Invoice No. 907191: $1,524.00 and Invoice No. 907087: $1,440.00) delivered contract price of the strawberries, and the $6,780.00 (907191: $3,660.00 and 907087: $3,120.00) cover price/market value of the strawberries, or $3,816.00, plus inspection fees of $288.08, or a total of $4,104.08, which amount Respondent seeks to recover through its Set Off (Answer & Set Off ¶ C).

Turning first to the truckload of strawberries and mixed squash billed on Complainant's invoice number 907087, Respondent's produce buyer, Dale S. Jensen, asserts in his Answering Statement affidavit that shortly after a USDA inspection of the strawberries was completed at Air Stream Foods in New York, he faxed the inspection report to Complainant's salesperson, Uriel Barbosa, and advised him that Respondent was

rejecting the strawberries (Answering Stmt. Affidavit of Dale S. Jensen ¶ 5).[3] We note, however, that the certificate of inspection referenced by Mr. Jensen shows that the strawberries had been unloaded into the cooler at Air Stream Foods before the inspection was performed (ROI Ex. A at 15). The unloading or partial unloading of the transport is considered an act of acceptance. *See* 7 C.F.R. § 46.2(dd)(1). We also note that the load in question included both strawberries *and* mixed squash, but Respondent has only alleged that the strawberries were rejected. The truckload of strawberries and mixed squash comprised a commercial unit which Respondent was obligated to accept or reject in its entirety.[4] We therefore find that Respondent accepted the strawberries.

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. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Company v. Ben Gatz Company*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4). *See also W. T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1700, 1703 (U.S.D.A. 1993); *Salinas Marketing Cooperative v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

The shipment in question reportedly arrived in New York on Sunday, July 12, 2009, five (5) days after shipment, and a USDA inspection was performed on the strawberries two (2) days later, on July 14, 2009, at 6:54 a.m. The inspection disclosed thirty-seven percent (37 %) average defects, including twenty-one percent (21%) overripe, fourteen percent (14%) bruising, and two percent (2%) decay. Pulp temperatures at the time of the inspection ranged from thirty-six (36) to thirty-seven (37) degrees Fahrenheit (ROI Ex. A at 15).

[3] This is the first of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

[4] The term "commercial unit" means a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract. A commercial unit must be accepted or rejected in its entirety. 7 C.F.R. § 46.43(ii).

The strawberries were sold under f.o.b. terms[5] (ROI Ex. A at 17). Where goods are sold f.o.b., the warranty of suitable shipping condition is applicable. Suitable shipping condition is defined in the Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j)) as meaning:

> that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.[6]

The warranty of suitable shipping condition extends only to the contract destination agreed between the parties, and the parties herein have made conflicting allegations concerning the contract destination for the subject

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[5] The Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(i)) define f.o.b. as meaning, "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition ..., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed."

[6] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. Harvest Fresh Produce Inc. v. Clarke-Ehre Produce Co., 39 Agric. Dec. 703, 708-09 (U.S.D.A. 1980).

load of strawberries and squash. Complainant asserts that the contract destination was Respondent's branch location in Salinas, California. Respondent asserts, to the contrary, that the contract destination was Air Stream Foods in Oceanside, New York.

Where the parties put forth affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish its allegation by a preponderance of the evidence. *E.g.*, *Lookout Mountain Tomato & Banana Co., Inc. v. Case Produce, Inc.*, 51 Agric. Dec. 1470, 1473 (1992). Complainant states the Salinas, California destination is shown on the confirmation, which was faxed to Respondent on July 6, 2009, and also on the bill of lading, which was faxed to Respondent on July 7, 2009, and that both of these documents were received by Respondent without dispute (Compl. ¶ 7). The record includes copies of these documents, both of which list Salinas, California as the destination for the shipment (Compl. Ex. 1, 8). Complainant also submitted a sworn statement from its sales agent, Mr. Uriel Barbosa, wherein Mr. Barbosa states the product was shipped to New York without Complainant's knowledge (Opening Stmt. ¶ 1).

To substantiate its allegation that the contract destination was Air Stream Foods, in Oceanside, New York, Respondent submitted affidavit testimony from its produce buyer, Mr. Dale S. Jensen, wherein Mr. Jensen states, in pertinent part, as follows:

> On June 23, 2009, Uriel Barbosa contacted Yuri Zilber and Ron Foncello, the produce buyers of Air Stream Foods in New York, a Produce Alliance affiliated member. At that time, Mr. Zilber and Mr. Foncello told Uriel that they would buy produce from Corona but only through Produce Alliance in Salinas. See Report of Investigation ("ROI") Ex. C., p. 4. I then made contact with Uriel for the purpose of selling produce to Air Stream. It was stated during our conversation and understood by Uriel Barbosa that I purchased the two loads in question and another load for Air Stream in New York.

(Answering Stmt. Affidavit of Dale S. Jensen ¶ 4). Report of Investigation Exhibit C, page 4, referenced by Mr. Jensen above, is a copy of an e-mail message dated June 23, 2009, from Complainant's Uriel Barbosa, to Yuri Zilber of Air Stream Foods, wherein Mr. Barbosa is providing Mr. Zilber with Complainant's physical and mailing addresses. This evidence shows that Complainant was in direct contact with Air Stream Foods prior to the transactions at issue here, although the message makes no reference to Complainant selling any produce to Air Stream Foods. It appears Mr. Jensen intended to refer to Report of Investigation Exhibit D, page 4, which is a copy of an e-mail message sent by Respondent's salesperson, Kevin Bateman, to Rob Feldgreber, Chief Financial Officer of Respondent, stating, in pertinent part:

> Salesman Uriel Barbosa of Corona Fruits & Veggies, Inc. contacted buyer Yuri Zilber of Air Stream Foods, Oceanside, New York in late June, 2009, soliciting his business for strawberries and various other vegetable items. Buyer Ron Foncello (Air Stream) subsequently directed Dale Jensen, buyer for Produce Alliance, Salinas, to source product for Air Stream from Corona. These are the first transactions that Produce Alliance, as a company, made with Corona. Mr. Barbosa was fully aware that the final consignee for these shipments was Air Stream Foods.

(ROI Ex. D at 4, *also* ROI Ex. C at 1). Respondent also submitted affidavit testimony from Ron Foncello, buyer/salesperson for Air Stream Foods, wherein Mr. Foncello states Complainant's Uriel Barbosa attempted to sell produce to Air Stream Foods on June 23, 2009, at which time Mr. Foncello states he informed Mr. Barbosa that Air Stream Foods would only buy produce from Complainant through Respondent (Answering Stmt. Aff. of Ron Foncello ¶ 4.)

In addition to the affidavit testimony just mentioned, Respondent also cites the use of Tectrol on the strawberries and the inclusion of a temperature recorder in the trailer as evidence that the contract destination for the shipment was New York. In an e-mail message dated September 21, 2009, Respondent's Kevin Bateman questions why, if Mr. Barbosa actually believed that the destination was Salinas, would Tectrol

have been applied to the strawberry pallets for a three-hour in-transit time. Mr. Bateman also questions why a temperature recorder would be placed in a truck for a shipment from Santa Maria to Salinas, a distance of 159 miles (ROI Ex. H at 1).

In *Clark Produce v. Primary Export International, Inc.*,[7] we stated that the significant factors for determining intended contract destination, in descending order of importance, are (1) indication in writing, such as a brokers memorandum or other contract memorandum, of the agreed contract destination; (2) indication of knowledge on the part of the seller as to the ultimate destination; and (3) the absence of an intermediate point of acceptance by the buyer.

While Complainant submitted both a confirmation of sale and an invoice indicating that the shipment in question was destined for Salinas, California, Complainant neglected to submit a statement from Uriel Barbosa to refute the sworn testimony of Dale Jensen and Ron Foncello indicating that Mr. Barbosa first attempted to sell the commodities in question to Air Stream Foods, but was told that such a sale would have to be made through Respondent. A sworn statement which has not been controverted must be taken as true in the absence of other persuasive evidence. *Crawford v. Ralf & Cono Comunale Produce Corp.*, 51 Agric. Dec. 801, 806 (U.S.D.A. 1992); *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (U.S.D.A. 1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (U.S.D.A. 1982). We therefore find that the preponderance of the evidence supports Respondent's contention that Complainant sold the strawberries and squash to Respondent with the knowledge that these commodities were purchased for shipment to Air Stream Foods.

This conclusion is further supported by the fact that Complainant used Tectrol on the strawberries and included a temperature recorder with the shipment, as these are steps normally taken to preserve the quality of the product and monitor its environment during prolonged periods in transit. Such measures would not normally be used for a shipment lasting only several hours. Hence, we conclude that the

[7] 52 Agric. Dec. 1715, 1720-21 (U.S.D.A. 1993).

contract destination for the load of strawberries and mixed squash in question was Air Stream Foods, in Oceanside, New York.

The USDA inspection performed in Oceanside, New York two (2) days following arrival disclosed thirty-seven percent (37%) average defects, twenty-eight percent (28%) of which was scored as serious damage, and two percent (2%) was decay. These results cover 200 flats of the strawberries. Absent any evidence to the contrary, we must assume that the forty (40) flats of strawberries that were not inspected were free of defects. *See Lookout Mountain Tomato & Banana Co., Inc. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1478 (U.S.D.A. 1992). When we average the results of the inspection over the 240 flats of strawberries shipped, the average defects are reduced to thirty-one percent (31%), including twenty-three percent (23%) serious damage and two percent (2%) decay.

In *Supreme Berries, Inc. v. R.C. McEntire, Jr.*,[8] we held that the maximum allowance for defects for a coast to coast shipment of strawberries under the suitable shipping condition rule is fifteen percent (15%) for average defects, including no more than eight percent (8%) serious damage and three percent (3%) decay. Although the inspection of the strawberries in question was delayed two (2) days, the strawberries were stored in the receiver's cooler between the time of delivery and the time of inspection, and the pulp temperatures disclosed by the inspection indicate that the strawberries were stored at proper temperatures. We therefore find that the average defects disclosed by the inspection, which total more than double the suitable shipping condition allowance, are sufficiently extreme to establish with reasonable certainty that a more timely inspection would have disclosed excessive defects in the strawberries. Accordingly, we find that the inspection results establish that the strawberries were not in suitable shipping condition.

Complainant's failure to ship strawberries in suitable shipping condition constitutes a breach of contract for which Respondent is entitled to recover provable damages. The general measure of damages for a breach of contract is the difference at the time and place of acceptance between the value of the goods accepted and the value they

[8] 49 Agric. Dec. 1210, 1216 (U.S.D.A. 1990).

would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. *R.F. Taplett Fruit & Cold Storage Co. v. Chinook Marketing Co.*, 39 Agric. Dec. 1537, 1541 (U.S.D.A. 1980).

The trouble report prepared by Respondent states the strawberries were moved to J. Margiotti Company ("Margiotti") on the Hunts Point Market to be worked for Complainant's account (ROI Ex. C at 11). By letter dated July 20, 2009, Respondent's Dale Jensen advised Complainant's Uriel Barbosa that Margiotti was unable to sell the strawberries because they were in such poor condition (ROI Ex. C at 17). On July 21, 2009, Margiotti faxed Air Stream Foods a dump ticket covering 164 flats of the strawberries (ROI Ex. C at 13-14). On the same date, Josef Mortak of Air Stream Foods sent an e-mail message to Respondent's Dale Jensen stating:

> Dale – Here is the paperwork with regards to the dumped berries from last week. Sorry about the Margiotta thing didn't think they were going to be twits!!! They said they understood and were going to do the right thing! I did tell them I wanted USDA, but no one listens to me anyway!

(ROI Ex. C at 12). Mr. Jensen responded on the same date with an e-mail message to Mr. Mortak stating: "Joseph they only show dumping 164 of the 240 straws – need the accounting of the balance of the straws please. Thanks! Dale." (ROI Ex. C at 12). Mr. Mortak replied: "According to Mr. Foncello we will pay for the 76 cs missing." (ROI Ex. C at 12).

As the foregoing e-mail exchanges between Mr. Jensen and Mr. Mortak illustrate, the consignee chosen to handle the strawberries, Margiotta, supplied evidence that 164 flats of the strawberries were dumped (ROI Ex. C at 13-14). Margiotta did not, however, account for the other 76 flats in the shipment. As a result, Air Stream Foods apparently agreed to pay Respondent for the 76 flats of strawberries that were not accounted for. Respondent prepared a trouble report indicating

that it intended to take a deduction in the amount of $1,639.04, which amount represents an allowance of $8.75 per flat for 164 flats of the strawberries plus the $144.04 USDA inspection fee (ROI Ex. K at 2). We presume this means Respondent intended to pay Complainant for the other seventy-six (76) flats of strawberries. We also note, however, that Mr. Jensen asserts in his Answering Statement affidavit that Margiotta "did not remit any proceeds to Air Stream or Produce Alliance for the strawberries."(Answering Stmt. Aff. of Dale S. Jensen ¶ 5).[9] Moreover, Air Stream Foods prepared an accounting of its damage claim against Respondent showing a loss of $9.95 per flat (the delivered price of the strawberries) for 200 flats of the strawberries, plus $144.04 for the cost of the USDA inspection (Answering Stmt. Aff. of Ron Foncello Ex. 2). No explanation is given for the failure of Air Stream Foods to account for the other forty (40) flats of strawberries in the shipment.

Given the confusion concerning the disposition of the strawberries and whether or not any payments were made, we are unable to determine the value of the strawberries as accepted based on the parties' accountings. Therefore, we will resort to an alternate means of determining this value. In instances where an account of sales has not been provided or lacks sufficient detail to be accepted as evidence of the value of accepted goods, we normally determine this value by reducing the value the goods would have had if they had been as warranted by the percentage of condition defects disclosed by a prompt inspection. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1878 (U.S.D.A. 1994).

The first and best method of ascertaining the value the strawberries would have had if they had been as warranted is to use the average price as shown by USDA Market News reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1192, 1197 (U.S.D.A. 1990). The terminal price report for New York City, the nearest reporting location to Oceanside, New York, shows that on July 14, 2009, 8/1-pound flats of California strawberries were selling for $10.00 to $12.00 per flat for large size, and $12.00 to $14.00 per flat for large to extra large size. As there is no indication that the strawberries in question were extra large, we will use the average reported price for

[9] This is the first of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

large strawberries, which results in a value for the strawberries if they had been as warranted of $11.00 per flat, or a total of $2,640.00. When we reduce this amount by thirty-one percent (31%), or $818.40, to account for the condition defects disclosed by the inspection, we arrive at a value for the strawberries as accepted of $1,821.60.

As we mentioned, Respondent's damages are measured as the difference between the value the strawberries would have had if they had been as warranted, $2,640.00, and their value as accepted, $1,821.60, or $818.40. In addition, Respondent may recover the $144.04 USDA inspection fee as incidental damages. Respondent also claims additional damages for the cost to purchase goods in substitution of those due from Complainant (Answer & Setoff ¶ C; Answering Stmt. Aff. of Dale S. Jensen ¶ 5).[10] We note, however, that the alleged "cover" purchases were made by Air Stream Foods, not Respondent (Answering Stmt. Aff. of Ron Foncello ¶ 5; ROI Ex. C at 15). Moreover, official comment 1 to U.C.C. section 2-712, the section of the Code that deals with cover purchases, states "[c]over is not available under this section if the buyer accepts the goods and does not rightfully revoke the acceptance." We have already determined that Respondent accepted the strawberries in question. Therefore, the remedy of cover is not available to Respondent.[11]

Respondent's total damages resulting from the breach of contract by Complainant with respect to the strawberries billed on invoice number 907087 equal $962.44 ($818.40 + $144.04). When this amount is deducted from the $3,331.00[12] contract price of the strawberries and

[10] This is the first of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

[11] We should note that in *Pandol Bros., Inc. v. Prevor Marketing International, Inc*., citing official comment 1 to U.C.C. § 2-601, which states "[a] buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover. . . ," we stated that cover is open to an accepting buyer. *See* 49 Agric. Dec. 1192 n.11 (U.S.D.A. 1990). However, as indicated above, the Code has since been revised to make clear that cover is not available to a buyer who accepts and does not revoke his acceptance.

[12] While Respondent maintains that Complainant invoiced at incorrect prices for the commodities in this shipment, the "correct" prices asserted by Respondent total $3,696.20, which is more than the $3,331.00 claimed by Complainant. (ROI Ex. C at 6-7). Complainant's recovery should be limited to the amount claimed. *See, e.g.*, Willoughby v. Frito-Lay, Inc., 45 Agric. Dec. 1245, 1263 (U.S.D.A. 1985). *Also,* Clark

squash billed on invoice number 907087, the net amount due Complainant from Respondent is $2,368.56.

Turning next to the truckload of strawberries billed on Complainant's invoice number 907191, Respondent's produce buyer, Dale S. Jensen, asserts in his Answering Statement affidavit that shortly after a USDA inspection of the strawberries was completed at Air Stream Foods in New York, he faxed the inspection report to Complainant's salesperson, Uriel Barbosa, and advised him that Respondent was rejecting the strawberries. (Answering Stmt. Affidavit of Dale S. Jensen ¶ 5.)[13] We note, however, that the certificate of inspection referenced by Mr. Jensen shows that the strawberries had been unloaded into the cooler at Air Stream Foods before the inspection was performed (ROI Ex. C at 22). The unloading or partial unloading of the transport is considered an act of acceptance. *See* 7 C.F.R. § 46.2(dd)(1). The strawberries were therefore accepted by Air Stream Foods through the act of unloading. The acceptance of the strawberries by Air Stream Foods precluded any subsequent rejection by Respondent. *Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345, 1349 (U.S.D.A. 1996). We therefore find that Respondent accepted the strawberries.

Respondent is liable to Complainant for the full purchase price of the strawberries it accepted less any damages resulting from any breach of contract by Complainant. The strawberries arrived in New York on Thursday, July 16, 2009, five (5) days after shipment. A USDA inspection was performed on the strawberries one (1) day later, on July 17, 2009, at 6:32 a.m., at the cooler of Air Stream Foods, in Oceanside, New York. The inspection disclosed forty-three percent (43%) average defects, including nineteen percent (19%) bruising, seventeen percent (17%) soft, and seven percent (7%) decay. Pulp temperatures at the time of the inspection ranged from thirty-seven (37) to thirty-eight (38) degrees Fahrenheit (ROI Ex. C at 22).

The strawberries in this shipment were sold under f.o.b. terms (ROI Ex. A at 23). Therefore, the warranty of suitable shipping condition is

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Produce v. Primary Export Int'l, Inc., 52 Agric. Dec. 1710, 1718 (U.S.D.A. 1993); Denice &Felice Packing Co. v. Corgan & Son, 45 Agric. Dec. 785, 788 (U.S.D.A. 1986).

[13] This is the second of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

applicable. Although Complainant asserts once again that the contract destination for the strawberries was Salinas, California, for the reasons already discussed with respect to the strawberries billed on invoice number 907087, we find that the contract destination for this shipment of strawberries was Air Stream Foods, in Oceanside, New York. Based on the suitable shipping condition allowances mentioned earlier in our discussion, we find further that the condition defects disclosed by the inspection performed at Air Stream Foods establish that the strawberries were not in suitable shipping condition. Complainant's failure to ship strawberries in suitable shipping condition constitutes a breach of contract for which Respondent is entitled to recover provable damages. Respondent's damages will once again be measured as the difference between the value of the strawberries as accepted and the value the strawberries would have had if they had been as warranted. With respect to the value of the strawberries as accepted, Ron Foncello of Air Stream Foods asserts in his Answering Statement affidavit that he sent the strawberries to the Hunts Point Market to see if any wholesalers could sell them, but because the strawberries were in such bad condition nobody would take them. Mr. Foncello states he then had the strawberries inspected again on July 21, 2009, after which he dumped the strawberries in the presence of the federal inspector (Answering Stmt. Aff. of Ron Foncello ¶ 6). The record includes a copy of the USDA inspection certificate whereon the federal inspector noted that the applicant (Air Stream Foods) intended to dump the strawberries (ROI Ex. C at 23).

In this instance, we find that the evidence submitted by Respondent is sufficient to establish that the strawberries it accepted had no commercial value. With respect to the value the strawberries would have had if they had been as warranted, the terminal price report for New York City, the nearest reporting location to Oceanside, New York, shows that on July 17, 2009, 8/1-pound flats of California strawberries were selling for $8.00 to $10.00 per flat for large size, and $12.00 to $14.00 per flat for large to extra large size. As there is no indication that the strawberries in question were extra large, we will use the average reported price for large strawberries, which results in a value for the strawberries if they had been as warranted of $9.00 per flat, or a total of $2,160.00.

ERRATA

As we mentioned, Respondent's damages are measured as the difference between the value the strawberries would have had if they had been as warranted, $2,160.00, and their value as accepted, $0.00, or $2,160.00. In addition, Respondent may recover the USDA inspection fees totaling $288.08 as incidental damages. Respondent also claims additional damages for the cost to purchase goods in substitution of those due from Complainant (Answer & Setoff ¶ C; Answering Stmt. Aff. of Dale S. Jensen ¶ 5).[14] For the reasons already stated, we find that the remedy of cover is not available to Respondent.

Respondent's total damages resulting from the breach of contract by Complainant with respect to the strawberries billed on invoice number 907191 equal $2,448.08 ($2,160.00 + $288.08). When this amount is deducted from the $1,610.00 contract price of the strawberries billed on invoice number 907191, there is a net loss due Respondent from Complainant of $838.08. We will offset this loss against the $2,368.56 owed to Complainant for strawberries and squash billed on invoice number 907087. This results in a net amount due Complainant from Respondent of $1,530.48.

Respondent's failure to pay Complainant $1,530.48 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. The above treatment of the issues between Complainant and Respondent resolves the issues in Respondent's Set Off. The Set Off should, therefore, be dismissed.

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 consequence of such violations." Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v.*

[14] This is the second of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

Producers Mktg. Ass'n, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). The interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid $500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation $1,530.48, with interest thereon at the rate of 0.19 percent (%) per annum from September 1, 2009, until paid, plus the amount of $500.00.

The Set Off is dismissed.

Copies of this Order shall be served upon the parties.

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ERRATA

DIMARE HOMESTEAD, INC. v. YZAGUIRRE FARMS LLC.
PACA Docket No. S-R-2010-412.
Decision and Order.
Filed December 22, 2011.

[Cite as: 70 Agric. Dec. W (U.S.D.A. 2011), *published in* 72 Agric. Dec. W (U.S.D.A. 2013).]

PACA-R.

Jurisdiction – Interstate Commerce – Florida Tomatoes Marketing Order

The sale of Florida-grown tomatoes by a Florida grower/shipper to a "pinhooker" who intended to sell the tomatoes to local buyers for use at farmers' markets and roadside stands is not in interstate commerce because the tomatoes in question are not eligible for shipment outside the state of Florida due to Marketing Order requirements and because the parties never intended or contemplated that these tomatoes would travel in interstate commerce. As a result, these tomatoes cannot be considered a commodity that commonly moves in interstate commerce. As there was no actual or contemplated movement in interstate commerce for the shipments in question, the Secretary is without jurisdiction to consider the dispute.

Shelton S. Smallwood, Presiding Officer.
Leslie Wowk, Examiner.
McCarron & Diess for Complainant.
Meuers Law Firm, P.L. for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as "the Act." A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $45,162.00 in connection with five (5) truckloads of tomatoes allegedly 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.

Although the amount claimed in the Complaint exceeds $30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Respondent filed an Answering Statement. Respondent's Answering Statement consists of the affidavit of Mr. Armando Yzaguirre, President of Respondent. Complainant filed a Statement in Reply. Complainant's Statement in Reply consists of the affidavit of Mr. Tony DiMare, Vice President of Complainant. Both parties also submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is P.O. Box 900460, Homestead, FL 33090. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a limited liability company whose post office address is 211 E. Market Road, Immokalee, FL 34142. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On March 26, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 1,093 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 10). On May 17, 2010, Complainant issued invoice number 702 billing Respondent for 1,093 twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $6,558.00 (ROI Ex. A at 2).

4. On March 27, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 2,169 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 11). On May 17, 2010, Complainant issued invoice number 593 billing Respondent for 2,169

twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $13,014.00 (ROI Ex. A at 3).

5. On April 1, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 1,051 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 12). On May 17, 2010, Complainant issued invoice number 708 billing Respondent for 1,051 twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $6,306.00 (ROI Ex. A at 4).

6. On April 6, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 1,135 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 13). On May 17, 2010, Complainant issued invoice number 709 billing Respondent for 1,135 twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $6,810.00 (ROI Ex. A at 5).

7. On April 16, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 2,079 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 14). On May 17, 2010, Complainant issued invoice number 860 billing Respondent for 2,079 twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $12,474.00 (ROI Ex. A at 6).

8. The informal complaint was filed on August 13, 2010 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for five (5) truckloads of tomatoes purchased from Complainant. Complainant states Respondent accepted the tomatoes in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling $45,162.00 (Compl. ¶ 7). To substantiate this contention, Complainant submitted copies of its sales confirmations and invoices showing that Respondent was billed for the five (5) shipments of tomatoes in question at a per unit price of $6.00 per box, for

a total of $45,162.00 for the 7,527 boxes of tomatoes in question (Compl. Ex. 2A-2E).

In response to Complainant's allegations, Respondent submitted an unverified Answer signed by its attorney wherein it asserts as an affirmative defense that "all transactions alleged in Complainant's Formal Complaint were mutually agreed by the parties to be on a "price-after-sale" basis and were never subject to specified pre-sale prices." (Answer at 5). Respondent subsequently submitted affidavit testimony from its President, Mr. Armando Yzaguirre, wherein Mr. Yzaguirre asserts that in March of 2010, he requested and obtained permission from Complainant to pick tomatoes from fields that Complainant's crews had fully harvested and that were no longer producing tomatoes of the kind and quality sold by Complainant (Answering Stmt. ¶ 19). Mr. Yzaguirre explains that after he sells such tomatoes, he settles up with the grower by deducting the harvest, transportation, sorting, packing charges and a commission from the sales proceeds (Answering Stmt. ¶ 13). According to Mr. Yzaguirre, when Respondent engages in this practice, which Mr. Yzaguirre states is sometimes referred to in the produce industry as "pinhooking" (Answering Stmt. ¶ 14), the growers usually do not quarrel with the returns, no matter how low, because there is no market for these tomatoes and any money the growers receive is "free money" on tomatoes that they would otherwise have plowed under (Answering Stmt. ¶ 13).

Before we consider the parties' dispute with respect to the pricing of the tomatoes, there is a jurisdictional issue raised by Respondent that must first be addressed. Specifically, Respondent, in its unverified Answer, asserts an affirmative defense that the tomatoes in question were not intended for sale in interstate commerce (Answer at 5). Respondent's Armando Yzaguirre subsequently testified that the PACA Branch does not have jurisdiction over the sales at issue in this action because the tomatoes were neither intended for sale in interstate or foreign commerce, nor were they in fact sold in interstate or foreign commerce (Answering Stmt. ¶¶ 47-48).

In order for the Secretary to have jurisdiction to hear this matter, the transactions in question must involve either interstate or foreign

commerce. Interstate commerce is defined in sections 499a(3) and (8) of the Act as follows:

> (3) ...commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.
>
> …
>
> (8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.

The foregoing definition has been interpreted as encompassing the actual physical movement of produce from one state to another (*see, e.g.*, *Clearview Farms v. Noha*, 21 Agric. Dec. 806 (U.S.D.A. 1962)), as well as transactions where the produce never physically crosses state lines but the parties to the transaction are located in different states (*see Tulelake Potato Distributors, Inc. v. Giustino*, 52 Agric. Dec. 752, 757 (U.S.D.A. 1993)). In addition, an even broader interpretation was applied in *Produce Place v. United States Department of Agriculture*, 319 U.S. App D.C. 369 (1996), where it was stated that if the shipment in question is of a type of commodity that is commonly shipped in interstate commerce,

and the shipment was shipped for resale by a produce dealer doing a substantial portion of its business in interstate commerce, the shipment is in interstate commerce under the Act.

Respondent's Armando Yzaguirre asserts, however, that the tomatoes salvaged from Complainant's fields were never intended for sale outside the state of Florida, as they would not meet the minimum grade of U.S. No. 2, nor were they were inspected (Answering Stmt. ¶ 11). In addition, Mr. Yzaguirre states the tomatoes were packed in used boxes (Answering Stmt. ¶ 11). According to Mr. Yzaguirre, Complainant knew that Respondent had no intention of selling the tomatoes in interstate commerce and was aware of Mr. Yzaguirre's intention to haul the tomatoes to Immokalee, Florida for sale to local buyers for use at farmers' markets and roadside stands (Answering Stmt. ¶ 21). Knowing that the tomatoes would not meet the standards for sale to customers outside the state of Florida, Mr. Yzaguirre states Complainant's Tony DiMare told him to "do the best" he could and sell whatever he was able to salvage from the fields (Answering Stmt. ¶ 22).

In response, Complainant submitted affidavit testimony from its Vice President, Mr. Tony DiMare, wherein Mr. DiMare states that tomatoes are a commodity which is commonly shipped in interstate commerce, and that Complainant conducts the majority of its tomato sale business in interstate and foreign commerce in states other than Florida and in Canada. Complainant's normal course of business is, however, of no significance in the instant case, given the evidence showing that Complainant sold the subject tomatoes to a receiver who plainly had no intention of shipping the tomatoes out of state. Moreover, as Respondent's Armando Yzaguirre indicates, the quality of the tomatoes was such that Respondent could not legally ship the tomatoes outside the state of Florida, as tomatoes produced in certain areas of Florida, including the Homestead area where the tomatoes in question were produced, are subject to a Federal Marketing Order which dictates, among other things, the quality of the tomatoes that may be sold outside of the specified growing region between October 10th and June 15th of each growing season. Specifically, the handling regulations under the Marketing Order state that the "[t]omatoes shall be graded and meet the requirements for U.S. No. 1, U.S. Combination or U.S. No. 2 of the U.S. Standards for Grades of Fresh Tomatoes." *See* 7 C.F.R. § 966.323(a)(4).

A federal or federal-state inspection must be obtained to establish that the tomatoes meet the stated requirements. *See* 7 C.F.R. § 966.323(a)(4). In addition, the containers in which the tomatoes are packed must be clean and bright in appearance without marks, stains, or other evidence of previous use. *See* 7 C.F.R. § 966.323(a)(3)(iii).

As we mentioned above, it is Respondent's contention that the parties were well aware when the contract was negotiated that the tomatoes Respondent intended to salvage from Complainant's fields would not be suitable for shipment outside the state of Florida, and that it was Respondent's intention to sell the tomatoes to local buyers for use at farmers' markets and roadside stands. While Complainant's Tony DiMare has testified that he did not know where the tomatoes would be transported or sold (Stmt. in Reply ¶ 13), Mr. DiMare fails to address Mr. Yzaguirre's sworn testimony that Mr. DiMare was aware that the salvaged tomatoes were not suitable for shipment to customers outside the state of Florida (Answering Stmt. ¶ 22). Mr. DiMare also fails to address Mr. Yzaguirre's sworn contention that the salvaged tomatoes were harvested from "old fields" which had already been harvested many times and no longer had any tomatoes that would meet the requirements for the U.S. No. 1, U.S. Combination, or U.S. No. 2 grades (Answering Stmt. ¶¶ 9, 20). Mr. DiMare, as Vice-President of a high-volume shipper of Florida-grown tomatoes, was presumably aware that such tomatoes would not meet the Marketing Order requirements for shipment outside the state of Florida. Hence, while it is true that Complainant is a dealer that conducts a substantial portion of its business in interstate commerce, the off-grade tomatoes at issue in the Complaint cannot be considered a commodity that is commonly shipped in interstate commerce.

We therefore find that the preponderance of the evidence supports Respondent's contention that Complainant was aware of the purely intrastate nature of the transactions in question at the time of contracting, and that there was neither contemplation nor actual involvement of the transactions in interstate commerce. Consequently, the Secretary lacks jurisdiction to consider the matters at issue in the Complaint, so the Complaint must be dismissed.

ORDER

The Complaint is dismissed.

Copies of this Order shall be served upon the parties.

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ERRATA

REPARATION DECISIONS

71 Agric. Dec.
Jan. – June 2012

L&M COMPANIES, INC. v. PANAMA BANANA DISTRIBUTION COMPANY.
PACA Docket No. R-09-046.
Decision and Order.
Filed January 12, 2012.

[Cite as: 71 Agric. Dec. i (U.S.D.A. 2012), *published in* 72 Agric. Dec. i (U.S.D.A. 2013).]

PACA-R.

Agency, employee or agent of principal

According to section 16 of the PACA (7 U.S.C. § 499p), the "act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person."

Agency, apparent authority

When a party acts in a manner which creates apparent authority in an agent it may be bound by the acts of the agent. It is a maxim of agency law that a principal is responsible for its agent's actions, even where the agent exceeds the scope of its actual authority.

Christopher Young, Presiding Officer.
Joseph Choate, Jr. for Complainant.
Mary E. Gardner for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA). A timely Complaint was filed with the Department on September 11,

2008 in which Complainant sought a reparation award against Respondent in the amount of $105,377.50, which was alleged to be past due and owing in connection with sixteen (16) shipments of various perishable agricultural commodities (mostly watermelons) sold to Respondent in the course of interstate commerce.[1]

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 on November 3, 2008, denying liability and requesting an oral hearing.

An oral hearing was held in Chicago, Illinois, on November 9-11, 2011. At the hearing, Complainant was represented by Joseph Choate, Jr., Esq., of Choate and Choate in San Marino, California. Respondent was represented by Mary E. Gardner, Esq., of the law office of Mary E. Gardner P.C. in West Dundee, Illinois. Christopher Young, Esq., attorney with the Office of the General Counsel, Department of Agriculture, served as the Presiding Officer. The parties submitted Joint Exhibits 2-18, 18-1 through 18-8, and 19-22 (JX). Additional evidence is contained in the Department's Report of Investigation (ROI).

At the hearing, two witnesses testified for Complainant and three witnesses testified for Respondent. A transcript of the hearing was prepared (Tr.). The parties filed post-hearing briefs, and claims for fees and expenses, and objections to the claims.

Findings of Fact

1. Complainant, L&M Companies, Inc., is a corporation whose business mailing address is 2925 Huntleigh Drive, Suite 204, Raleigh, NC 27604. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA.[2]

2. Respondent, Panama Banana Distribution Company, is a corporation whose business address is Chicago International Produce Market, 2404

[1] During the course of the formal reparation case and hearing, Complainant modified its claim to 14 loads and total damages of $61,650.49.
[2] PACA license number 19980840.

Wolcott Avenue, Chicago, IL 60608. At the time of the transactions alleged in the Complaint, Respondent was licensed under the PACA.[3]

3. Between June 12, 2007, and July 2007, by oral contract(s), Complainant sold to Respondent sixteen loads[4] (16) wholesale loads of watermelons, cantaloupe, cumbers, chili peppers, and broccoli (Complainant's Compl. at 1).

4. Though there is dispute as to whether the oral contract involved "PAS", "Open", or "Consignment" price terms, it is clear from the record that set prices were not agreed upon at the time the oral contracts were reached between Complainant and Respondent, and that prices were to be agreed or settled upon after Respondent sold the produce in question in this case (Complainant's Compl. at 1-2; Resp't's Answer at 1-7; JX 2-18, 18-1 through 18-8, and 19-22, Tr. 15-17, 36, 102, 147, 244-246, 287, 293, 297, 319).

5. Though the Complaint filed in this case claims that the delivery terms of the loads were all f.o.b.[5], it is clear that Complainant arranged for transportation of loads in this case, and that the oral contract(s) reached contemplated that freight charges were to be paid by Complainant (Tr. 246-247, 299-302, 435).

6. The oral contract(s) were reached between Ed Kettyle, a salesman for Complainant, and two individuals who worked for Respondent: Stephen Alexander, operations manager, and Deke Pappas, owner of Respondent (Tr. 242, 380, 423-424, 442-449).

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[3] PACA license number 19153729.

[4] Complainant withdrew its claim as to loads numbers one and eight (Compl's Br. at 2). The remaining claims consist mostly of loads of watermelons.

[5] 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 Int'l v. Blue Anchor, Inc., 56 Agric. Dec. 969, 975-76 (U.S.D.A. 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).

7. Respondent did not order the produce involved in this case; rather, Ed Kettyle, per instructions from his supervisors (Tr. 238) was told to "load trucks" and "get product out of [Complainant's] cooler due to overload of product (*Id*.). Complainant had a policy whereby the sales department had deadlines and "needed to have product out in five days" (Tr. 239, 241-242). As long as produce remained on trucks, Complainant incurred additional freight charges. Complainant had to unload the produce to avoid incurring continued freight charges (JX 19). Ed Kettyle contacted Respondent and "begged" them to take produce loads off Complainant's hands (Tr. 237-243). According to Ed Kettlye, "we kind of forced it" (Tr. 239, 243).

8. Ed Kettyle and Respondent's salesman arrived at an agreement whereby Respondent would keep 15 percent of returns from sale of loads as commission, and remit "whatever was left" to Complainant (Tr. 239). Before Complainant loaded anything, the arrangement was discussed with Ed Kettyle's supervisors (*Id*.). No set price was ever put on the product sent to Respondent, and Respondent never agreed to pay market price for loads sent to them by Complainant (Tr. 244, 263-264).

9. After Complainant delivered the loads in this case to Respondent, Ed Kettyle of Complainant and Deke Pappas of Respondent settled on prices for all of the loads (Tr. 261, 297-304, 309-310, 319, 331-332, 342, 447-449, 461-62, 469-70, 509-510, 513).

10. Following settlement of all of the loads in question, Respondent paid Complainant the settlement amounts by various checks, and Complainant (Tr. 453-456, 511-512, 520).

Conclusions

Complainant alleged in the formal Complaint that Respondent is liable for $105,377.50, in connection with sixteen (16) shipments of grapes sold to Respondent in the course of interstate commerce. During the course of the formal reparation case and hearing, Complainant modified its claim to fourteen (14) loads and total damages of $61,650.49. Complainant claims that all loads in question were ordered by Respondent, under the terms either "open", "PAS", or "F.o.b." (Resp't's Br. at 6, 17). Complainant also claims that invoices were sent

to Respondent when it ordered the loads, and that Respondent agreed to pay the prices listed on each invoice (Resp't's Br. at 7).

Respondent claims that it did not order the produce involved in this case; and that Complainant's salesman, Ed Kettyle contacted Respondent and asked them to handle several "troubled" or "distressed" loads. (Resp't's Br. at 2-4.) Respondent claims that there was no set price on the produce and that the loads were on consignment, and that Respondent would keep fifteen (15) percent of all sales (Resp't's Br. at 4). Respondent further claims that after the loads were accepted and resold by Respondent, an account of sale was provided to Complainant, and that Respondent and Complainant settled on prices for all of the loads (Resp't's Br. at 4-10).

As noted above, at hearing, two (2) witnesses testified for Complainant and three witnesses testified for Respondent. The testimony of the witnesses for Complainant and Respondent, and their accounts of what took place between the parties in June and July of 2007, is vastly different. Complainant's witnesses, Keith Purvis and Greg Cardamone, Ed Kettyle's sales supervisors, testified to Complainant's position (that Respondent ordered the produce and agreed to pay the invoice price [or apparently a top market price], and that Respondent's settled prices were never agreed upon by Complainant). However, Keith Purvis stated that he never had any contact with Respondent about any of the loads involved in this case (Tr. 133-134). Nevertheless, Keith Purvis looked at the documents contained in JX 2-18, and testified that because it was Respondent's general practice to issue a revised invoice in cases where settlement on loads is reached, and because there was no revised invoice in JX 2-18, Complainant and Respondent could not have settled on a price for any of the loads (Tr. 27-28, 38).

Greg Cardamone testified that he was a direct supervisor of Ed Kettyle, but not until mid August 2007, one month *after* the sales involved in this case (Tr. 143, 184). (Wes Summer was Ed Kettyle's direct supervisor in June and July 2007.) (Tr. 184). Greg Cardamore was not directly involved in any of the sales or loads involved in this case (Tr. 144, 184). Mr. Cardamore merely testified that *generally* if Ed Kettyle were to make any adjustments in price, a supervisor would have to "sign off" (Tr. 149). Neither Keith Purvis nor Greg Cardamone were

directly involved in the transactions at issue in this case, while others who testified were.

Ed Kettyle was the salesman for every load at issue in this case[6] (Tr. 232-234; JX 19). He testified that pursuant to instructions from his supervisors (Tr. 238), he was told to "load trucks" and "get product out of [Complainant's] cooler due to overload of product (*Id*.). Complainant had a policy whereby the sales department had deadlines and "needed to have product out in five days" (Tr. 239, 241-242). As long as produce remained on trucks, Complainant incurred additional freight charges. Complainant had to unload the produce to avoid incurring continued freight charges (JX 19). Ed Kettyle contacted Respondent and "begged" them to take produce loads off Complainant's hands (Tr. 237-243). According to Ed Kettyle, "we kind of forced it" (Tr. 239, 243). None of the loads in question in this case were ordered by Respondent (Tr. 239).

Ed Kettyle and Respondent's salesman arrived at an agreement whereby Respondent would keep fifteen (15) percent of returns from sale of loads, and remit "whatever was left" to Complainant (Tr. 239). Before Complainant loaded anything, the arrangement was discussed with Ed Kettyle's supervisors (Tr. 239, 26, 281, 334). No set price was ever put on the product sent to Respondent, and Respondent never agreed to pay market price for loads sent to them by Complainant, nor agreed to pay the prices listed on the invoices (Tr. 244, 246, 299-300). Complainant arranged for transportation of loads in this case, and freight charges were to be paid by Complainant (Tr. 246-247, 299-302, 435).

Mostly at issue were watermelons in this case, and Ed Kettyle testified that some of the watermelons "were so bad [that] if we could just break even, then that would be fine by us. At least that is the gist that I got from everyone. We don't want to see any negatives. Just trying to get to zero. Trying, you know, not to have to pay anything else." (Tr. 250). In many cases, Ed Kettyle asked Respondent not to bother with getting an inspection of the produce in the loads (Tr. 254-255).

[6] Ed Kettyle is a former employee of Complainant (Tr. 272).

ERRATA

After Complainant delivered the loads in this case to Respondent, Ed Kettyle and Deke Pappas of Respondent settled on prices for all of the loads (Tr. 261, 297-304, 309-310, 319, 331-332, 342, 447-449,461-62, 469-70 , 509-510, 513). Ed Kettyle testified that he obtained approval from his supervisors (either Keith Purvis or Wes Summers) when he settled all the loads in this case (Tr. 256), and that the settlements in this case were what he "thought he was told to do." (Tr. 342). While documents were not presented at hearing to show that the settlement agreements were clearly memorialized in writing, Ed Kettyle testified that he sent emails documenting settlements of the loads in this case (Tr. 280-281, 287 309- 310), and he testified in no uncertain terms that he reached at the least verbal settlement agreements with Respondent as to every load (Tr. 297, 303, 309, 319). This verbal reliance was a necessity in Ed Kettyle's mind because of the pressure of the season, the overload of product, and instructions to him to "get it done" (Tr. 315, 317, 326, 329, 331, 332).

Both Stephen Alexander and Deke Pappas of Complainant provide testimony that corroborates that of Ed Kettyle (Tr. 379-396, 421-507). Following settlement of all of the loads in question, Respondent paid Complainant the settlement amounts by various checks, and Complainant cashed the checks (Tr. 453-456, 511-512, 520).

We find the testimony of those directly involved in the transactions, that of Ed Kettyle, Stephen Alexander, and Deke Pappas, all stating that (1) Complainant contacted Respondent and asked Respondent to receive the loads in question and "do the best they could" with sales; (2) that no set price was agreed on when the produce was sent; and (3) that settled prices were agreed upon after Respondent sold the produce and provided an account of sale to Complainant, to be most credible in this case. Moreover, the documents admitted in the case further corroborate this position. While each load has an accompanying invoice stating a price, each load *also* has a copy of the same invoice with prices crossed out to match an accompanying account of sale from Respondent, (JX 2-18), which corroborates the testimony that the invoices prices were not agreed upon when the produce was sent (Tr. 297, 319), and that settlement occurred based on the accounts of sale (Tr. 264-265, 303). While Complainant claimed in its Complaint that the loads were ordered F.o.b., Complainant appeared to acknowledge at hearing the majority of loads

were "open" as to price, and that all of the loads would have required a settlement after Respondent's sales.[7]

Keith Purvis testified that Complainant has a policy of marking loads as "open" when there is no price because of troubled or distressed loads. (Tr. 92-111, 114.) By Complainant's own admission, ten out of the fourteen loads in question (loads 2-7, load 11, and load 15) contain documentary notations that the loads were "open", and thus troubled or distressed (*see* Complainant's Br. at 3-4).

Each of the loads[8] (with the exception of load number 11) also contain some other independent form of documentary notation (in addition to the "open" notation described above) that the loads in this case were troubled or distressed, and/or that they were not ordered by Respondent under the F.o.b. terms claimed by Complainant in its formal Complaint: a "soft, decay" notation, "no inspection needed per Ed. K" on the bill of lading in JX 2; a "redirected" and "unloaded under protest" notation on the bill of lading and inspection showing damage of six (6) percent and serious damage of one (1) percent in JX 3; a "soft decay" notation on the bill of lading and inspection showing 8 percent damage and one (1) percent decay in JX 4; an "unloaded under protest" notation on the purchase order in JX 5; an "unloaded under protest" notation on the purchase order and inspection showing five (5) percent damage and five (5) percent serious damage with two (2) percent decay in JX 6; an "unloaded under protest" notation on the bill of lading and inspection showing fourteen (14) percent damage and six (6) percent serious damage in JX 7; an "unloaded under protest" notation on the bill of lading and inspection showing twenty (20) percent damage and sixteen (16) percent serious damage in JX 9; an inspection showing twenty-two (22) percent serious damage and inspection showing nineteen (19) percent damage in JX 10; an "unloaded for L&M account" notation on the bill of lading and inspection showing twenty-nine (29) percent

[7] Throughout, Complainant appears to waffle back and forth between the positions that Respondent ordered the produce F.o.b. and simply failed to pay the agreed upon invoice price, that Respondent ordered the produce delivered and failed to pay for both the produce and freight, and that the loads were sold with no set price, but that settlement on them was never properly achieved.

[8] We note again that loads number 1 and 8 have been withdrawn from Complainant's claim.

damage and twenty-nine (29) percent serious damage in JX 12; an inspection showing nineteen (19) percent damage in JX 13; an "unloaded under protest" notation on the bill of lading and inspection showing eleven (11) percent damage and eleven (11) percent serious damage with some decay in JX 14; an "unloaded under protest due to condition" notation on the bill of lading and inspection showing twelve (12) percent damage and twelve (12) percent serious damage in JX 15; and a "rejection" notation on a Fresh Pik Produce invoice and inspection showing percent damage and four (4) percent serious damage (with a notation of "some advanced stages of decay" on the inspection) in JX 16. Accordingly, these documents pertaining to the loads, taken in their entirety, corroborate the testimony that the produce was not "ordered" by Respondent, that much of the produce was distressed, and that Respondent would not have agreed to pay the price listed on the invoice (or a top market price in the alternative, as Complainant suggested at hearing).

The aggregate of documentary evidence and the testimony of the witnesses directly involved in the transactions supports Respondent's position in this case, and Complainant has failed to prove by a preponderance of the evidence all of the material allegations of its Complaint. *See Haywood County Co-operative Fruit v. Orlando Tomato, Inc.*, 47 Agric. Dec. 581, 583 (U.S.D.A. 1988); *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (U.S.D.A. 1987); *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533 (U.S.D.A. 1975).

The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec 893, 894 (U.S.D.A. 1987). The party which has the burden of proof as to a fact must prove the fact by a preponderance of the evidence. *Id*; *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (U.S.D.A. 1969). In this case, based on the testimony of witnesses at hearing and on the documents admitted, Respondent has met its burden to prove by a preponderance its claims that Respondent did not "order" the loads at issue, that Complainant contacted Respondent and asked Respondent to receive the loads in question and "do the best they could" with sales, that no set price was agreed on when the produce was sent (we find that for purposes of this case, it is irrelevant whether the loads

were sold to Respondent price after sale, or open, or on consignment, since settlement based on the resale prices of the loads was made), and that settled prices were agreed upon after Respondent sold the produce and provided an account of sale to Complainant.

Complainant does not appear to deny the fact the Ed Kettyle performed the act of settling the loads in this case with Respondent; rather, Complainant argues that Ed Kettyle did not have authority to do so, and did not obtain the necessary approval of the settlements from his supervisors to properly effectuate the settlements (Complainant's Br. at 8-9). The testimony of Ed Kettyle, which we have already found to be credible (indeed, Mr. Kettyle is the one witness in the proceeding not currently affiliated with either party and with nothing to gain from his testimony[9]), rebuts this argument, and states that not only did he have approval authority[10] (Tr. 260-261), but that approval (both tacit and express) of the settlements from either Keith Purvis or Wes Summers was obtained for all of the loads in question (Tr. 256, 263, 270-271, 342; JX 19). Even were it not the case that either Keith Purvis or Wes Summers (or some higher authority at Complainant[11]) approved settlement with Respondent, Complainant's argument (that Ed Kettyle could not alone effectuate settlements in this case) fails.

According to section 16 of the PACA (7 U.S.C. § 499p), the "act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, *shall in every case* be deemed the act,

[9] Ed Kettyle's credibility and testimony in this case is further bolstered by several reference letters, all written by L&M employees in the summer of 2006 (prior to the events of this case) which testify to Mr. Kettyle's honesty, good character, good work ethic, responsibility, and good salesmanship (JX 20). Moreover, it does not appear that Mr. Kettyle at this time would gain anything from testifying "in favor" of one party or another (i.e., any current substantial business relationship with either, Tr. 242, 274-275), or that he bears any ill will towards Complainant, his former employer, that might prejudice his testimony (Tr.273-274).

[10] The testimony of Keith Purvis also suggests that salespeople of Complainant have authority to settle loads (Tr. 28).

[11] Ed Kettyle states that the owner of Complainant spoke with him at one point about the settlements, and asked Ed Kettyle to get more on a load, and Ed Kettyle and Deke Pappas "re-worked settlement" (Tr. 263).

omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person" (emphasis added).

The common law of agency and the *respondeat superior* theory of corporate liability support a finding that Ed Kettyle's settlements with Respondent were made "within the scope of his employment and office." The Restatement defines "scope of employment" as follows:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

The *respondeat superior* theory of corporate liability provides that to be within the "scope of the employment", the "servant's conduct" must be "the kind which he is authorized to perform, occurs substantially within the authorized limits of time and space, and is actuated at least in part, by a desire to serve the master." *See* PROSSER, TORTS 352 (1955). *See also United States v. Sun Diamond Growers of California*, 138 F.3d 961, 970 (D.C. Cir. 1998); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 406-407 (4th Cir. 1985); *United States v. Cincotta*, 689 F.2d 238, 241-242 (1st Cir. 1982). The doctrine of *respondeat superior* was underlined and strengthened by Congress through its enactment of section 16 of the PACA, which explicitly provides an identity of action between a licensee and its employees, agents, and officers acting within the scope of their employment.

Ed Kettle, Complainant's salesman, settled the loads in this case with Respondent while he was at Complainant's place of business, during regular business hours, and in connection with the sale of produce loads made as part of Respondent's business (Tr. 261, 297-304, 309-310, 319, 331-332, 342, 447-449,461-62, 469-70, 509-510, 513). Moreover, sale of the loads and effectuating the settlements on them in this case were what Ed Kettyle "thought he was told to do" by his employer, the Complainant (Tr. 250, 342). And as stated *supra*, we credit Ed Kettyle testimony that in his mind, Complainant wanted him to, and in fact authorized and instructed him to, sell the loads to Respondent and subsequently settle on a price because of the pressure of the season, the overload of product, and instructions to him to "get it done" (Tr. 250, 315, 317, 326, 329, 331-332). The settlements in this case were intended by Ed Kettyle to benefit Complainant and further Complainant's policy of "getting it done" in a tough selling situation (Tr. 250,331-332, 338, 343-344). Therefore, Ed Kettyle was acting within the scope of his employment when he settled with Respondent on prices for the loads in this case.

Complainant argues that if Ed Kettyle settled the loads in this case, he did so without Complainant's knowledge (Complainant's Br. at 8-9). Recent cases before the Secretary have reviewed the issue of identity of action between a corporate PACA licensee and a licensee's employees, and have specifically addressed the issue of whether the licensee's knowledge of the actions is a necessary element of such identity of action. In each of these cases, the licensee was deemed by the Judicial Officer to be liable for the actions of its employees, agents or officers despite the fact that there was no evidence that the officers and directors of the licensee had actual knowledge that the employee, agent, or officer was committing the violations.

This issue was specifically addressed in *In re: Post & Taback, Inc.*, 2003 WL 22965185 (U.S.D.A. Dec. 16, 2003), wherein we set forth the proper[12] interpretation of section 16 of the PACA stating, "[a]s a matter

[12] We reversed the initial decision of Chief Administrative Law Judge James W. Hunt, who had incorrectly decided that a PACA licensee must have actual knowledge that its employee, agent, or officer made illegal payments before the licensee could be held responsible for the actions of its employee, agent, or officer under section 16 of the PACA. *In re:* Post & Taback, Inc., 2003 WL 22965185 (U.S.D.A. Dec. 16, 2003), at *14.

of law, the knowing and willful violations by [Respondent's employees, agents, or officers] are deemed to be knowing and willful violations by Respondent, even if Respondent's officers, directors and owners have no actual knowledge of unlawful gratuities, conspiracy and bribery and would not have condoned the unlawful gratuities, conspiracy, and bribery had they known of them." *Id.* at *13. We further stated that, "the knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors." *Id.* at *11.

On *de novo* review of a PACA reparation case against Hunts Point wholesaler Koam Produce, the United States District Court for the Southern District of New York found that bribery payments made by Koam's employee were within the scope of his employment and therefore were the acts of Koam. *See Koam Produce, Inc. v. Dimare Homestead, Inc.*, 213 F. Supp. 2d 314 (S.D.N.Y. 2002). The United States Court of Appeals for the Second Circuit affirmed this decision. *Koam Produce, Inc. v. Dimare Homestead, Inc.*, 329 F. 3d 123, 130 (2d Cir. 2003).

In the reparation case, *Dimare Homestead, Inc. v. Koam Produce, Inc.*, 59 Agric. Dec. 866 (U.S.D.A. 2000), a produce seller sued Koam Produce alleging that the price allowance it gave the wholesaler on a load of produce should be set aside on the grounds of misrepresentation or mistake. The seller claimed that its price reduction was based on falsified inspection certificates, resulting from bribes paid to USDA produce inspectors, and that it would not have agreed to the reductions if it had been aware that bribery had taken place. One of the arguments made by Koam was that it should not be held liable for the actions of its employee, Marvin Friedman, who was convicted of bribery. The Judicial Officer disagreed, stating that "although there is no explicit testimony in the record that Friedman was authorized by Koam to bribe the federal inspectors, we conclude that the bribing of the federal inspectors was within his inherent agency power, and was done by Friedman within the scope of his employment." *Id.* at 874. On appeal, the Court upheld this decision, noting that section 16 of the PACA provides that an employer is responsible for the actions of its employees, agents, or officers made "within the scope of his employment or office",

and the bribe payments made by Friedman were within the scope of his employment:

> Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission, merchant dealer, or broker ...." 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. Dimare Homestead, Inc., 329 F. 3d at 130. Similarly, in *In re: Geo A. Heimos Produce Co., Inc.*, 2003 WL 22680351 (U.S.D.A. Oct. 29, 2003), the Respondent objected to a finding that it had violated the Act, and claimed that it had no actual knowledge of, and did not approve of, alterations of USDA inspection certificates by what it termed a "rogue employee". *Id.* at *19. The Judicial Officer stated that lack of actual knowledge of its employee's actions is not a defense to Respondent's responsibility for its employee's violations of section 2(4) of the PACA. *Id.*

Assuming *arguendo* that Complainant was not aware of Ed Kettyle's settlements until well after they were made (the record shows that the settlements were made and Respondent paid the settled amounts, and then Complainant later [about two months after payment] took issue with the settlement amounts) (Tr. 144, 456, 505; JX 22), under section 16 of the PACA, Complainant is nevertheless bound by Ed Kettyle's settlements. Indeed, the language of section 16 could not be more explicit. The act of employees, agents or officers of a licensee "shall in every case" be the act of the licensee. Moreover, in the case at hand, Ed Kettyle can in no way be deemed to be a "rogue employee", as Mr. Kettyle's testimony establishes that he was acting pursuant to directives of superiors in terms of "getting it done" in a tough selling situation for Complainant (Tr. 250,315, 317, 326, 329, 331-332, 338, 343-344). Ed

Kettyle was acting within the scope of his employment when he settled all of the loads in this case with Respondent, and thus, as a matter of law, Ed Kettyle's acts are deemed the acts of Complainant in this case. (7 U.S.C. § 499p).

We have held in numerous reparation cases that when a party acts in a manner which creates apparent authority in an agent it may be bound by the acts of the agent. *A.P.S. Marketing, Inc. v. M. Degaro Co., Inc.*, 59 Agric. Dec. 416 (U.S.D.A. 2000); *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, 44 Agric. Dec. 468, 1400 (U.S.D.A. 1985); *Western Cold Storage v. Schons*, 38 Agric. Dec. 903 (U.S.D.A. 1979); *Johnson Produce v. R. L. Burnett Brokerage Co.*, 37 Agric. Dec. 1743 (U.S.D.A. 1978); *Arakelian v. O'Day*, 31 Agric. Dec. 1395 (U.S.D.A. 1972); *G. Fava Co. v. Parkhill Produce Co.*, 19 Agric. Dec. 928 (U.S.D.A. 1960); *Johnson v. Fritchey*, 16 Agric. Dec. 1082 (U.S.D.A. 1957); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (U.S.D.A. 1955).

We have further held that it is a maxim of agency law that a principal is responsible for its agent's actions, even where the agent exceeds the scope of its actual authority. *Westside Produce Co. v. E.L. Kempf & Son, Inc.*, 39 Agric. Dec. 727 (U.S.D.A. 1980). Here, whether Ed Kettyle had authority (or obtained authority) to settle loads (his testimony, which I have already found credible, suggests he did, *see supra*), Complainant was bound by Ed Kettyle's agreed settlements. *See Dragonberry Produce, LLC v. Pic Fresh Global, Inc.*, R-06-053 (U.S.D.A. Oct. 31, 2006) (where we held that the company must honor settlements negotiated by a former salesperson). We stated in that case that it was not unreasonable for Respondent to presume that granting price adjustments was within the scope of employment as salesperson for Complainant, even though Complainant claimed that granting settlements was outside the salesperson's "job description."

Moreover, the testimony of Complainant's own witnesses, when taken together, suggests that each of the loads in question in this case was indeed settled by Complainant. According to Keith Purvis' testimony, it appears that Complainant would not have paid the grower involved on any of the loads in this case until settlement with the buyer was actually made (Tr. 85-93). Greg Cardamone of Complainant testified that the

grower has in fact been paid for all of the loads in question in this case (Tr. 185-186). It follows, then, according to this testimony, that Complainant *in fact* has already "settled" every load in this case with Respondent. Finally, it is not disputed by Complainant that Respondent wrote checks to Complainant for the settled upon amounts, and that Complainant cashed the checks. Based on the foregoing, payment in full for the loads in question in this case has been tendered by Respondent and accepted by Complainant. (*See* U.C.C. § 3-311 and *Pacific Tomato Growers, LTD v. American Banana Co., Inc.*, 60 Agric. Dec. 352 (U.S.D.A. 2001), which states that there can be an accord and satisfaction where the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.))

Here, Complainant knew or had reason to know that Ed Kettyle had settled the payment for the loads in question with Respondent; the aggregate of evidence shows that loads were in fact settled, that Complainant knew or had reason to know that payment of checks tendered by Respondent was for the agreed upon settlement[13], and that the checks were cashed in August of 2007, within one month after the last load in question was shipped to Respondent.

We will briefly note that Complainant bafflingly puts on its case (from the informal stage on up to brief) as if Respondent contacted Complainant, ordered the produce in each load in question (Complainant appears to switch back and forth between a claim that the produce was ordered on an F.o.b. or delivered basis), the produce in each load was of exceptional quality, and Respondent simply failed to pay for most, if not any, of it. From the arguments presented at informal stage and in the formal complaint (and at hearing), Complainant seems to turn a blind eye to the "back story" in the case, or even recognize that a back story could exist. From the arguments presented in brief post-hearing, Complainant

[13] Ed Kettyle states that he sent an email to his supervisors after the checks were cashed by Complainant, and Complainant waited two months to then contact Respondent and inform it that they were unhappy with Respondent's returns in its accounts of sale. The email stated that Mr. Kettyle had already settled the loads in question in this case and questioned why Complainant was "going back on it now" (Tr. 280).

seems to ignore (and will that we in turn do so) some of the testimony of its own witnesses and all of the testimony of Respondent's witnesses, and more, the existence of all documents involving each load, which establish that there *was* in fact a situation *other* than a straight F.o.b. or delivered sale involved as to every load (i.e. Respondent did not contact Complainant and order/purchase the loads), that Complainant prevailed upon Respondent to handle the loads, that the price was settled after Respondent handled the loads, and that Respondent paid Complainant (and Complainant accepted) the settled amounts. We further note that Complainant puts on a case for damages that asks that Respondent pay the full market value for seemingly exceptional, or at least, good quality produce, plus freight, for every load (Tr. 141-229, 150-152; Complainant's Brief, pgs. 11-17). Based on the testimony of all witnesses and documents, that shows, *inter alia,* that Respondent did not specifically order the produce, that Respondent never agreed to pay for freight[14], that there was clearly an issue of distressed produce in this case, and clearly an issue of settling on a prices after Respondent sold the loads in question, Complainant's position on damages borders on absurd.

While management (or ownership) at Complainant company may have reviewed the settlements reached *after* the fact and decided that the settlements did not provide Complainant with enough money (Tr. 443, 452-454), we find that the settlement amounts presented by Respondent in the case were indeed authorized by Complainant, and that Complainant accepted and cashed the checks provided by Respondent as payment for the agreed upon settlement amounts. Accordingly, Complainant has failed to prove its case, and its Complaint should be dismissed. Complainant is therefore not entitled to damages or attorney's fees.

Fees and Expenses

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 864 (U.S.D.A. 2000); *Mountain Tomatoes,*

[14] Complainant admits that many of the loads in this case were redirected to Respondent after being delivered elsewhere by Complainant and rejected (Tr. 223-225); a fact that makes Complainant's position that Respondent "ordered" the produce and somehow agreed to pay for, or should, pay for freight, even more baffling.

Inc. v. E. Patapanian & Son, Inc., 48 Agric. Dec. 707, 715 (U.S.D.A. 1989). The question of which party is the prevailing party is one that depends upon the facts of the case. *Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric Dec. 343 (U.S.D.A. 2003). In hearing cases, it is the province of the Secretary to determine what are reasonable fees and expenses. *Mountain Tomatoes*, 48 Agric. Dec. 707 (U.S.D.A. 1989).

Each party made claims for fees and expenses in this case. Since Complainant failed to carry its burden of proof for which its Complaint should be dismissed, it is not the prevailing party. As Respondent is the prevailing party here it is entitled to reasonable fees and expenses. Respondent claimed $8,423.00 of duly itemized fees and expenses incurred in preparation for the hearing in this case. We find these fees and expenses reasonable, and allow them.

Respondent also claimed $6,022.80 in fees and expenses in connection with attendance at hearing. Of those, the itemization for "travel time: roundtrip from office to courthouse", in the amount of $1,777.50, is disallowed. *See Golden Harvest Farms, Inc. v. Stanley Produce Co., Inc.*, 38 Agric. Dec. 727 (U.S.D.A. 1979); *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (U.S.D.A. 2000) (attorney's fees claimed for time spent in travel disallowed). Therefore, $4,245.30 is allowed in connection with attendance at hearing. We note that in the itemization for fees and expenses in connection with hearing, Respondent claims costs associated with one of Respondent's witnesses, Ed Kettyle. Fees for voluntary non-subpoenaed witnesses are allowable. *Watson Distributing v. Fruit Unlimited, Inc.*, 42 Agric. Dec. 1613, 1618 (U.S.D.A. 1983).

The fees and expenses provision under section 7(a) of the PACA has been interpreted to exclude any fees or expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure. *Mountain Tomatoes, Inc. v. Patapanian & Son*, 48 Agric. Dec. 707 (U.S.D.A. 1989); *Pinto Bros. v. F.J. Bolestrieir Co.*, 38 Agric. Dec. 269 (U.S.D.A. 1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 24 (U.S.D.A. 1977); *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (U.S.D.A. 2000). Accordingly, we deny the "post hearing fees and costs" claim of

Respondent's attorney for hours expended on the post hearing brief and costs for photocopies of legal research, and find that such activity is not connected to the oral hearing. This activity takes place entirely after the hearing is completed.

While it is true that in preparing a post hearing brief, time spent in review of the transcript and citation to same would not occur had the case been decided under the documentary procedure (as there would be no transcript to review and cite when preparing the brief), in this case, Respondent's attorney has given no indication of the portion of time preparing the post hearing brief that was actually spent reviewing and citing to sections of the transcript in the brief (the time spent reviewing the transcript and performing legal research for the brief is lumped together) (Resp't's Fee Req., Ex. C.) Therefore, we disallow the entire amount claimed by Respondent's attorney for preparation of Respondent's brief. However, we will allow the costs of transcript copies, $48.24, claimed by Respondent's attorney, as that amount was incurred as a direct result of the hearing, and the expense would not have been incurred had the case been decided by documentary procedure. Based on the foregoing, the allowable amount of expenses claimed by Respondent's attorney is $12,716.54 ($8,423.00 plus $4,245.30 plus $48.24).

ORDER

The Complaint in this case is dismissed.

Within thirty (30) days from the date of this Order, Complainant shall pay Respondent, the prevailing party, the amount of $12,716.54 in attorney's fees and expenses.

Copies of this Order shall be served upon the parties.

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M & M PACKAGING, INC. v. CASA DE CAMPO, INC.
PACA Docket No. E-R-2010-288.
Decision and Order; Order on Reconsideration.
Filed March 9, 2012.

[Cite as: 70 Agric. Dec. xx (U.S.D.A. 2011), *published in* 72 Agric. Dec. xx (U.S.D.A. 2013).]

PACA-R.

Procedure – Prejudgment interest limited to amount sought in complaint

Complainant sought interest in a specified amount on the past due debt at the rate stated on its invoices. Because Complainant sought a specified amount of prejudgment interest in its complaint, the award of prejudgment interest was limited to the dollar amount sought in the complaint.

Shelton S. Smallwood, Presiding Officer.
Earl E. Elliott, Examiner.
Robert N. Isseks, Counsel for Complainant.
Andrew Squire, Counsel for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act ("PACA"), 1930, as amended (7 U.S.C. § 499a *et seq*.) ("Act"). A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $53,575.40,[1] allegedly due in connection with eleven (11) truckloads of potatoes and onions shipped in the course of interstate commerce.

Copies of the Report of Investigation ("ROI") prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer that admits liability

[1] $51,156.00 plus $345.00 for bank charges and $2,074.40 for interest at the rate of eighteen percent (18%) per annum for amounts due over thirty (30) days.

to Complainant in the amount of $31,616.00 and asserts an affirmative defense.

On September 15, 2010, in accordance with section 7(a) of the Act, an Order Requiring Payment of the Undisputed Amount was issued, requiring Respondent to pay Complainant $31,616.00, plus interest at the rate of .26% per annum from June 1, 2010, until paid, plus the $500.00 handling fee Complainant paid to file the Complaint. Respondent has not made payment to Complainant on the Order. Respondent's liability for payment of the disputed amount was left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Although the amount claimed in the Complaint exceeds $30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant did not file additional evidence. Respondent submitted an Answering Statement which was not filed timely within the Department's allotted filing period. Neither party filed briefs.

Findings of Fact

1. Complainant is a corporation whose post office address is 401 Pulaski Hwy. Rd. #2, Goshen, NY 10924. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a corporation whose post office address is 4 Dundee Ave., Patterson, NJ 07503. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. Complainant, by oral contract, sold and shipped eleven (11) truckloads of potatoes and onions to Respondent, f.o.b.[2] Ten (10) of

[2] Complainant's invoices are silent as to the terms of delivery, therefore f.o.b. terms are assumed. Hunts Point Tomato Co., Inc. v. S & K Farms, Inc., 42 Agric. Dec. 1224, 1225 (U.S.D.A. 1983).

Complainant's eleven (11) invoices state "Interest is charged on all accounts 30 days past due at the monthly Periodic Rate of 1-1/2 % which approximates AN ANNUAL PERCENTAGE RATE OF 18%." (Compl. Ex. 3, 5, 7, 9, 11, 13, 15, 17, 19, 21). One invoice, number 20797, does not contain the eighteen percent (18%) interest terms (Compl. Ex. 1). Complainant's 11 invoices are set forth more fully below:

Inv. No.	***Date***	***Description***	***Price***	***Total***
20797	12-24-2009	200 10-LB BAGS ONIONS	$1.50	$300.00
		50 20/2-LB BAGS RED ONIONS	$11.00	$550.00
		20 50-LB BAGS WHITE ONIONS	$13.00	$260.00
		40 50-LB BAGS SPANISH ONIONS	$9.00	$360.00
		80 25-LB BAGS RED JUMBO	$7.00	$560.00
		160 10/5-LB BAGS EASTERN POTATOES	$6.50	$1,040.00
		25 10/5-LB BAGS RED POTATOES	$13.50	$337.50
		50 50-LB BAGS CHEF POTATOES	$7.00	$350.00
		Invoice Total		*$3,757.50*

(Compl. Ex. 1).

Inv. No.	***Date***	***Description***	***Price***	***Total***
20893	1-06-2010	200 10-LB BAGS ONIONS	$1.50	$300.00
		200 10-LB BAGS RED ONIONS	$2.00	$400.00
		50 20/2-LB BAGS ONIONS	$8.00	$400.00
		50 20/2-LB BAGS RED ONIONS	$11.00	$550.00
		45 50-LB BAGS YELLOW ONIONS	$4.00	$180.00
		21 50-LB BAGS WHITE JUMBO ONIONS	$13.50	$283.50
		150 10/5 LB BAGS EASTERN POTATOES	$7.00	$1,050.00
		42 50-LB BAGS RED A POTATOES	$13.50	$567.00
		15 WHITE C'S	$40.00	$600.00
		40 50-LB BAGS SPANISH ONIONS	$11.00	$440.00
		Invoice Total		*$4,770.50*

(Compl. Ex. 3).

ERRATA

Inv. No.	***Date***	***Description***	***Price***	***Total***
19817	1-09-2010	45 50-LB BAGS SPANISH COL ONIONS	$11.00	$495.00
		50 20/2 LB BAGS ONIONS	$8.00	$400.00
		50 20/2 LB BAGS RED ONIONS	$11.00	$550.00
		250 10/5-LB BAGS EASTERN POTATOES	$8.00	$2,000.00
		7 50-LB BAGS RED C POTATOES	$45.00	$315.00
		Invoice Total		*$3,760.00*

(Compl. Ex. 5).

Inv. No.	***Date***	***Description***	***Price***	***Total***
19839	1-16-2010	200 10-LB BAGS ONIONS	$1.50	$300.00
		200 10-LB BAGS RED ONIONS	$2.00	$400.00
		90 50-LB BAGS ONIONS	$5.00	$450.00
		30 50-LB BAGS WHITE ONIONS	$32.00	$960.00
		50 20/2-LB BAGS ONIONS	$8.50	$425.00
		50 20/2-LB BAGS RED ONIONS	$13.00	$650.00
		100 10/5-LB BAGS EASTERN POTATOES	$7.50	$750.00
		126 50-LB BAGS RED A POTATOES	$13.50	$1,701.00
		84 80-CT RUSSET	$10.00	$840.00
		14 WHITE C'S	$40.00	$560.00
		Invoice Total		*$7,036.00*

(Compl. Ex. 7.)

Inv. No.	***Date***	***Description***	***Price***	***Total***
19918	1-23-2010	50 20/2-LB BAGS ONIONS	$9.00	$450.00
		80 25-LB BAGS RED MEDIUM ONIONS	$7.00	$560.00
		160 10/5-LB BAGS EASTERN POTATOES	$8.00	$1,280.00
		120 5/10 LB BAGS RUSSET POTATOES	$8.50	$1,020.00
		50 50-LB BAGS CHEF POTATOES	$8.00	$400.00
		84 50-LB BAGS RED A POTATOES	$13.50	$1,134.00
		Invoice Total		*$4,844.00*

(Compl. Ex. 9).

Inv. No.	*Date*	*Description*	*Price*	*Total*
20005	2-06-2010	200 10-LB BAGS RED ONIONS	$2.50	$500.00
		50 20/2 LB BAGS ONIONS	$10.00	$500.00
		50 20/2 LB BAGS RED ONIONS	$14.00	$700.00
		80 25-LB BAGS RED MEDIUM ONIONS	$8.00	$640.00
		100 10/5-LB BAGS EASTERN POTATOES	$8.00	$800.00
		25 10/5-LB BAGS RED POTATOES	$13.50	$337.50
		42 50-LB BAGS RED A POTATOES	$13.50	$567.00
		Invoice Total		*$4,044.50*

(Compl. Ex. 11).

Inv. No.	*Date*	*Description*	*Price*	*Total*
21121	2-18-2010	200 10-LB BAGS YELLOW ONIONS	$1.75	$350.00
		72 10-LB BAGS RED ONIONS	$2.50	$180.00
		50 20/2-LB BAGS YELLOW ONIONS	$10.00	$500.00
		50 20/2-LB BAGS RED ONIONS	$15.50	$775.00
		90 50-LB BAGS YELLOW ONIONS	$5.00	$450.00
		100 10/5-LB BAGS EASTERN POTATOES	$8.00	$800.00
		50 5/10-LB BAGS RED POTATOES	$10.00	$500.00
		168 50-LB BAGS RED A POTATOES	$13.50	$2,268.00
		Invoice Total		*$5,823.00*

(Compl. Ex. 13).

Inv. No.	*Date*	*Description*	*Price*	*Total*
21197	2-25-2010	200 10-LB BAGS RED ONIONS	$3.50	$700.00
		50 20/2-LB BAGS YELLOW ONIONS	$11.00	$550.00
		50 20/2-LB BAGS RED ONIONS	$16.00	$800.00
		90 50-LB BAGS SPANISH ONIONS	$16.00	$1,440.00
		25 50-LB BAGS WHITE ONIONS	$50.00	$1,250.00

		84 50-LB BOXES RED POTATOES	$13.50	$1,134.00
		Invoice Total		*$5,874.00*

(Compl. Ex. 15).

Inv. No.	***Date***	***Description***	***Price***	***Total***
21308	3-25-2010	50 20/2-LB BAGS SMALL YELLOW ONIONS	$12.00	$600.00
		50 20/2-LB BAGS RED ONIONS	$28.00	$1,400.00
		50 50-LB BAGS SMALL YELLOW ONIONS	$15.00	$750.00
		50 50-LB BAGS SPANISH ONIONS	$25.00	$1,250.00
		Invoice Total		*$4,000.00*

(Compl. Ex. 17).

Inv. No.	***Date***	***Description***	***Price***	***Total***
21353	4-02-2010	199 10-LB BAGS ONIONS	$3.50	$696.50
		50 20/2-LB BAGS SMALL YELLOW ONIONS	$12.00	$600.00
		30 20/2-LB BAGS RED ONIONS	$28.00	$840.00
		50 50-LB BAGS SPANISH ONIONS	$26.00	$1,300.00
		30 25-LB BAGS RED MEDIUM	$17.00	$510.00
		Invoice Total		*$3,946.50*

(Compl. Ex. 19).

Inv. No.	***Date***	***Description***	***Price***	***Total***
21393	4-7-2010	50 20/2-LB ONIONS PP	$12.00	$600.00
		30 20/2-LB BAGS RED ONIONS	$28.00	$840.00
		50 50-LB BAGS SPANISH ONIONS	$27.00	$1,350.00
		30 25-LB BAGS RED MEDIUM	$17.00	$510.00
		Invoice Total		*$3,300.00*

(Compl. Ex. 21).

4. On September 7, 2010, subsequent to the filing of the Complaint, Complainant advised the Department that it received payments of $1,000.00 from Respondent on August 3, 2010, and $1,000.00 from

Respondent on August 13, 2010, or $2,000.00 in total payments. Respondent attempted to make additional payments to Complainant with checks which were returned by Complainant's bank for insufficient funds, resulting in $345.00 in bank charges for Complainant (Compl. Ex. 23-45, 47-50).

5. The informal Complaint was filed on April 20, 2010 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover $53,575.40, arising from $51,156.00 allegedly due in connection with 11 truckloads of potatoes and onions shipped in the course of interstate commerce, plus $345.00 in bank charges for checks tendered by Respondent as payment which were returned by Complainant's bank for insufficient funds, and $2,074.40 for interest at the rate of 18% per annum for amounts due over 30 days. (Compl. ¶¶ 6, 8, Ex. 46.)

Complainant states that Respondent accepted the potatoes and onions in compliance with the contracts of sale, but that it has since failed, neglected, and refused to pay Complainant the amount of $53,575.40 as explained above (Compl. ¶¶ 6, 8). However, on September 7, 2010, subsequent to the filing of the Complaint, Complainant advised the Department that it received payments of $1,000.00 from Respondent on August 3, 2010, and $1,000.00 from Respondent on August 13, 2010, or $2,000.00 in total payments. Complainant's total claim is therefore reduced by $2,000.00, to $51,574.54, which is the amount Complainant seeks to recover in this proceeding.

Complainant, as the moving party, has the burden of proving its allegations by a preponderance of the evidence. *Sun World Int'l, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (U.S.D.A. 1987); *W.W. Rodgers & Sons v. Cal. Produce Distribs., Inc.*, 34 Agric. Dec. 914, 919 (U.S.D.A. 1975). To support its claim, Complainant submitted copies of its 11 invoices billing Respondent for the potatoes and onions (Compl. Ex. 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21) and invoices from its bank, totaling $345.00, for checks Respondent tendered as payment which

were returned by Complainant's bank for insufficient funds (Compl. Ex. 23-45, 47-50), and a spreadsheet showing Complainant's calculation that $2,074.4 0 is due for interest at the rate of eighteen percent (18%) per annum (Compl. Ex. 46).

In response to Complainant's allegations, Respondent submitted an unsworn Answer that admits liability to Complainant in the amount of $31,616.00 (Answer at 1). On September 15, 2010, in accordance with section 7(a) of the Act, an Order Requiring Payment of Undisputed Amount was issued, requiring Respondent to pay Complainant $31,616.00, plus interest at the rate of .26% per annum from June 1, 2010, until paid, plus the $500.00 handling fee Complainant paid to file the Complaint. Respondent has not made payment to Complainant on the Order.

Since Respondent admits liability to Complainant for the potatoes and onions and does not allege that it rejected any of the potatoes and onions, we conclude that Respondent accepted the eleven (11) truckloads of potatoes and onions at issue. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2 (dd)(3). 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 Distrib., Inc.*, 60 Agric. Dec. 840, 844 (U.S.D.A. 2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (U.S.D.A. 1988). The burden to prove a breach of contract rests with the buyer of the accepted goods. U.C.C. § 2-607(4); *see also Grower-Shipper Potato Co. v. Sw. Produce Co.*, 28 Agric. Dec. 511 (U.S.D.A. 1969).

There is no dispute that the potatoes and onions were sold f.o.b. The Regulations (Other than Rules of Practice) Under the Act (7 C.F.R. § 46.43(i)) define f.o.b. as follows:

> 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 shipping condition, and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. . . .

"Suitable shipping condition" is defined in the Regulations (Other than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j)) as meaning "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties**.**" By definition, the suitable shipping condition warranty is applicable only where transportation service and conditions are normal.[3] Where goods are accepted, the burden is upon the buyer to prove that the transportation conditions were normal. *Dave Walsh Co. v. Rozak's Produce Co.*, 39 Agric. Dec. 281, 284 (U.S.D.A. 1980). As the issue of abnormal transportation has not been raised here by either of the parties, we assume that the transportation service and conditions were normal. *Dave Walsh Co., Inc.* at 284; *Veg-A-Mix v. Wholesale Produce Supply*, 37 Agric. Dec. 1296, 1299 (U.S.D.A. 1978); *Hartsell v. Angel Produce Co.*, 29 Agric. Dec. 153, 156 (U.S.D.A. 1970). We conclude therefore that Complainant's suitable shipping condition

[3] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. Harvest Fresh Produce, Inc. v. Clarke-Ehre Produce Co., 39 Agric. Dec. 703, 708-09 (U.S.D.A. 1980) (internal citations omitted).

warranty applies to the eleven (11) shipments of potatoes and onions at issue.

The next issue we will discuss is whether Respondent has asserted any legitimate affirmative defenses. "[T]he burden is on [R]espondent to establish, by a preponderance of the evidence, [its] affirmative defense." *Newmiller Farms, Inc. v. Nicolls*, 36 Agric. Dec. 1230, 1232 (U.S.D.A. 1977). Respondent submitted an unsworn Answering Statement which was not filed timely within the Department's allotted time period. Statements that are unsworn or unverified are without evidentiary value. *C. H. Robinson Co. v. ARC Fresh Food System, Inc.*, 50 Agric. Dec. 950, 952 (U.S.D.A. 1991); *Prillwitz v. Sheehan Produce*, 19 Agric. Dec. 1213, 1215 (U.S.D.A. 1960). Although the unverified pleadings are not evidence, they do serve to frame the issues between the parties. *J.R. Norton Co. v. Corgan & Son, Inc.*, 44 Agric. Dec. 2130, 2132 (U.S.D.A. 1985). Respondent asserts an affirmative defense in its unsworn and untimely Answering Statement that several adjustments were authorized by an employee of Complainant and that Complainant agreed to allow Respondent to sell "off product" price after sale (Answering Statement at 1). The party that claims the contract was modified has the burden of proof. *Garren-Teed Co., Inc. v. Mo-Bo Enters., Inc.*, 51 Agric. Dec. 811, 813 (U.S.D.A. 1992); *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506, 508 (U.S.D.A. 1975); *Regency Packing Co., Inc. v. Auster Co., Inc.*, 42 Agric. Dec. 2042, 2045 (U.S.D.A. 1983). Respondent did not provide evidence to support its unverified claim that Complainant's employee agreed to price adjustments or evidence, such as USDA inspection reports, to prove that it received "off product" from Complainant or that Complainant agreed to amend the terms of any of the eleven (11) sales contracts to price after sale. For the reasons stated, we find that Respondent's affirmative defense is without merit.

We find Respondent liable to Complainant for the full purchase price for eleven (11) truckloads of potatoes and onions, or $51,156.00. Complainant submitted evidence showing that it incurred $345.00 in bank charges for Respondent's checks tendered as payments which were returned by Complainant's bank for insufficient funds (Compl. Ex. 23-45, 47-50). We find that Complainant is entitled to reimbursement for the bank charges as consequential damages. *J&C Enters., Inc. v. Homeland*

Produce, 58 Agric. Dec. 1102, 1105 (U.S.D.A. 1999). This brings the amount due Complainant from Respondent to $51,501.00.

In addition, Complainant seeks $2,074.40 for interest at the rate of eighteen percent (18%) per annum for amounts due over thirty (30) days (Compl. ¶ 6, Ex. 46). Complainant's claim is based on its invoices, containing the statement, "Interest is charged on all accounts 30 days past due at the monthly Periodic Rate of 1-1/2 % which approximates AN ANNUAL PERCENTAGE RATE OF 18%" and a spreadsheet showing Complainant's calculation that $2,074.40 is due for interest at the rate of eighteen percent (18%) per annum up to May 28, 2010. As mentioned above, on September 15, 2010, in accordance with section 7(a) of the Act, an Order Requiring Payment of Undisputed Amount was issued, requiring Respondent to pay Complainant $31,616.00, plus interest at the rate of .26% per annum from June 1, 2010, until paid, plus the $500.00 handling fee Complainant paid to file the Complaint. Respondent has not made payment to Complainant on the Order.

If parties contract for the payment of interest at a rate which is different than that normally awarded in reparation proceedings, this forum will award the percent of interest for which the parties contracted. 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[4] the contract. The parties contracted, via the invoices issued to Respondent for the payment of interest at a rate of eighteen percent (18%) per annum on balances unpaid after thirty (30) days. In accordance with PACA precedent case, *Dennis B. Johnston v. AG Grower Sales LLC*, PACA Docket No. R-08-137,

[4] It was held in *Dayoub Mktg., Inc. v. S.K. Produce Corp.*, 2005 U.S. Dist. Lexis 26974 (S.D.N.Y. 2005) that a one and one-half percent (1.5%) interest charge per month does not materially alter the parties contract. *See also* 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").

decided July 2, 2010, Complainant could be entitled to claim eighteen percent (18%) interest for the period of time until an Order is entered in this case (prejudgment interest) which greatly exceeds the contractual interest of $2,074.40 which Complainant seeks to recover in this proceeding. As Complainant seeks to only recover contractual interest until May 28, 2010, or $2,074.40 in this proceeding, we shall limit Complainant's prejudgment interest to the amount requested, or $2,074.40, less $230.58 requested for invoice number 20797 (Compl. Ex 1) which does not contain the 18% interest terms, for a total of $1,843.82. *Clark Produce v. Primary Export Int'l, Inc.*, 52 Agric. Dec. 1715, 1723 (U.S.D.A. 1993); *Willoughby v. Frito-Lay, Inc.*, 45 Agric. Dec. 1245, 1263 (U.S.D.A. 1985). Adding $1,843.82 for Complainant's prejudgment interest, brings the balance due Complainant by Respondent to $53,344.82. Subtracting Respondent's total payments of $2,000.00,[5] we find Respondent liable to Complainant for $51,344.82.

Respondent's failure to pay Complainant $51,344.82 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). The interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

[5] On September 7, 2010, subsequent to the filing of the Complaint, Complainant advised the Department that it received a payment of $1,000.00 from Respondent on August 3, 2010, and that it received another payment of $1,000.00 from Respondent on August 13, 2010, for $2,000.00 in total payments.

PGB Int'l LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (U.S.D.A. 2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid $500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice Under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

Within thirty (30) days from the date of issuance of this Order, Respondent shall pay Complainant as reparation $51,344.82, with interest at the rate of .26% per annum on the amount of $31,616.00 from the date of this Order, until paid, plus interest at the rate of 0.10% per annum on the amount of $19,728.82 from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

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 September 22, 2011, in which Respondent was ordered to pay Complainant as reparation $51,344.82, with interest thereon at the rate of 0.26 percent per annum on the amount of $31,616.00 from the date of the Order, until paid. Respondent was further ordered to pay Complainant interest at the rate of 0.10 percent per annum on the amount of $19,728.82 from the date of this Order, until paid, plus the amount of $500.00. Initially, we note that the September 22, 2011, Decision and Order concerned only the sum of $19,728.82 that remained in dispute between the parties, as Respondent had already been ordered to pay Complainant the undisputed sum of $31,616.00, plus interest at the rate of 0.26 percent per annum from June 1, 2010, until paid, plus the amount of $500.00, by Order dated September 15, 2010.

Therefore, the Decision and Order of September 22, 2011, should have awarded Complainant the sum of $19,728.82, with interest thereon at the rate of 0.10 percent per annum from September 22, 2011, until paid.

On October 13, 2011, the Department received from Complainant a Petition for Reconsideration of the Order. Respondent was served with a copy of the Petition and afforded the opportunity to submit a reply. Respondent did not submit a timely reply to Complainant's Petition.

In its Petition, Complainant states that it erred in calculating interest only up to date of the Complaint, May 28, 2010 (Pet. at 1). Complainant states it never intended to limit the amount of interest awarded and that it should not have stated a specific amount of interest in the Complaint (Pet. at 1). Accordingly, Complainant requests that we "honor the 18% Interest language" stated on its invoices, i.e., that we allow Complainant to recover pre-judgment interest at the rate of eighteen percent (18%) per annum from the date payment was due through the date of the Decision and Order (Pet. at 1).

A petition for reconsideration "shall state specifically the matters claimed to have been erroneously decided and the alleged errors." 7 C.F.R. § 47.24(a). Complainant has not alleged that the decision was erroneously decided or contained errors; rather, Complainant is requesting that reconsideration be given for its error in the Complaint. Since Complainant had ample opportunity to discover and correct its mistake during the course of the documentary procedure under which the case was heard, we are denying Complainant's request.

Based on our review of the evidence and for the reasons cited, we conclude that Complainant's petition 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 thirty (30) days from the date of this Order, Respondent shall pay Complainant, as reparation, $19,728.82, with interest thereon at the rate of 0.10 percent per annum from September 22, 2011, until paid.

Copies of this Order shall be served upon the parties.

_____

FROERER FARMS, INC., D/B/A OWYHEE PRODUCE v. SELECT ONION LLC.
PACA Docket No. W-R-2007-433.
Decision and Order; Order on Reconsideration.
Filed March 30, 2012.

[Cite as: 71 Agric. Dec. xxxiv (U.S.D.A. 2012), *published in* 72 Agric. Dec. xxxiv (U.S.D.A. 2013).]

PACA-R.

Revocation of Acceptance

Where Complainant delivered onions to Respondent that were grown in fields treated with the pesticide Furadan after it expressly warranted that the onions sold to Respondent would be Furadan-free, Complainant materially breached the contract. Respondent's subsequent communication to Complainant concerning the unfitness of the onions, its refusal to pay Complainant's invoices, and its demand for a refund of the sums it had already paid, constituted a revocation of acceptance. As the nonconformity of the onions, which was both difficult to discover and obscured by Complainant's assurances, substantially impaired the onions' value to Respondent, and the revocation was communicated to Complainant within a reasonable time after the breach was discovered, Respondent's revocation was held permissible.

Charles Kendall, Presiding Officer.
Leslie Wowk, Examiner.
Meuers Law Firm, P.C., Counsel for Complainant
Rynn & Janowsky, LLP, Counsel for Respondent
Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as "the Act." A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against

Respondent in the amount of $36,956.71 in connection with ten truckloads of onions 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 at least $125,393.04 for damages allegedly sustained in connection with its purchase of the ten truckloads of onions at issue in the Complaint, and for payments that Respondent made to Complainant for earlier purchases of Complainant's onions. Complainant filed a reply to the Counterclaim denying liability to Respondent.

The amount claimed in both the Complaint and the Counterclaim exceeds $30,000.00, and Respondent, in its Answer and Counterclaim,[1] requested an oral hearing. On July 28, 2009, the parties entered a Joint Stipulation Setting Deadlines under the Documentary Procedure 7 C.F.R. 47.20 ("Joint Stipulation"), whereby they agreed "to have the documentary procedure set forth in the regulations at 7 C.F.R. § 47.20 govern the case," but with "slight modifications to the deadlines for the required filings." Joint Stipulation ¶¶ iv-v. Therefore, by agreement of the parties, the case proceeded under the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20), although the times prescribed for filings in sections 47.20 (c), (d), (e) and (g) were replaced with the times agreed upon by the parties in their Joint Stipulation.

Under the documentary procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement.[2]

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[1] Respondent's submission entitled "Respondent Select Onion's Answer to Formal Complaint with Affirmative Defenses and Counterclaim; Request for Oral Hearing" is referred to here and throughout this decision as "Answer and Counterclaim."

[2] Complainant's Opening Statement is an affidavit signed and sworn to by its Manager, Craig Froerer, its General Manager, Shay Myers, and its Office Manager, Robin Froerer.

Respondent filed an Answering Statement.[3] Both parties also submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 3150 Echo Road, Nyssa, OR 97913. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a limited liability company whose post office address is P.O. Box 1010, Ontario, OR 97914. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On August 3, 2006, the United States Environmental Protection Agency ("EPA") issued an Interim Reregistration Eligibility Decision concerning the pesticide carbofuran wherein it concluded:

> The Agency is proposing to cancel all uses of carbofuran based on ecological, occupational, and dietary risks of concern, and to revoke all tolerances, with the exception of bananas, rice, sugarcane, and coffee. These tolerances will be maintained for import purposes only. Several uses were identified as having moderate benefits to growers, and the Agency is proposing to implement a 4-year phase-out for those crops. Therefore EPA is proposing to delay the effective date of revocation of the tolerances for artichokes, corn, peppers, and sunflowers until 2010. All other tolerances will be proposed for revocation following completion of this IRED.

(ROI Ex. E at 16-41.)

4. On September 1, 2006, the Oregon Department of Agriculture ("ODA") sent correspondence to local onion growers advising that the Idaho and Oregon Departments of Agriculture had initiated investigations concerning the reported use of the restricted pesticide,

[3] Respondent's Answering Statement is an affidavit signed and sworn to by its Managing Member, Farrell Larson, its Vice-President of Sales and Marketing, Susan Williams, and its Director of Operations, Loney Larson.

carbofuran, in an off-label manner to treat onion crops for control of thrips (ROI Ex. E at 8).

5. Between September 5 and 15, 2006, onion samples from Complainant's fields were tested for the presence of carbofuran by the Idaho Food Quality Assurance Laboratory. No carbofuran was detected in the onions (ROI Ex. E at 11, 114, 116, 118-121).

6. On or about September 9, 2006, Respondent paid Complainant for the onions it received as of that date with check number 20516 in the amount of $6,000.00. (Answering Stmt. ¶ 9; ROI Ex. E at 3.)

7. Between September 10 and 15, 2006, onion samples from Complainant's fields were tested for the presence of carbofuran by ODA Laboratory Services. No carbofuran was detected in the onions (ROI Ex. E at 111-113, 115).

8. On September 24, 2006, ODA investigator Michael Babbitt ("Babbitt") and ODA brand inspector Darrell Cochran ("Cochran") made an unannounced visit to the place of business of Complainant, where they spoke with Complainant's Craig Froerer ("Froerer"). At that time, Froerer advised Babbitt and Cochran that he had not applied Furadan (carbofuran)[4] to onions or to any of his other crops. Froerer provided Babbitt and Cochran with a list of the applications of pesticides that he had made to his onions in 2006 (ROI Ex. E at 46).

9. On September 26, 2006, the ODA collected samples from Complainant's fields, analyzed the samples, and found the following residues (except where indicated otherwise, the samples were of soil):

[4] Carbofuran is the active ingredient in Furadan.

Farm Service Tract. field	carbofuran (ppm)	3-hydroxycarbofuran*
825-1	0.024 (vegetative)	<0.01
840-5	0.071	<0.01
840-5	0.011 (vegetative)	0.03 (vegetative)
847-6&7	0.057 (vegetative)	<0.01
847-5	0.027	<0.01
1189-2	0.013	<0.01
803-3	0.010	<0.01
803-4&5	0.100	0.024

*3-hydroxycarbofuran is a degradant of carbofuran.

(ROI Ex. E at 52, 147-160.)

10. On October 4, 2006, Bob Spencer, agricultural resources program manager for the Idaho Department of Agriculture, advised Dale Mitchell ("Mitchell"), assistant administrator of the ODA Pesticides Division, that 10 parts per billion (ppb) of carbofuran had been detected in onion bulbs collected from an Idaho field of Complainant. Mitchell called Froerer and again asked whether Complainant had applied Furadan to its onions. Froerer replied that they had. On the same date, the ODA issued an embargo on all onions grown by Complainant in Oregon (ROI Ex. E at 47, 102-107).

11. On October 5, 2006, after reviewing market assurance analytical results of onion bulb samples taken from Complainant's fields, the ODA released Complainant from the embargo (ROI Ex. E at 125-128). On the same date, Complainant and Respondent entered a written "Agreement" providing as follows:

> Complainant will:
>
> • Rent Respondent's rail loading facility in Ontario, Oregon no longer than April 1, 2006;

- Supply all personnel and equipment to load rail cars at the facility;

- Pay utilities of $50.00 per month to Respondent;

- Repair any damage done to the rail loading facility; and

- Allow Respondent the right to match the price for any processing onions and super colossal onions that Complainant has for sale.

Respondent will:

- Allow Complainant to use rail cars assigned to Respondent at no charge;

- Allow Complainant to use Respondent's customer base to sell their onions; and

- Pay for all onions purchased from Complainant within 30 days of receipt of invoice.

(ROI Ex. E at 9.)

12. On November 4, 2006, Complainant and Respondent entered a written "Onion Purchase Contract" providing as follows:

- Complainant will supply US #1 yellow onions packaged in plastic bins (supplied by Respondent) and supply grade sheets;

- Complainant will supply, upon request by Respondent, a data sheet listing all fertilizers, herbicides, pesticides, and fungicides that have been used to produce the onions covered under the contract, and any other information needed under the Food Securities Act;

- The minimum size of the onions will be 4 ½ inches (no more than 5% under) with no maximum size;

- A minimum of 80 percent of the onions supplied under the contract will have single centers;

- The contract will begin on November 1, 2006, and end on March 31, 2007;

- Demands for quantity will be made with four days notice;

- The total volume of onions committed under the contract is 10,000 pounds;

- Respondent will pay market price at time of each order minus $0.0250/lb bag cost; and

- Respondent will pay for the onions in 30 days.

(ROI Ex. A at 24.)

13. On or about November 17, 2006, a supplemental Furadan sales report was submitted to the ODA by JC Watson Company ("Watson"), Homedale, Idaho. The report included an invoice showing that on or about December 20, 2005, Watson sold to Complainant forty-five (45) gallons of FMC Corp. Furadan 4F insecticide (ROI Ex. E at 47, 91-97).

14. On or about November 27, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217479 billing Respondent for 252 fifty (50) pound sacks of super colossal onions at $14.50 per sack, plus $1,615.60 for plastic bins, for a total invoice price of $5,269.60 (ROI Ex. A at 4).

15. On or about November 28, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions.

Complainant issued invoice 217494 billing Respondent for fifteen (15) wooden bins of colossal onions at $172.00 per bin, or $2,580.00, and 2,760 pounds of #2 onions in three (3)plastic bins at $0.07 per pound, or $193.20, for a total invoice price of $2,773.20 (ROI Ex. A at 7).

16. On or about November 29, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217491 billing Respondent for ten (10) select plastic bins of colossal yellow onions at $110.00 per bin, or $1,100.00, and eighteen (18) wooden bins of colossal onions at $172.00 per bin, or $3,096.00, for a total invoice price of $4,196.00 (ROI Ex. A at 5).

17. On or about December 4, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217252 billing Respondent for 19,664 pounds of #2 onions in eighteen (18) plastic bins at $0.07 per pound, for a total invoice price of $1,376.48 (ROI Ex. A at 9).

18. On or about December 6, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217256 billing Respondent for 6,060 pounds of #2 onions in five (5) plastic bins at $0.07 per pound, for a total invoice price of $424.20 (ROI Ex. A at 11).

19. On or about December 13, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217263 billing Respondent for 400 fifty (50) pound sacks of jumbo yellow onions at $12.00 per sack, or $4,800.00, plus $10.00 for an inspection fee and $54.00 for nine (9) pallets at $6.00 each, for a total invoice price of $4,864.00 (ROI Ex. A at 17).

20. On December 15, 2006, Respondent paid Complainant for the onions it received as of that date with check number 22279 in the amount of $8,568.28. (Answering Stmt. ¶ 16; ROI Ex. E at 4).

21. On December 18, 2006, the parties entered a written "Select Onion Company Supply Contract" providing:

> • Complainant agrees to sell onions to Respondent at a price of $850 per hundred-weight;
>
> • The onions shall be U.S. No. 2 grade, with a diameter greater than 3 inches;
>
> • Payment for the onions is due 30 days from invoice;
>
> • Complainant is responsible for loading the onions at its facility;
>
> • Respondent shall tare the onions upon delivery at its facility; and
>
> • Respondent will pay $0.025 per pound for onions between 2¾ and 3 inches in diameter.

(ROI Ex. E at 10.)

22. On or about December 20, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217275 billing Respondent for 513 fifty (50) pound sacks of super colossal onions at $18.00 per sack, or $9,234.00, twelve (12) pallets at $6.00 each, or $72.00, and 7,870 pounds of #2 onions in eight (8) plastic bins at $0.085 per pound, or $668.95, for a total invoice price of $9,974.95 (ROI Ex. A at 13).

23. On or about December 21, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217279 billing Respondent for 14,615 pounds of #2 onions in two (2) plastic bins and eleven (11) wooden bins at $0.085 per pound, for a total invoice price of $1,242.28 (ROI Ex. A at 15).

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24. On January 12, 2007, Respondent paid Complainant for the onions it received as of that date with check number 22279 in the amount of $8,568.28 (Answering Stmt. ¶ 18; ROI Ex. E at 4).

25. On or about February 6, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one truckload of onions. Complainant issued invoice 217440 billing Respondent for 84 50-pound sacks of super colossal onions at $21.00 per sack, or $1,764.00, plus 2 pallets at $6.00 each, or $12.00, for a total invoice price of $1,776.00. (ROI Ex. A at 20.)

26. On or about February 6, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 226607 billing Respondent for 230 fifty (50) pound sacks of super colossal onions at $22.00 per sack, for a total invoice price of $5,060.00. (ROI Ex. A at 22.)

27. On March 29, 2007, the ODA found Froerer in violation of ORS 634.372(4), which provides: "A person may not: Perform pesticide application activities in a faulty, careless or negligent manner." (ROI Ex. E at 187). Froerer was fined $10,693.00 for this violation (ROI Ex. E at 88). Froerer did not contest the finding or penalty, and a Final Order by Default was issued on April 25, 2007 (ROI Ex. E at 195-201).

28. Respondent learned of the March 29, 2006, ODA finding when it was published on April 6, 2006, by the The Capitol Press in Oregon. (ROI Ex. E at 5, 12-13.) Respondent communicated its view of the breach to Complainant by letter dated April 10, 2007 (Answering Stmt. ¶ 24; ROI Ex. E at 14-15).

29. The informal complaint was filed on August 22, 2007, which is within nine (9) months from the date the cause of action accrued (ROI Ex. A at 1).

30. Respondent filed its response to the informal complaint, asserting facts forming the basis of its Counterclaim, on October 5, 2007 (ROI Ex. E at 1-213).

Conclusions

This dispute concerns Respondent's liability for ten truckloads of onions purchased from Complainant. Complainant states Respondent accepted the onions in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices totaling $36,956.71 (Compl. ¶ 6). Respondent asserts, in response, that its agreement to purchase the onions was conditioned upon the onions being free from the illegal use of the carbofuran insecticide (commercially marketed as "Furadan")[5], and that Complainant breached this agreement by supplying onions that were not "Furadan-free." Respondent also asserts that Complainant breached its agreement to supply certain documents specified in the contract of sale, including grade sheets and a data sheet listing all fertilizers, herbicides, pesticides and fungicides used in the production of the onions (Answer & Countercl. ¶ 4).

Although Respondent maintains that the onions supplied by Complainant did not comply with the contract requirements, Respondent acknowledges that the onions were accepted and resold to its customers (Answer & Countercl. ¶ I). 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. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Company v. Ben Gatz Company*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4). *See also W. T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1700, 1703 (U.S.D.A. 1993); *Salinas Marketing Cooperative v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

We will first consider Respondent's allegation that Complainant breached the contract by supplying onions that were not "Furadan-free."

[5] *See* ROI Ex. E at 93.

Respondent, as the party asserting that Complainant warranted that the onions would be free from Furadan, has the burden to prove this allegation by a preponderance of the evidence.[6] Respondent asserts that in September of 2006, which is prior to the transactions in question, Complainant's Robin Froerer verbally assured Respondent's Susan Williams that Complainant did not use Furadan on its onions. Respondent states its concern about the possible use of Furadan was based on the warnings issued by Oregon and Idaho, and because Respondent needed to assure its customers that the onions they were purchasing were free of Furadan. (Answering Stmt. ¶ 8.)

While Complainant asserts that neither Craig Froerer, Robin Froerer, nor Shay Myers ever denied using Furadan to Respondent, Complainant acknowledges that on November 4, 2006, Robin Froerer provided Respondent's Loney Larson with copies of lab test results showing that no carbofuran was detected on Complainant's onions (Opening Stmt. ¶¶ 31-33). Complainant states further that Loney Larson's subsequent agreement to execute the Onion Purchase Contract on November 4, 2006,[7] was based on his satisfaction with the test results and the safety of the product grown by Complainant (Opening Stmt. ¶ 34).

Given that Complainant provided Respondent with documents indicating there was no Furadan detected on the onions that it intended to sell to Respondent, we find that Complainant expressly warranted that the onions at issue in this dispute would be free from Furadan.[8]

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[6] The buyer carries the burden of proof as to special terms. World Wide Brokerage, Inc. v. Calhoun Fruit & Produce, Inc., 49 Agric. Dec. 613, 616 (U.S.D.A. 1990).

[7] This is a written agreement wherein Respondent agreed to purchase 10,000 pounds of U.S. No. 1 yellow onions from Complainant between November 1, 2006, and March 1, 2007 (ROI Ex. A at 24).

[8] Express warranties are representations made by a seller to a buyer that relate to the quality or performance of the product sold. The seller must deliver goods that conform to his representations unless he proves that those representations did not create an enforceable express warranty:

> Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

Complainant asserts, however, that Respondent has failed to submit evidence showing that the onions it purchased were grown in the fields that Complainant treated with Furadan, or that the onions Respondent received contained any Furadan residue (Complainant's Br. ¶ B). Complainant asserts specifically that it grew 309 acres of onions in seventeen (17) fields located in eastern Oregon (Opening Stmt. ¶ 13). In the summer of 2006, Complainant states Craig Froerer applied the insecticide Furadan in some of Complainant's seventeen (17) Oregon fields in an effort to control thrips, but that there were ten (10) fields where Furadan was not used (Opening Stmt ¶ 14). According to the Final Order by Default issued by the ODA, however, Craig Froerer "stated he applied FMC Furadan 4f EPA Reg. No. 279-2876 to his seventeen (17) onions fields."[9] (ROI Ex. E at 199).

We conclude, on this basis, that the preponderance of the evidence supports Respondent's contention that the onions Complainant sold to Respondent were produced in fields that were treated with Furadan.
Next we must consider whether Complainant's use of Furadan on the fields where the onions were grown constitutes a breach of warranty, even in the absence of any evidence that there was any Furadan residue

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> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313.

[9] Respondent states it chose not to appeal the factual findings of the Notice of Imposition of Civil Penalty to Craig Froerer in order to avoid additional time and expense. (Opening Stmt. ¶ 40.) As a result, a Final Order by Default was issued based on the prima facie case made on the record. (ROI Ex. E at 194-210.)

present on the onions Respondent purchased.[10] The record shows that at the time of the transactions in question, producers of onions in the states of Oregon and Idaho had been notified that the Oregon and Idaho Departments of Agriculture were investigating the off-label use of Furadan in onion fields. The Oregon and Idaho Departments of Agriculture further advised that the off-label use of this pesticide is considered a violation of pesticide law, and that since the EPA has not established a tolerance for carbofuran on onions, it is vitally important to assure that no onions with residues of carbofuran enter the food chain (ROI Ex. E at 57).

In all sales of goods where the seller is considered a merchant with respect to the goods in question, there is an implied warranty that the goods will be merchantable. *See* U.C.C. § 2-314(1). For goods to be merchantable they must:

> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promise or affirmations of fact made on the container or label if any.

[10] Furadan (carbofuran) residue was never detected in any of the onion bulbs sampled by the Oregon and Idaho Departments of Agriculture. (ROI Ex. E at 11, 111-116, 118-121.) Residue from the pesticide was only detected in the soil and plant samples. (ROI Ex. E at 52, 147-160.)

In light of the advisory that was issued by the Oregon and Idaho Departments of Agriculture prior to the transactions in question, we can reasonably presume that onions produced in fields treated with Furadan, and sold subsequent to the advisory, would not pass without objection in the trade. Moreover, such onions would not be considered fit for the ordinary purpose for which onions are used, i.e., resale and, ultimately, consumption. Accordingly, we find that Complainant breached the implied warranty of merchantability by shipping Respondent onions that were produced in fields treated with the pesticide Furadan.

As we mentioned, Respondent has also alleged that Complainant breached its agreement to supply certain documents specified in the contract of sale, including grade sheets and a data sheet listing all fertilizers, herbicides, pesticides and fungicides used in the production of the onions. Whether or not Complainant breached its agreement to supply these documents is of no consequence given that we have already determined that the evidence establishes a breach of warranty by Complainant. Respondent is, therefore, entitled to seek remedies for Complainant's breach.

The general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The first comment to Oregon's version of U.C.C. § 2-714, however, points out that, "1. This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by." Here, the time for revocation of acceptance had not gone by when Respondent communicated the fact of the breach to Complainant. Respondent discovered the breach on April 6, 2007, and communicated it to Complainant on April 10, 2007. In effect, Respondent's communication of the unfitness of the onions, its refusal to pay on Complainant's invoices, and its demand for a refund of sums it had already paid to Complainant for purchases of Complainant's onions in transactions before those in the Complaint, constitute a revocation of acceptance.

ERRATA

We have previously permitted revocation of acceptance, but only in limited, particular circumstances where the goods were unsuitable for the buyer's purposes, and the unsuitability could not have been readily discovered by the buyer. *Highland Juice Co., Inc. v. T.W. Garner Food Co.*, 38 Agric. Dec. 1001, 1008-11 (U.S.D.A. 1979); *Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475, 1479-80 (U.S.D.A. 1978). The analysis of whether Respondent's revocation of acceptance in this case is permissible comes under U.C.C. § 2-608. The Oregon version of that section states:

> 72.6080. UCC 2-608. Revocation of acceptance in whole or in part
>
> (1) The buyer may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the buyer if the buyer has accepted it:
>
> (a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) Without discovery of such nonconformity if the acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if the buyer had rejected them.

O.R.S. § 72.6080

Complainant's onions, at the time they were accepted by Respondent, appeared to be ordinary onions fit for sale and consumption as Furadan-free. The fact that they were not was both difficult to discover and obscured by Complainant's assurances. Respondent's revocation of acceptance, then, complied with (1)(b) of U.C.C. 2-608. Respondent's revocation of acceptance also complied with (2) of U.C.C. 2-608, because, as noted above, Respondent notified Complainant that the nonconformity substantially impaired the onions' value to Respondent within four days of Respondent's discovery of the nonconformity.

As a buyer who revoked acceptance, Respondent has the same rights and duties with regard to the goods involved as if Respondent had rejected them. Respondent is relieved of a duty to pay Complainant for the nonconforming onions, and has a right to demand a refund of money it has already paid for Complainant's nonconforming onions. Ordinarily, a buyer who rejects goods has a duty to return them to the seller, or make them available for the seller's disposition. Comment 6 to Oregon's U.C.C. 2-608 says in this regard, "[w]orthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded." For these purposes, we take notice of the fact that perishable agricultural commodities in fields with illegal pesticide application are worthless goods.

Complainant's material breach relieved Respondent of any duty to perform, that is, to pay Complainant for its onions. Therefore, the Complaint should be dismissed.

Respondent asserts in its Answer and Counterclaim that it has been damaged due to Complainant's misrepresentations in the amount of at least $125,393.04, which it says consists of the amount Respondent paid Complainant for the onions that were treated with the illegal pesticide application ($25,810.04)[11], plus the amount of $99,583.00, which is the amount that Respondent resold the onions to its customers for, and is the amount to be refunded to Respondent's customers in order to make those customers whole. Respondent also asserts that for the unforeseen future

[11] Respondent apparently made an error in calculating this total, as the payments it claimed to have made to Complainant total $25,809.99.

it will be subject to liability to the customers to whom it sold the Furadan-treated onions (Answer & Countercl. ¶ I).

Respondent provided evidence that it made payments of $6,000.00, $8,568.28, and $11,241.71 to Complainant for the onions from Complainant's 2006-2007 crop, for a total of $25,809.99. Complainant did not dispute these allegations. Respondent asserted these payments in response to Complainant's informal complaint. Counterclaims arising out of different transactions than those covered by a timely complaint must be filed within nine (9) months after the cause of action as to such counterclaims accrued. Respondent filed its response on October 5, 2007, which was well within nine (9) months of when its cause of action accrued, upon discovery of Complainant's breach, on April 6, 2007.

In regard to refunds to Respondent's customers, Respondent did not include with its Answer and Counterclaim any evidence showing that its customers requested or were given a refund of the purchase price they paid for the onions. Since Respondent presumably received and retained full payment from its customers for the ten truckloads of onions in question, we find that Respondent has failed to establish that it was damaged in this regard. We rejected a similar request for damages for refunds to the buyer's customers in *Cal-Swiss Foods*, 37 Agric. Dec. at 1480-1481 (U.S.D.A. 1978), reasoning that any refunds were offset by the customers' payments to the buyer.

Respondent's assertion that for the unforeseen future it will be subject to liability to the customers to whom it sold the Furadan-treated onions is not accompanied by any evidence, and is not stated with any specificity. Any award in this regard would be purely speculative, and thus none will be considered.

Complainant's failure to pay Respondent $25,809.99 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Respondent. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925);

see also Louisville & Nashville R.R. v. Ohio Valley Tie Co., 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). The interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Respondent in this action paid $300.00 to file its counterclaim as required by section 47.8(a) of the Rules of Practice under the Act (7 C.F.R. § 47.8(a)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

The Complaint is dismissed.

Within thirty (30) days from the date of this Order, Complainant shall pay Respondent as reparation $25,809.99, with interest thereon at the rate of 0.19 percent per annum from March 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

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 June 3, 2011, dismissing the

Complaint and ordering Complainant to pay Respondent, as reparation, $25,809.99, with interest thereon at the rate of 0.19 percent per annum from March 1, 2007, until paid, plus the amount of $300.00. On June 22, 2011, Complainant filed an Unopposed[12] Motion to Stay Enforcement of Reparation Order and to Enlarge Time to File Petition for Reconsideration (Motion). On October 7, 2011, an Order was issued granting Complainant's Motion and providing Complainant with twenty (20) days from the date of the Order to file a petition for reconsideration. Complainant's Petition for Reconsideration was subsequently received by the Department on October 27, 2011. Respondent was served with a copy of the Petition and afforded twenty (20) days from receipt of the Petition to submit a reply. Respondent did not submit a reply to the Petition within the time provided.

In the Petition, Complainant asserts that the Decision and Order is erroneous on the issues of liability and damages (Pet. at 2). With respect to the issue of liability, Complainant argues that the Department erred in finding that Respondent properly revoked its acceptance of the subject onions without conducting the two-step analysis required under U.C.C. § 2-608 to make that finding (Pet. at 2). In addition, Complainant states the Department found that Complainant's misuse of carbofuran breached express and implied warranties made to Respondent while overlooking the fact that the use was disclosed to Respondent prior to the sales, and that the onions were tested by the Oregon and Idaho Departments of Agriculture, neither of which found carbofuran in the onions (Pet. at 2).

While Complainant refers in its Petition to "the fact that the use [of carbofuran] was disclosed to [Respondent] prior to the sales" (Pet. at 2), Complainant fails to point us to any evidence in the record showing that its use of carbofuran was disclosed to Respondent prior to the onion sales in question. On the contrary, the record includes testimony from Respondent's representatives asserting that they were not made aware of Respondent's use of carbofuran prior to agreeing to purchase the subject onions (Answering Stmt. ¶¶ 12, 15, 17, 19). We also note that the published finding of Complainant's use of carbofuran is dated March 29, 2007, which is more than a month after the last sale of the subject onions to Respondent. (ROI Ex. A at 22; ROI Ex. E at 5, 12-13). Moreover, the

[12] Complainant's counsel indicated that she contacted Respondent's counsel, who expressed no opposition to the relief sought (Motion at 1, n.1).

issue of whether or not carbofuran was detected in the onions themselves is irrelevant, as there is always an implied warranty that crops are produced without illegal application of pesticides or other banned chemicals, and the evidence plainly shows that Complainant breached this warranty.

Also in connection with the issue of liability, Complainant asserts that any revocation of acceptance based on worthless goods requires a two-step analysis, with the first step involving a subjective determination of the value of the goods based on the unique circumstances of the buyer, which is then followed by an objective determination of the value of the goods. (Petition at 3-4.) In support of this contention, Complainant cites *Jorgensen v. Pressnall*, 274 Or. 289-90, 545 P.2d 1382, 1384-85 (1976), wherein the Court held:

> Whether plaintiffs proved nonconformities sufficiently serious to justify revocation of acceptance is a two-step inquiry under the code. Since ORS 72.6080(1) provides that the buyer may revoke acceptance of goods "whose nonconformity substantially impairs its value *to him*," the value of conforming goods *to the plaintiff* must first be determined. This is a subjective question in the sense that it calls for a consideration of the needs and circumstances of the plaintiff who seeks to revoke; not the needs and circumstances of an average buyer.[13] The second inquiry is whether the nonconformity in fact substantially impairs the value of the goods to the buyer, having in mind his particular needs. This is an objective question in the sense that it calls for evidence of something more than plaintiff's assertion that the nonconformity impaired the value to him; it requires evidence from which it can be inferred that plaintiff's needs were not met because of the nonconformity. In

[13] *See* U.C.C. § 2-608, comment 2: "The test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances." *See also* Tiger Motor Co. v. McMurtry, 284 Ala. 283, 292, 224 So.2d 638 (1969): "We are aware that what may cause one person great inconvenience of financial loss, may not another."

> short, the nonconformity must *substantially* impair the value of the goods to the plaintiff buyer.[14] The existence of substantial impairment depends upon the facts and circumstances in each case.[15]

Complainant argues that while the Department's statement "we take notice of the fact that perishable agricultural commodities in fields with illegal pesticide application are worthless goods" may arguably constitute the first step of the analysis, it completely omits the second step, i.e., to determine the objective value of the onions supplied by Complainant (Pet. at 5, *citing* Decision at 17). Complainant states there is no evidence that the value of the onions was in any way impaired and that, to the contrary, the Department found that Respondent failed to prove any damages stemming from the onions, which it resold and was paid in full for (Pet. at 5, *citing* Decision at 18).

The decision found that the onions were intrinsically, objectively without value (Decision at 14). Contrary to Complainant's argument, this finding has nothing to do with the first step of the analysis. Rather, it decides the second step. A nonconformity that renders the onions worthless logically must substantially impair the value of the onions to Respondent. Moreover, since the nonconforming onions were devoid of value in and of themselves, they perforce did not meet the needs of Respondent.

With respect to damages, Complainant states our finding that Respondent is not liable to Complainant for the 10 unpaid loads, and that Respondent is entitled to recover all amounts paid to Complainant for other purchases in 2006, wholly ignores vital aspects of Oregon's codification of U.C.C. § 2-314, which requires proof of both causation and damages. (Petition at 2.) Complainant states further that by misapplying U.C.C. § 2-608 and ordering Complainant to repay over $25,000.00 to Respondent, the Department fails to consider the fact that Respondent was paid in full for the onions, and must return the value

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[14] *See* U.C.C. § 2-608, comment 2; Herbstram v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d 181, 185 (1975): "Whether there has been a substantial impairment is based upon an objective factual evaluation rather than upon a subjective test of whether the buyer believed the value was substantially impaired."

[15] Tiger Motor Co. v. McMurtry, *supra* note 13.

received to Complainant if it is revoking acceptance. (Petition at 2-3.) Finally, Complainant states the Decision and Order effectively results in a windfall in favor of Respondent, who pays nothing for over $60,000.00 in onions that it resold and was paid for. (Petition at 3.)

Respondent submitted a Counterclaim which was made up of two parts, the first of which was a request for recovery of the $25,810.04 that it paid Complainant "for onions that were treated with the illegal pesticide application and therefore were in breach of the agreement." (Counterclaim ¶ I.) This sum was awarded to Respondent in accordance with U.C.C. § 2-608, and Oregon's codification thereof, which gives a buyer who revokes acceptance the same rights and duties with regard to the goods involved as if the buyer had rejected them, and thereby entitled Respondent to a refund of the funds remitted to Complainant for the worthless onions. (Decision at 16-17.)

The remainder of Respondent's Counterclaim consisted of a request for damages in the amount of $99,583.00 for the sales proceeds Respondent collected from its customers, which Respondent stated would be refunded. (Counterclaim ¶ I.) As Complainant acknowledges in its petition (Petition at 10), Respondent's claim for such damages was denied because Respondent failed to prove that it actually incurred the losses it claimed. (Decision at 18). In the decision we stated specifically:

> … Respondent did not include with its Answer and Counterclaim any evidence showing that its customers requested or were given a refund of the purchase price they paid for the onions. Since Respondent presumably received and retained full payment from its customers for the ten truckloads of onions in question, we find that Respondent has failed to establish that it was damaged in this regard. …

(Decision at 18). Complainant nevertheless claims that the decision results in a windfall for Respondent, who pays nothing for over $60,000.00 in onions that it resold and was paid for (Pet. at 3). However, the issue of whether or not Respondent resold and collected proceeds for the onions deemed worthless and effectively rejected by Respondent due

to Complainant's use of an illegal pesticide is between Respondent and its customers and has no relevance here. Complainant should not be rewarded for its wrongdoing by obtaining the decision it seeks.

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 is dismissed.

Within thirty (30) days from the date of this Order, Complainant shall pay Respondent as reparation $25,809.99, with interest thereon at the rate of 0.19 percent per annum from March 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

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ERRATA

REPARATION DECISIONS

71 Agric. Dec.
July – Dec. 2012

INTERFRESH, INC. v. B. SAYERS, INC.
PACA Docket No. W-R-2011-535.
Decision and Order.
Filed July 11, 2012.

[Cite as: 71 Agric. Dec. a (U.S.D.A. 2012), *published in* 72 Agric. Dec. a (U.S.D.A. 2013).]

PACA-R.

Accord and Satisfaction – Unjustified late payment was not made in "Good Faith"

U.C.C. § 3-311(a) includes several requirements for accord and satisfaction, the first of which is that the payment be tendered in "Good Faith". We were unable to find that Respondent's late payment was made in "Good Faith" as defined in U.C.C. § 3-103(a)(4). "Good Faith" as defined in U.C.C. § 3-103(a)(4) means honesty in fact and the observance of reasonable commercial standards of fair dealing.

The payment terms in Complainant's invoice were PACA prompt, which means within ten days after acceptance. 7 C.F.R. § 46.2(aa)(5). Respondent's check is dated far beyond ten days. There is nothing to indicate that Respondent objected to the payment terms stated in Complainant's invoice. In the absence of a timely objection by Respondent, the payment terms stated in Complainant's invoice became incorporated into the sales contract. U.C.C. § 2-207(2).

Shelton S. Smallwood, Presiding Officer.
Earl E. Elliott, Examiner.
Complainant, *pro se.*
Respondent, *pro se.*
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act 1930 ("PACA"), as amended, (7 U.S.C. § 499a *et seq*.) ("Act"). A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $5,772.00 in connection with one (1) truckload of onions sold and shipped to Respondent in the course of interstate commerce.

Copies of the Report of Investigation (ROI) 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 affirmative defenses.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in the Rules of Practice Under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties filed briefs.

Findings of Fact

1. Complainant is a corporation whose post office address is 2019 West Orangewood Ave., Ste. A, Orange, CA 92868. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent is a corporation whose post office address is 8024 West Arapaho Ct., Boise, ID 83714. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about June 21, 2011, Complainant, by oral contract, sold to Respondent, and agreed to ship one truckload of onions from a loading point in California, to Respondent in Boise, Idaho. On the same day,

ERRATA

Complainant issued invoice number 366881 billing Respondent for 900 fifty (50) pound (lb.) bags jumbo USA yellow onions, at $10.00 per bag, or $9,000.00, f.o.b., plus $120.00 for pallets and $83.55 for inspections, for a total invoice price of $9,203.55. Payment terms were PACA prompt (Compl. Ex. 1).

4. Respondent paid Complainant $3,431.55 with check number 7116, dated August 2, 2011, for invoice number 366881. "Full & Final Pymt Inv 366881" is handwritten on the face of Respondent's check (ROI Ex. C at 2). Complainant deposited Respondent's check on August 8, 2011 (*Id*. at 3), and prepared a "Customer Payment Discrepancy Form" on the same day which indicated that the reason for the short payment by Respondent was market decline/damages (ROI Ex. A at 4). A copy of Complainant's invoice contains a handwritten breakdown by Respondent of its deductions for market decline and damages (ROI Ex. A at 6).

5. The informal complaint was filed on September 14, 2011 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the balance of the contract price for one truckload of jumbo yellow onions sold and shipped to Respondent in the course of interstate commerce. Complainant states that Respondent accepted the onions in compliance with the sales contract for a total price of $9,203.55, but that it has since paid only $3,431.55, leaving a balance due of $5,772.00, which Respondent has failed, neglected and refused to pay. (Compl. ¶¶ 4-6-8.)

Complainant, as the moving party, has the burden of proving its allegations by a preponderance of the evidence. *Sun World Int'l, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (U.S.D.A. 1987); *W.W. Rodgers & Sons v. Cal. Produce Distribs., Inc.*, 34 Agric. Dec. 914, 919 (U.S.D.A. 1975). As evidence to substantiate its allegations, Complainant submitted a copy of its invoice number 366881 billing Respondent for the onions, which were shipped on June 21, 2011, from a loading point in California, to Respondent in Boise, Idaho. Payment

terms on the invoice were PACA prompt (Compl. Ex. 1), which means within ten (10) days after acceptance. 7 C.F.R. § 46.2(aa)(5).

In response to Complainant's allegations, Respondent submitted a sworn Answer that denies Complainant's allegations and asserts affirmative defenses (Answer ¶¶ 1-5). Respondent has the burden of proving its affirmative defense(s) by a preponderance of the evidence. *Jules Produce Co., Inc. v. Quality Melon Sales, Inc.*, 40 Agric. Dec. 152, 154 (U.S.D.A. 1981); *Walker v. Amato*, 27 Agric. Dec. 1543, 1545 (U.S.D.A. 1986). Respondent does not allege, however, that it attempted to reject any of the onions to Complainant. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2(dd)(3). We conclude therefore that Respondent accepted the onions billed on Complainant's invoice number 366881. 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 Distrib., Inc.*, 60 Agric. Dec. 840, 844 (U.S.D.A. 2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (U.S.D.A. 1988). The burden to prove a breach of contract rests with the buyer of the accepted goods. U.C.C. § 2-607(4); *see also Grower-Shipper Potato Co. v. Sw. Produce Co.*, 28 Agric. Dec. 511, 514 (U.S.D.A. 1969).

We will now determine whether Respondent has asserted any legitimate affirmative defenses. Respondent's first affirmative defense is that Complainant breached three contracts, which are unrelated to the onions billed on Complainant's invoice number 366881, and also that Complainant granted Respondent allowances for market decline on invoice number 366881 (Answer ¶¶ 2-4; Answering Statement at 1). A copy of Complainant's invoice number 366881 contains a handwritten breakdown by Respondent of its deductions for market decline and damages (ROI Ex. A at 6). Complainant denies Respondent's first affirmative defense (ROI Ex. A at 5; Opening Statement at 1-2; Statement in Reply at 1-2; Complainant's Br. at 1-2). Respondent has not furnished any evidence in support of either the breaches of contract it alleges by Complainant or the allowances for market decline it alleged that Complainant granted on invoice number 366881. Lacking evidence to support its allegations, we find that Respondent's first affirmative defense is without merit.

ERRATA

Respondent's second affirmative defense is that the balance due alleged by Complainant was resolved in full by accord and satisfaction. Respondent alleges that Complainant knew that a dispute existed but deposited Respondent's check number 7116, dated August 2, 2011, for $3,431.55, with "Full & Final Pymt Inv 366881" handwritten on the face of the check (ROI Ex. C at 2; Answer ¶¶ 4-5; Answering Statement at 1-2; Resp't's Br. ¶¶ 1-3). Complainant deposited Respondent's check on August 8, 2011 (*Id.* at 3), and prepared a "Customer Payment Discrepancy Form" on the same day which indicated that the reason for the short payment by Respondent was market decline/damages (ROI Ex. A at 4). There is no evidence that Respondent advised Complainant of any dispute before tendering its check. Complainant denies that Respondent's check met all of the essential elements for accord and satisfaction (Opening Statement at 1-2; Statement in Reply at 1-2; Complainant's Br. at 1-2).

Section 3-311 of the Uniform Commercial Code ("U.C.C."), entitled "Accord and Satisfaction By Use of Instrument," states, in pertinent part:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
>
> (c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:
>
> (1) The claimant, if an organization, proves that (i)

> within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.
>
> (2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).
>
> (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

U.C.C. § 3-311.

Subsection (a) above includes several requirements, the first of which is that the payment be tendered in good faith. "Good faith" as defined in U.C.C. § 3-103(a)(4) means honesty in fact and the observance of reasonable commercial standards of fair dealing. In *Lindemann Produce, Inc. v. ABC Fresh Mktg., Inc.*, 57 Agric. Dec. 738, 745 (U.S.D.A. 1998), we held that the lumping of full payments on undisputed invoices with partial payments on disputed invoices together in one check which requires a creditor to accept the partial payments in order to receive the undisputed full payments in a timely manner constitutes a lack of good faith. Another example of a lack of good faith, described in Official Comment 4 to U.C.C. section 3-311, is the practice of some business debtors of routinely pre-printing full satisfaction language on all of their

checks so that all or a large part of the debtor's obligations are paid by checks bearing the full satisfaction language, whether or not there is a dispute with the creditor as to the amount due. U.C.C. § 3-311 Official Comment 4. We do not find either circumstance present in the instant case, as Respondent issued an individual check specifically as payment of Complainant's invoice number 366881, and the full satisfaction language on the check is not pre-printed (ROI Ex. C at 2). Moreover, even if it were pre-printed, in *Lindemann* we stated "references to specific invoices serve to particularize the full satisfaction language so as to remove the uncertainty referred to in the Official Comment's example." *Id*. at 744. However, we do find that Respondent's payment was very late. Complainant shipped the onions on June 21, 2011, from a loading point in California, to Respondent in Boise, Idaho. As mentioned above, the payment terms on Complainant's invoice were PACA prompt (Compl. Ex. 1), which means within ten (10) days after acceptance. 7 C.F.R. § 46.2(aa)(5). Respondent's check number 7116 is dated August 2, 2011 (ROI Ex. C at 2), which was far beyond the agreed payment terms in the sales contract. There is nothing to indicate that Respondent objected to the payment terms stated on Complainant's invoice. In the absence of a timely objection by Respondent, the payment terms stated on Complainant's invoice becomes incorporated into the sales contract. U.C.C. § 2-207(2). 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 payment terms in Complainant's invoice, or that the payment terms materially altered the contract. As mentioned above, "Good faith" as defined in U.C.C. section 3-103(a)(4) means honesty in fact and the observance of reasonable commercial standards of fair dealing. Based upon the evidence and the reasons stated, we cannot find that Respondent's late payment was made in "Good Faith" as defined in U.C.C. § 3-103(a)(4).

In addition, U.C.C. section 3-311(a) also specifies that the claim must be unliquidated or subject to a bona fide dispute. A refusal of one party to pay another an amount justly owed is not deemed a bona fide dispute.

Roll Packing House v. Bracker Vegetable Sales Co., 18 Agric. Dec. 975, 982-83 (U.S.D.A. 1959). The existence of a good faith dispute is important, as it puts the creditor on notice so that the payment may not be accidentally processed in a routine manner. *A. Sam & Sons Produce Co., Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1053 n.13 (1991). It also furnishes a reason for compromising, or failing to pay according to the original agreement, an indebtedness otherwise valid on its face. *Id.* Where the agreed purchase price of the goods is not in dispute, the issuance of a partial payment check listing deductions and a protest of the deductions by the party receiving the partial payment check does not establish the existence of a bona fide dispute. *Eustis Fruit Co., Inc. v. Auster Co., Inc.*, 51 Agric. Dec. 861, 881-82 (U.S.D.A. 1992). In the instant case there was no disagreement over the quality and condition of the onions at issue upon delivery and Respondent failed to prove that any bona fide dispute existed between the parties (*supra* p. 4). Therefore, based upon the evidence and the reasons stated, we find that the balance due on the onions at issue was not resolved by accord and satisfaction. Respondent's second affirmative defense is therefore without merit.

Having considered all of the evidence in the record, Respondent's affirmative defenses, and the statements of the parties, we find Respondent liable to Complainant for the full purchase price for the onions, or $9,203.55, less Respondent's payment of $3,431.55, leaving a balance due Complainant of $5,772.00, which Respondent has failed to pay.

Respondent's failure to pay Complainant $5,772.00 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). The interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (U.S.D.A. 2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid $500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice Under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

Within thirty (30) days from the date of this Order, Respondent shall play Complainant as reparation $5,772.00, with interest thereon at the rate of 0.20% per annum from August 1, 2011, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

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DIMARE HOMESTEAD, INC. v. YZAGUIRRE FARMS LLC.
PACA Docket No. S-R-2010-412.
Order on Reconsideration.
Filed August 1, 2012.

[Cite as: 71 Agric. Dec. j (U.S.D.A. 2012), *published in* 72 Agric. Dec. j (U.S.D.A. 2013).

PACA-R.

Jurisdiction – Interstate Commerce – Florida Tomatoes Marketing Order

The sale of Florida-grown tomatoes by a Florida grower/shipper to a "pinhooker" who intended to sell the tomatoes to local buyers for use at farmers' markets and roadside stands is not in interstate commerce because the tomatoes in question are not eligible for shipment outside the state of Florida due to Marketing Order requirements and because the parties never intended or contemplated that these tomatoes would travel in interstate commerce. As a result, these tomatoes cannot be considered a commodity that commonly moves in interstate commerce. As there was no actual or contemplated movement in interstate commerce for the shipments in question, the Secretary is without jurisdiction to consider the dispute.

Shelton S. Smallwood, Presiding Officer.
Leslie Wowk, Examiner.
McCarron & Diess for Complainant.
Meuers Law Firm, P.L. for Respondent.
Ruling 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 December 22, 2011, dismissing the Complaint. On January 10, 2012, the Department received from Complainant a petition for reconsideration of the Order. Respondent was served with a copy of the petition and afforded the opportunity to submit a reply. Respondent requested and was granted an extension until March 12, 2012 to file its reply to the petition. On March 9, 2012, the Department received a reply from Respondent requesting that the petition be denied.

In the Petition, Complainant argues that our decision to dismiss the Complaint for lack of jurisdiction is based on two (2) erroneous

conclusions. Complainant states first that in drawing this conclusion we shifted the burden of proving the condition of the produce received by Respondent to Complainant and reduced the standard of proof to establish such condition to oral representations made by Respondent's representative (Pet. at 1). Complainant also contends that we changed the standard for finding interstate commerce by reinterpreting the meaning of the term "commodity." (Pet. at 1, 5).

We will first address Complainant's contention that we shifted the burden to prove the condition of the tomatoes Respondent accepted to Complainant. As Complainant notes in its Petition, Respondent submitted detailed testimony from its President, Mr. Armando Yzaguirre, wherein Mr. Yzaguirre states the tomatoes in question were picked from fields that Complainant's crews had fully harvested and were no longer producing tomatoes of the kind and quality sold by Complainant (Answering Stmt. ¶ 19); that the growers normally consider the return on such tomatoes as "free money" because the tomatoes would have otherwise been plowed under (Answering Stmt. ¶ 13); and that the tomatoes were packed in used boxes and would not meet the minimum grade U.S. No. 2, so they were only suitable for sale to local buyers at farmers' markets and roadside stands (Answering Stmt. ¶¶ 11, 21). Respondent submitted this testimony to establish that at the time of contracting, both parties were aware that the tomatoes in question were "salvaged" tomatoes that were not suitable for shipment outside the state of Florida. In other words, Mr. Yzaguirre's testimony concerns the nature of the commodity contracted for, rather than the specific condition of the tomatoes accepted. Hence, Complainant's contention that we accepted such testimony as evidence of the condition of the tomatoes is a misrepresentation of the discussion.

Where a buyer has accepted produce and is attempting to prove a breach of contract by the seller, testimonial evidence of the condition of produce cannot stand in place of a USDA inspection.[1] There is, however,

[1] *See* Declo Produce, Inc. v. Sun Valley Potatoes, Inc., 59 Agric. Dec. 433, 438 (U.S.D.A. 2000), wherein we stated "[w]e have held many times that the only way to prove a breach as to condition is by a neutral inspection of produce … we will not accept testimonial evidence of an interested party as to condition." *See also* Tantum v. Weller, 41 Agric. Dec. 2456 (U.S.D.A. 1982); O. D. Huff, Jr., Inc. v. Pagano & Sons, 21 Agric. Dec. 385 (U.S.D.A. 1962).

no such bar to the use of testimonial evidence to establish the terms of the contract,[2] including the type of produce contracted for. For example, a buyer's statement that a seller sold potatoes as U.S. No. 1 is evidence that the contract called for U.S. No. 1 potatoes, at least until such statement is rebutted by the seller. Similarly here, Respondent submitted detailed testimony concerning the nature of the tomatoes that Complainant sold to Respondent, and the testimony submitted by Complainant failed to specifically address any of Respondent's contentions. It is well-established that sworn statements that have not been controverted must be taken as true in the absence of other persuasive evidence. *Crawford v. Ralf & Cono Comunale Produce Corp.*, 51 Agric. Dec. 804, 808 (U.S.D.A. 1992); *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (U.S.D.A. 1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (U.S.D.A. 1982). Therefore, the decision appropriately held that the preponderance of the evidence supported Respondent's contention that Complainant was aware at the time of contracting that the tomatoes it agreed to sell to Respondent were "salvage" tomatoes that were not suitable for shipment outside the state of Florida.

Complainant next asserts that we changed the meaning of the term "commodity" by concluding that off-grade tomatoes are not a commodity that is commonly shipped in interstate commerce (Pet. at 5). This argument concerns the application of current precedent concerning the meaning of "interstate commerce" to the circumstances in this case. Specifically, we referred in the decision to *Produce Place v. United States Department of Agriculture*, 319 U.S. App. D.C. 369 (1996), wherein the D.C. Circuit Court held that if a shipment is of a type of commodity that is commonly shipped in interstate commerce, and the shipment is shipped for resale by a produce dealer doing a substantial portion of its business in interstate commerce, the shipment is in interstate commerce under the Act (Decision at 5-6). Considering the evidence Respondent submitted concerning the type of tomatoes it

[2] *See, e.g.*, Agri-National Sales Co., Inc. v. Caamano Bros., Inc., Caamano Bros., Inc. v. Agri-National Sales Co., Inc., 46 Agric. Dec. 983, 985 (U.S.D.A. 1987), wherein we stated "the uncontroverted statement of Caamano is sufficient for it to have carried its burden of persuasion that the actual price was $5.05."

purchased from Complainant, we concluded that the tomatoes were not a type of commodity that is commonly shipped in interstate commerce.

Complainant argues that this conclusion is erroneous because the term "commodity" means a particular kind of fruit or vegetable (e.g., grapes, broccoli, tomatoes, etc.), so the commodity in question is tomatoes, which is a commodity that is commonly shipped in interstate commerce. (Pet. at 5). There is, however, no indication that the reference in the decision to the off-grade tomatoes in question as a commodity that is not commonly shipped in interstate commerce was intended to create a new class of commodity or suggest that commodities that don't meet grade standards in general are not shipped in interstate commerce. Rather, this statement was merely a summation of our earlier finding that Respondent's uncontroverted sworn testimony concerning the quality of the tomatoes and the circumstances of their harvesting, and the Florida Marketing Order which prohibited their sale outside the state of Florida, established that the parties never intended nor contemplated that the tomatoes in question would travel in interstate commerce. Consequently, we find that Complainant's claim that this interpretation "changes" the meaning of the term "commodity" is without merit.

Finally, we should note that Complainant also mentions our statement that "there was neither contemplation nor actual involvement of the transactions in interstate commerce" (Decision at 8), and states this applies another meaning of interstate commerce that is at odds with the meaning of "interstate commerce" in *Produce Place*, et al.[3] (Pet. at 5). This statement was, however, merely an acknowledgement that there was no evidence of either actual or intended movement in interstate commerce, so unless the other criteria set forth in *Produce Place* were met, which they were not, the transactions could not be considered as involving interstate commerce.

[3] Complainant also cites *Produce Supply, Inc. v. Guy E. Maggio*, PACA Docket No. R-08-042 (December 12, 2008), wherein we held that a shipment of broccoli was in interstate commerce because broccoli is a commodity that is commonly shipped in interstate commerce, and because the broccoli in question was shipped for resale by a produce dealer doing a substantial portion of its business in interstate commerce; and *In re Southland + Keystone*, 132 B.R. 632, 640-41 (9th Cir. BAP 1991), wherein the court held that produce transactions are in interstate commerce and subject to PACA when commodities are of the type typically sold in interstate commerce because the sellers are those Congress intended to protect by enacting PACA.

Based on our reconsideration 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 is dismissed.

Copies of this Order shall be served upon the parties.

_____

COASTAL MARKETING SERVICE, INC. v. VIBO PRODUCE LLC.
PACA Docket No. W-R-2011-118.
Decision and Order.
Filed October 17, 2012.

[Cite as: 71 Agric. Dec. n (U.S.D.A. 2012), *published in* 72 Agric. Dec. n (U.S.D.A. 2013).]

PACA-R.

Procedure - Condition Precedent
An Express Condition to Performance of a Contract
Pay-when-paid agreement

Complainant (seller) agreed to wait to be paid until Respondent (buyer) was paid by a third party, Respondent's customer, which filed for bankruptcy after the pay-when-paid agreement was made. Pay-when-paid agreements usually arise in construction contracts where the general contractor pays the sub-contractor when it is paid by the homeowner or some other responsible party. *See Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co.*, 303 F.2d 655, 658-60 (6th Cir. Ohio 1962). Courts have held that when a pay-when-paid provision in a contract does not address the possibility of insolvency that payment would be postponed for a reasonable period of time to afford a payer the opportunity to collect the funds necessary to pay a payee, but have found it unreasonable to conclude that a pay-when-paid agreement should require a payee to wait to be paid for an indefinite period of

time, which may never occur, when the parties did not provide for this condition at the time the contract was entered into. *Id.*

The fact that such act is not performed or that such event does not happen does not discharge the contract and performance is required in at least a reasonable time, but if such was not the intention of the parties, the possibility of insolvency could have been expressed in unequivocal terms in the contract. *See L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co*., 189 Ariz. 178, 181 (Ariz. Ct. App. 1997), citing *Thos. J. Dyer Co*. Unless the contract clearly shows that an act or event is an express condition, it is not a "condition precedent" to performance under the contract. *See Brady Farms, Inc. v. Crosby*, 37 Agric. Dec. 1962, 1966-70 (U.S.D.A. 1978).

The Regulations Under the Act (7 C.F.R. § 46.2(aa)(5)) require payment for produce by a buyer within ten (10) days after the day on which the produce is accepted. Respondent's invoices to its third-party customer indicate that payment was due Respondent from that customer within twenty-one (21) days. We found it reasonable under the pay-when-paid agreement for Respondent to have collected the funds within twenty-one (21) days and to have paid Complainant within thirty-one (31) days after the day on which the produce was accepted.

Shelton S. Smallwood, Presiding Officer.
Earl E. Elliott, Examiner.
Complainant, *pro se.*
Respondent, *pro se.*
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act 1930 (PACA), as amended (7 U.S.C. § 499a *et seq*.) ("Act"). A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $24,917.03 in connection with two (2) truckloads of mixed vegetables sold and delivered in the course of interstate commerce.

Copies of the Report of Investigation ("ROI") 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 affirmative defenses.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in the Rules of Practice

Under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement and a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 1705 Colonial Blvd., Ste C3, Ft. Meyers, FL 33907. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a limited liability company whose post office address is 44 Kents Ave., Rio Rico, AZ 85642. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about April 30, 2010, Complainant's Salesperson, George Hardwick, sold one (1) truckload of mixed vegetables to Respondent and delivered the vegetables from loading points in Los Angeles, California and Nogales, Arizona, to Respondent's customer, Action Produce in South San Francisco, California (Compl. ¶ 4). Complainant's passing indicates that Complainant shipped the vegetables on the same day (Compl. Ex. 9 at 2). On the same day, Complainant issued invoice number 5492 billing Respondent for 29,903 pounds of watermelons (produce of Mexico), at $.275 per pound, or $8,223.33, and 200 cartons of white corn (produce of USA) at $15.25 per carton, or $3,050.00, for a total sales price of $11,273.33 delivered. Payment was due in twenty-one (21) days (Compl. Ex. 9 at 1).

4. On May 3, 2010, Respondent issued invoice number 302929 billing its customer, Action Produce, for 29,903 pounds of watermelons size-5, at $.285 per pound, or $8,522.36, and 200 48-count cartons of white corn at $15.75 per carton, or $3,150.00, for a total sales price of $11,672.36. Payment was due in twenty-one (21) days (Compl. Ex. 5 at 10).

5. On or about May 1, 2010, Complainant's Salesperson, George Hardwick, sold one (1) truckload of mixed vegetables to Respondent and delivered the vegetables from loading points in Los Angeles, California

and Nogales, Arizona, to Respondent's customer, Action Produce in South San Francisco, California (Compl. ¶ 4). Complainant's passing indicates that Complainant shipped the vegetables on the same day (Compl. Ex. 10 at 2). On the same day, Complainant issued invoice number 5493 billing Respondent for 23,460 pounds of watermelons (produce of Mexico), at $.26 per pound, or $6,099.60, 158 cartons of white corn (produce of USA) at $13.95 per carton, or $2,204.10, and 400 cartons of Roma tomatoes (produce of Mexico) at $13.35 per carton, or $5,340.00, for a total sales price of $13,643.70 delivered. Payment was due in twenty-one 21 days (Compl. Ex. 10 at 1).

6. On May 3, 2010, Respondent issued invoice number 302927 billing its customer, Action Produce, for 23,460 pounds of watermelons size-5, at $.27 per pound, or $6,334.20, 160 cartons of white corn 48-count at $16.00 per carton, or $2,560.00, and 400 cartons of Roma tomatoes at $13.85 per carton, or $5,540.00, for a total sales price of $14,434.20. Payment was due in twenty-one (21) days (Compl. Ex. 5 at 8).

7. Complainant has not been paid for the two (2) shipments of mixed vegetables described in Findings of Fact 3 and 5. At some point, Complainant and Respondent verbally entered a "pay-when-paid" agreement which was not reduced to writing at the time of the agreement (Compl. ¶ 6). However, in a signed letter, dated February 1, 2011, to the Department's Western Regional Office of PACA, Complainant's President, Carl J. Denholtz, stated "[w]e reluctantly agreed with Vibo [Respondent] that due to the unusual circumstances that we were both in we would wait to be paid by Vibo when they were paid by Action [Respondent's customer]. Unfortunately Action has filed for Bankruptcy. . . ." (ROI Ex. E at 2).

8. The informal complaint was filed on December 29, 2010 (ROI Ex. A at 1), which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the sales price of $24,917.03 for two (2) truckloads of mixed vegetables sold to Respondent and delivered to Respondent's customer, Action Produce, in

the course of interstate commerce. Complainant states that it never received payment (Compl. ¶¶ 4-6).

Complainant, as the moving party, has the burden of proving its allegations by a preponderance of the evidence. *See Sun World Int'l, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (U.S.D.A. 1987); *see also W.W. Rodgers & Sons v. Cal. Produce Distrib., Inc.*, 34 Agric. Dec. 914, 919 (U.S.D.A. 1975). As evidence to substantiate its allegations, Complainant submitted copies of its invoices numbers 5492 and 5493 billing Respondent for the vegetables and the corresponding passings (Compl. Ex. 9 at 1-2, Ex. 10 at 1-2).

In response to Complainant's sworn allegations, Respondent submitted a sworn Answer that generally denies the allegations in the Complaint and asserts affirmative defenses. Respondent has the burden of proving its affirmative defense(s) by a preponderance of the evidence. *See Jules Produce Co. v. Quality Melon Sales, Inc.*, 40 Agric. Dec. 152, 154 (U.S.D.A. 1981); *see also Walker & Hagen v. Amato*, 27 Agric. Dec. 1543, 1545 (U.S.D.A. 1986). We will now determine whether Respondent has asserted any legitimate affirmative defenses.

Respondent's first affirmative defense is that it owes no money to Complainant because it was only a Broker in these transactions and that the record does not contain evidence to prove it purchased or accepted the vegetables at issue (Answer at 1-2).

In response, Complainant's President, Carl J. Denholtz, submitted a sworn Opening Statement that denies Respondent's claim that it was only a broker in the transactions at issue. In an effort to further support its claims, Complainant submitted a copy of an analysis letter prepared by the Department's Western Regional Office of PACA advising Respondent to contact Complainant in an effort to settle this matter (Opening Statement at 1, Ex. 1-2). In *Carmack v. Selvidge*, 51 Agric. Dec 892, 902 (1992) we stated:

> The report [ROI] contains both factual findings . . . and advisory opinions . . . and is included as evidence in the proceeding to be considered by the Presiding Officer. The report itself is neither binding on the Presiding

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> Officer nor determinative of the Presiding Officer's final legal judgment. Each party is given the opportunity to rebut the investigator's findings in the same manner as each is allowed to submit other evidence. When the record is presented to the Presiding Officer for preparation of a decision, the Presiding Officer examines all evidence: the Report of Investigation, the pleadings submitted by the parties, and any other evidence contained in the record. The Presiding Officer considers each piece of evidence and renders a decision based on the totality of the evidence contained in the record.

"Where the parties put forth affirmative, but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish its allegation by a preponderance of the evidence." *Lookout Mountain Tomato & Banana Co. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1475 (U.S.D.A. 1992).

Complainant's invoices clearly reflect that Respondent was the buyer of the vegetables at issue (Compl. Ex. 9 at 1-2, Ex. 10 at 1-2). "An invoice, while not fully dispositive of the terms and conditions of a transaction, must be given great weight, particularly where it has not been timely challenged." *Action Produce v. Ward's Fruit & Produce, Inc.*, 46 Agric. Dec. 1845, 1847 (U.S.D.A. 1987); *see also Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (U.S.D.A. 1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218, 224-25 (U.S.D.A. 1960). There is no evidence that Respondent promptly challenged the terms in Complainant's invoices. It simply did not pay the invoices. In addition, there is no evidence that Respondent prepared broker confirmations or memorandums of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due as required by the Regulations Under the Act (7 C.F.R. 46.28(a)). Further, Respondent billed its customer, Action Produce, for the two shipments of vegetables (Compl. Ex. 5 at 8, 10). If Respondent were a broker, it would have invoiced its customer, Action Produce, for broker fees only. Instead it billed Action Produce for the price of the produce with a mark-up for profit. This type of invoicing strongly suggests that Respondent was a buyer who resold produce rather than a

broker. For the reasons stated, we conclude that Respondent purchased the two shipments of vegetables at issue. In addition, we conclude that Respondent accepted the two (2) shipments of vegetables as it has not alleged that it attempted to reject any of the vegetables to Complainant. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2 (dd)(3). 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. *See Ocean Breeze Export, Inc. v. Rialto Distrib., Inc.*, 60 Agric. Dec. 840, 903 (U.S.D.A. 2001); *see also World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (U.S.D.A. 1988). The burden to prove a breach of contract rests with the buyer of the accepted goods. U.C.C. § 2-607(4); *see also W. T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1705, 1710 (U.S.D.A. 1993); *Salinas Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987). In the instant case, Respondent has not alleged that Complainant breached the contracts. Respondent's first affirmative defense that it was merely a broker is without merit.

Respondent's second affirmative defense is that it had a payment agreement with Complainant that was visible in black and white (Answering Statement at 2). The record reflects that at some point Complainant and Respondent verbally entered a pay-when-paid agreement which was not reduced to writing at the time of the agreement (Compl. ¶ 6). However, the verbal agreement was later confirmed in writing by Complainant in a signed letter, dated February 1, 2011, to the Department's Western Regional Office of PACA. In the signed letter, Complainant's President, Carl J. Denholtz, stated "[w]e reluctantly agreed with Vibo [Respondent] that due to the unusual circumstances that we were both in we would wait to be paid by Vibo when they were paid by Action [Respondent's customer]. Unfortunately Action has filed for Bankruptcy. . . ." (ROI Ex. E at 2). Further evidence of the verbal pay-when-paid agreement was confirmed by Complainant to Respondent in an e-mail note, dated December 22, 2010, in which Complainant's President, Carl J. Denholtz, stated "[y]ou and I had agreed that payment of our invoices would be deferred until you received payment from Action. Unfortunately this course can no longer be pursued. . . ." (ROI Ex. G at 9). We have repeatedly held that unsworn evidence may be treated as evidentiary pursuant to 7 C.F.R. § 47.7 of the Rules of Practice Under the Act if contained within the ROI, and that either party shall be

permitted to submit evidence in rebuttal. *Tanita Farms, Inc. v. City Wide Distrib., Inc.*, 44 Agric. Dec. 1738, 1739 (U.S.D.A. 1985). We find no evidence in rebuttal to these letters in the record. Respondent has proven its second affirmative defense that it had a payment agreement with Complainant by a preponderance of the evidence.

Next, we must determine the effect of the pay-when-paid agreement upon the outcome of this case. In the instant case, Complainant (seller) agreed to wait to be paid until Respondent (buyer) was paid by a third party, Respondent's customer, Action Produce, which filed for bankruptcy after the pay-when-paid agreement was made. Pay-when-paid agreements usually arise in construction contracts where the general contractor pays the sub-contractor when it is paid by the homeowner or some other responsible party. *See Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co.*, 303 F.2d 655, 658-60 (6th Cir. Ohio 1962). Courts have held that when a pay-when-paid provision in a contract does not address the possibility of insolvency that payment would be postponed for a reasonable period of time to afford a payer the opportunity to collect the funds necessary to pay a payee, but have found it unreasonable to conclude that a pay-when-paid agreement should require a payee to wait to be paid for an indefinite period of time, which may never occur, when the parties did not provide for this condition at the time the contract was entered into. *Id.* The fact that such act is not performed or that such event does not happen does not discharge the contract and performance is required in at least a reasonable time, but if such was not the intention of the parties, the possibility of insolvency could have been expressed in unequivocal terms in the contract. *See L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 181 (Ariz. Ct. App. 1997), citing *Thos. J. Dyer Co*. Unless the contract clearly shows that an act or event is an express condition, it is not a "condition precedent" to performance under the contract. *See Brady Farms, Inc. v. Crosby*, 37 Agric. Dec. 1962, 1966-70 (U.S.D.A. 1978).

Lastly, as the possibility of insolvency was not addressed in the oral contract between Complainant and Respondent, we must determine a reasonable time for payment by Respondent. The Regulations Under the Act (7 C.F.R. 46.2(aa)(5) require payment for produce by a buyer within ten days after the day on which the produce is accepted. Respondent's invoices to its customer, Action Produce, indicate that payment was due

Respondent within twenty-one (21) days or no later than May 24, 2010 (Compl. Ex. 5 at 8, 10). In light of the pay-when-paid agreement, it would therefore be reasonable to expect Respondent to have paid Complainant within ten (10) days of May 24, 2010, or no later than June 4, 2010.

In summary, based upon the evidence in the record, we find Respondent liable to Complainant for $24,917.03 for the mixed vegetables billed on Complainant's invoices, numbers 5492 and 5493, and that payment was due on June 4, 2010. Respondent has not paid Complainant.

Respondent's failure to pay Complainant $24,917.03 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). The interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (U.S.D.A. 2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid $500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice Under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. §

499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation $24,917.03, with interest thereon at the rate of 0.18% per annum from July 1, 2010, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

_____

WESTBERRY FARMS LTD. v. SUNGATE MARKETING LLC.
PACA Docket No. W-R-2011-192.
Decision and Order.
Filed December 20, 2012.

[Cite as: 71 Agric. Dec. w (U.S.D.A. 2012), *published in* 72 Agric. Dec. w (U.S.D.A. 2013).]

PACA-R.

Joint Account Transactions

Practice and Procedure – Necessary Parties

Where the counterclaim submitted by Respondent concerned produce that was part of a joint venture, and one of the joint venture partners had not and could not be joined in the proceeding, determined that the counterclaim must be dismissed, as any amount due Complainant or Respondent under the venture was dependent, at least in part, upon the contribution of and the proceeds due the third party, so an adequate judgment could not be rendered without the presence of the third party, (a necessary party to the action), to provide evidence and testimony in this regard.

Shelton S. Smallwood, Presiding Officer.
Leslie Wowk, Examiner.
Complainant, *pro se.*
Respondent, *pro se.*
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as "the Act." A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $41,107.84 in connection with eight (8) trucklots of blueberries shipped in the course of foreign commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant and asserting a Counterclaim in the amount of $80,418.40 in connection with five (5) truckloads of pomegranates that Respondent allegedly sold to Complainant.[1] Complainant filed a reply to the Counterclaim denying liability to Respondent.[2]

While the amounts claimed in the Complaint and in the Counterclaim exceed $30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Complainant also submitted a brief.

[1] Respondent submitted one (1) untitled document with paragraphs 1 through 11 comprising its Answer, and paragraphs A though I comprising its Counterclaim.

[2] Complainant submitted one document entitled "Opening Statement/Counter Claim Response" which served as both its Opening Statement and its reply to Respondent's Counterclaim.

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Findings of Fact

1. Complainant is a corporation whose post office address is 34488 Bateman Road, Abbotsford, British Colombia, V2S7Y8. Complainant is not licensed under the Act.

2. Respondent is a limited liability company whose post office address is 822 Amy Court, East Wenatchee, WA 98802. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On July 16, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Los Angeles, California, one trucklot of blueberries (Compl. Ex. 7).Respondent prepared a confirmation dated July 16, 2010, listing the sale by Complainant to Respondent of 960 cartons (12x6 oz.) of blueberries at $8.55 per carton, for a total purchase price of $8,208.00 (Compl. Ex. 6). Complainant issued invoice number 20052689, dated August 6, 2010, billing Respondent for 960 cartons (12x6 oz.) of fresh blueberries at $8.55 per carton, for a total invoice price of $8,208.00 (Compl. Ex. 5). Respondent has not paid this invoice.

4. On August 4, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Vernon, California, one trucklot of blueberries (Compl. Ex. 4). Respondent prepared a confirmation dated August 4, 2010, listing the sale by Complainant to Respondent of 288 cartons (pint) of blueberries at $11.65 per carton, or $3,355.20, and 192 cartons (6 oz.) of blueberries at $7.60 per carton, or $1,824.00, for a total purchase price of $5,179.20 (Compl. Ex. 3). Complainant issued invoice number 20052688, dated August 6, 2010, billing Respondent for 288 cartons (12x1 lb.) of fresh blueberries at $11.65 per carton, or $3,355.20, and 240 cartons (12x6 oz.) of fresh blueberries at $7.60 per carton, or $1,824.00, for a total invoice price of $4,814.40 (Compl. Ex. 2). The invoice shows the quantity of 240 cartons for the 6 oz. blueberries crossed through and "192" handwritten beside it; however, the dollar amount for these blueberries was not adjusted (Compl. Ex. 2). Respondent has not paid this invoice.

5. On August 4, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Vernon, California, one (1) trucklot

of blueberries (Compl. Ex. 9). Respondent prepared a purchase order listing the purchase by Respondent of eighty (80) cartons (12x1 pint) of blueberries at $11.63 per carton (Compl. Ex. 9). Complainant issued invoice number 20052690, dated August 6, 2010, billing Respondent for eighty (80) cartons (12x1 pint) of fresh blueberries at $11.63 per carton, for a total invoice price of $930.40 (Compl. Ex. 8). Respondent has not paid this invoice.

6. On August 4, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Vernon, California, one trucklot of blueberries (Compl. Ex. 11). Respondent prepared a purchase order listing the purchase by Respondent of 288 cartons (4x2#) of blueberries at $10.93 per carton (Compl. Ex. 11). Complainant issued invoice number 20052691, dated August 6, 2010, billing Respondent for 288 cartons (4x2 lbs.) of fresh blueberries at $10.93 per carton, for a total invoice price of $3,147.84 (Compl. Ex. 10). Respondent has not paid this invoice.

7. On August 4, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Vernon, California, one (1) trucklot of blueberries (Compl. Ex. 14). Respondent prepared a purchase order listing the purchase by Respondent of 960 cartons (12x6 oz.) of blueberries at $7.60 per carton (Compl. Ex. 13). Complainant issued invoice number 20052692, dated August 6, 2010, billing Respondent for 960 cartons (12x6 oz.) of fresh blueberries at $7.60 per carton, for a total invoice price of $7,296.00 (Compl. Ex. 12). Respondent has not paid this invoice.

8. On August 5, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Richmond, British Columbia, one (1) trucklot of blueberries (Compl. Ex. 17). Respondent prepared a confirmation dated August 4, 2010, listing the sale by Complainant to Respondent of 192 cartons (12x125 gram) of blueberries at $8.55 per carton, for a total purchase price of $1,641.60 (Compl. Ex. 16). Complainant issued invoice number 20052701, dated August 9, 2010, billing Respondent for 192 cartons (12x125 gram) of fresh blueberries at $8.55 per carton, for a total invoice price of $1,641.60 (Compl. Ex. 15). Respondent has not paid this invoice.

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9. On August 13, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Los Angeles, California, one (1) trucklot of blueberries. (Compl. Ex. 23.) Respondent prepared a purchase order listing the purchase by Respondent of 864 cartons (12x1 pint) of blueberries at $14.75 per carton. (Compl. Ex. 22.) Complainant issued invoice number 20052725, dated August 19, 2010, billing Respondent for 864 cartons (12x1 pint) of fresh blueberries at $14.75 per carton, for a total invoice price of $12,744.00 (Compl. Ex. 21). Respondent has not paid this invoice.

10. On August 18, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in San Francisco, California, one (1) trucklot of blueberries (Compl. Ex. 20). Respondent prepared a confirmation dated August 18, 2010, listing the sale by Complainant to Respondent of 144 cartons (pint) of blueberries at $16.15 per carton, for a total purchase price of $2,325.60 (Compl. Ex. 19). Complainant issued invoice number 20052735, dated August 23, 2010, billing Respondent for 144 cartons (12x1 pint) of fresh blueberries at $16.15 per carton, for a total invoice price of $2,325.60 (Compl. Ex. 18). Respondent has not paid this invoice.

11. The informal Complaint was filed on February 4, 2011, which is within nine (9) months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the agreed purchase price for eight trucklots of fresh blueberries sold and shipped to Respondent. Complainant states Respondent accepted the blueberries in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices totaling $41,107.84 (Compl. ¶ 7). In response to Complainant's allegations, Respondent admits purchasing the subject blueberries but asserts that due to quality issues, only $26,009.00 is owed to Complainant for the blueberries (Answer ¶¶ 4-10). In addition, Respondent asserts in its Counterclaim that Complainant owes Respondent $80,418.40 for five (5) trucklots of pomegranates that Complainant purchased from Respondent (Countercl. ¶ F).

We will first address the eight (8) trucklots of fresh blueberries at issue in the Complaint. As we just mentioned, Respondent admits purchasing the blueberries but contends that it owes less than the amount sought in the Complaint for the blueberries. We will consider Respondent's specific defenses individually by invoice number below.

Invoice No. 20052689

Respondent states there were not any noted problems on this load and states the invoice should be paid in full for the amount of $8,208.00 (Answer Ex. 1). We therefore find that Respondent owes Complainant the invoice price of $8,208.00 for the blueberries in this shipment.

Invoice No. 20052688

Respondent states the blueberries in this shipment were rejected by its customer, Northgate, due to softness and decay, and that an internal inspection showed twelve percent (12%) soft with one percent (1%) decay (Answer Ex. 1). Respondent states further that the 191 cartons of blueberries in six-ounce (6 oz.) containers were accepted with an adjustment (Answer Ex. 1). Respondent states that per conversations had with "Navtej and Parm,"[3] the rejected fruit was sent to Marina Produce to repack, after which the repacked fruit was sent to a different customer with an open price (Answer Ex. 1). Respondent states it has yet to receive any remittance from that customer and is in the process of filing a PACA claim (Answer Ex. 1). Finally, Respondent states Northgate remitted for 191 cartons at $9.00 per carton, for a total of $1,719.00, from which Respondent will deduct its commission in the amount of $171.90, and $218.00 for freight, leaving a balance due Complainant of $1,329.10 (Answer Ex. 1).

Complainant's CEO, Mr. Parm Bains, states the bill of lading for the shipment bears a statement in bold lettering that reads "all claims must be filed upon receipt of delivery," and asserts that a claim is understood in the industry to mean that the receiver upon discovering quality issues will normally call a federal inspection and inform the supplier via e-mail

[3] This is apparently a reference to Respondent's former intern, Mr. Navtej Singh Bains, and Complainant's CEO, Mr. Parm Bains.

as to the quality issues and make a mutually agreed settlement (Opening Stmt. at 1-2). Mr. Bains states further that Complainant was never informed by Navtej (Bains) of any quality issues with respect to any of the shipments, either verbally or via e-mail, or through any other communication (Opening Stmt. at 2). According to Mr. Bains, Navtej is a student who interned under Respondent and its manager, Mr. Dominic Farinelli, to learn marketing and sales in the fresh fruit and vegetable industry (Opening Stmt. at 2). Mr. Bains states Mr. Farinelli and Respondent's Mr. Chris Hartmann were the appropriate people to inform Complainant of quality issues, and that there were in fact two occasions when these individuals notified Complainant of problems with its product (Opening Stmt. at 2). Mr. Bains states it was not until January 25, 2011, after many attempts were made via e-mail to get information on why Complainant was not getting paid, that Complainant became aware of quality issues with the shipments, other than the two just mentioned (Opening Stmt. at 2). Mr. Bains states this was a shock and a surprise to Complainant, as it had not been informed of any problems or received any federal inspections (Opening Stmt. at 2). Finally, Mr. Bains states Respondent made its own decisions as to what to do with the product without consulting Complainant, causing Complainant to incur a substantial loss (Opening Stmt. at 2).

Attached to the Opening Statement of Mr. Parm Bains are a number of documents submitted to substantiate his statements. The first is a copy of one of Complainant's bills of lading bearing the statement "ALL CLAIMS MUST BE FILED UPON RECEIPT OF DELIVERY." (Opening Stmt. Ex. 1). The bill of lading is, however, a contract of haul between Complainant and the carrier, and as such it is not an appropriate place to find the obligations of Respondent pursuant to the sales contract negotiated with Complainant.

The next document is a sworn statement from Mr. Navtej Singh Bains, wherein Mr. Bains states he was employed as an intern with Respondent at the time of the subject transactions (Opening Stmt. Ex. 2). While acting in this capacity, Mr. Bains states he did not discuss quality issues relating to the blueberry shipments with representatives of Respondent, nor was he requested to communicate any concerns about the quality of the blueberries to his father, Mr. Parm Bains, who was the General Manager of Complainant (Opening Stmt. Ex. 2). As a result, Mr.

Bains states he never communicated any concerns about quality to Parm Bains while he was interning with Respondent (Opening Stmt. Ex. 2).

The next two (2) documents submitted by Complainant are copies of e-mail messages sent by Respondent's Mr. Dominic Farinelli to Complainant, dated August 16 and 17, 2010, respectively, stating in the first case that blueberries delivered to Nippon in Vancouver were too soft, and in the second case, that six pallets of blueberries were too soft and a little wet (Opening Stmt. Ex. 3-4). Neither message mentions a specific transaction.

Complainant also submitted evidence that Mr. Parm Bains sent a number of e-mail messages to Respondent's Mr. Chris Hartmann in October and November of 2010 requesting payment for the blueberries (Opening Stmt. Ex. 19-21). In response, Mr. Hartmann sent messages on November 1 and November 15, 2010, informing Complainant that Respondent was still attempting to collect from its customers (Opening Stmt. Ex. 20-21). On January 25, 2011, Mr. Hartmann sent Complainant an e-mail message containing a breakdown of the amount due for each shipment and advising that Respondent still had not been paid on many of the files (Opening Stmt. Ex. 5-20).

In response to the statement of Mr. Parm Bains and the additional evidence submitted therewith, Respondent submitted a sworn Answering Statement signed by Mr. Chris Hartmann, managing partner of Respondent. Mr. Hartmann states that while notification of issues was given as noted in Complainant's Opening Statement Exhibits 3 and 4, most notifications were verbal (Answering Stmt. ¶ 4). Mr. Hartmann also admits not securing federal inspections; however, Mr. Hartmann states Respondent believed it was covered by the verbal notifications (Answering Stmt. ¶ 4). According to Mr. Hartmann, Navtej was in the Clovis, California office with Mr. Dominic Farinelli and had daily contact with his father, Mr. Parm Bains, gathering and disseminating information for Respondent (Answering Stmt. ¶ 4). Mr. Hartman also asserts that Complainant knew of the quality issues, as they stopped shipments for some time in the U.S. because of complaints from receivers (Answering Stmt. ¶ 4).

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In response to Mr. Hartmann's testimony, Complainant submitted a sworn Statement in Reply signed by Mr. Parm Bains, attached to which is a notarized, but not sworn, statement from Mr. Dominic Farinelli that reads as follows:

> During the time that Nav Bains was working with me in Fresno for Sungate Marketing he was present in the capacity of an intern and a student. In an effort to increase his knowledge about the processes of the produce industry he participated in a variety of capacities including but not limited to website design, communicating with customers and with Westberry Farms upon request. All actions performed by Nav were done at my request; this included communication with Westberry Farms regarding orders. Regarding dealing with quality issues on Westberry's blueberry shipments to us, Nav was never asked nor did he address those with Parm or any other staff member at Westberry Farms. Ultimately it was my responsibility to initiate any and all communications.

(Stmt. in Reply Ex. 1). Although Mr. Farinelli's statement is not sworn, it is in evidence under the documentary procedure and may be considered by the trier of facts. *Woods v. Conagra Inc.*, 50 Agric. Dec. 1018, 1022-23 (U.S.D.A. 1991). In reference to this statement, Mr. Parm Bains states "we now have two notarized statements one from Navtej and one from his supervisor Mr. Dominic that no verbal notification was ever given and only on two occasions as noted in exhibits 3 and 4 that written notifications were ever made." (Stmt. in Reply ¶ 5). Further, Mr. Parm Bains states "no verbal notifications were made as the respondent claims to have been made through my son, Navtej to me." (Stmt. in Reply ¶ 10).

Respondent acknowledges accepting all of the blueberry shipments at issue in this dispute (Answer ¶ 8). The Uniform Commercial Code, section 2-607(3)(a), provides that "where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy." Complainant has submitted testimony from the individual employed by Respondent who purportedly provided notice to

Complainant, as well as the individual who purportedly received the notice, both of whom deny that such notice was given or received. Moreover, while Complainant acknowledges receiving written notice via e-mail messages in two instances, there is no indication that this notice relates to any of the blueberry shipments at issue in this dispute. Consequently, we find that Respondent has failed to sustain its burden to prove that prompt notice of a breach was provided to Complainant.

As a result of its failure to establish that it provided Complainant with prompt notice of a breach, Respondent is barred from recovering any damages that may have resulted from the alleged breach of contract by Complainant. We should note that even if Respondent were successful in showing that Complainant was timely notified of a breach, Respondent still would not be entitled to recover damages in the absence of any independent evidence, such as a USDA inspection, to establish that the blueberries did not conform to the contract requirements, or proof that Complainant specifically waived its right to receive such proof.[4] Accordingly, we find that Respondent is liable to Complainant for the blueberries it accepted in this shipment at the full invoice price of $4,814.40.

Invoice No. 20052690

Respondent states the blueberries in this shipment were noted to have some softness on arrival, and that per conversations had with Navtej and Parm, the blueberries were left with the understanding that remittance would be lower than originally expected (Answer Ex. 1). Respondent states its customer, Cooseman's, remitted $10.00 per carton, for a total of $800.00, from which it will deduct its commission of $80.00 and freight of $468.57, leaving a balance due Complainant of $251.43 (Answer Ex. 1).

For the reasons already stated, we find that Respondent is barred from recovering the damages claimed due to its failure to provide independent evidence that the blueberries failed to comply with the contract

[4] The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4). *See also* W. T. Holland & Sons, Inc. v. Sensenig, 52 Agric. Dec. 1705, 1710 (U.S.D.A. 1993); Salinas Mktg. Coop. v. Tom Lange Co., Inc., 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

requirements or establish that Complainant was given timely notice of the alleged breach. Consequently, Respondent is liable to Complainant for the blueberries it accepted in this shipment at the full invoice price of $930.40.

Invoice No. 20052691

Respondent states the blueberries in this shipment were noted to have some softness on arrival which meant that the product necessitated repacking due to the strictness of the receiver (Answer Ex. 1). Per conversations had with Navtej and Parm, Respondent states the fruit was taken to Marina Produce to be repacked (Answer Ex. 1). Respondent adds that an internal analysis of the fruit showed fifteen percent (15%) soft, and the repacking charge was $1.50 per box (Answer Ex. 1). Respondent states its customer, Coast Produce, remitted for 288 cartons at $15.00 per carton, for a total of $4,320.00, from which it will deduct its commission of $432.00, repacking fees of $436.78 and freight of $3,019.22, leaving a balance due Complainant of $3,019.22 (Answer Ex. 1).

For the reasons already stated, we find that Respondent is barred from recovering the damages claimed due to its failure to provide independent evidence that the blueberries failed to comply with the contract requirements or establish that Complainant was given timely notice of the alleged breach. Consequently, Respondent is liable to Complainant for the blueberries it accepted in this shipment at the full invoice price of $3,147.84.

Invoice No. 20052692

Respondent states the blueberries in this shipment were noted to be soft upon arrival but were accepted, and that its customer, VIP, paid in full so Respondent will pay Complainant the full invoice amount of $7,296.00 (Answer Ex. 1). Accordingly, we find that Respondent owes Complainant $7,296.00 for the blueberries in this shipment.

Invoice No. 20052701

Respondent states there were not any noted problems on this load and states the invoice should be paid in full for the amount of $1,641.60 (Answer Ex. 1). Accordingly, we find that Respondent owes Complainant $1,641.60 for the blueberries in this shipment.

Invoice No. 20052725

Respondent states the blueberries in this shipment were rejected upon arrival due to softness, and that per conversations had with Navtej and Parm, the product was sent to Marina Produce to be repacked and used on other orders (Answer Ex. 2). Respondent states a total of 432 cartons were shipped to its customer, Northbay, on file numbers 19259 and 19270, and the repacking fee was $2.15 per carton (Answer Ex. 2). Respondent states Northbay remitted for 288 cartons at $12.00 per carton, for a total of $3,456.00, on file number 19259, and for 144 cartons at $18.00 per carton, for a total of $2,592.00, on file number 19270 (Answer Ex. 2). From the total of $6,048.00 remitted by Northbay, Respondent states it will deduct its commission in the amount of $604.80, repacking fees of $1,857.60 and freight in the amount of $1,647.55, leaving a net amount due Complainant for the blueberries of $1,938.05 (Answer Ex. 2).

For the reasons already stated, we find that Respondent is barred from recovering the damages claimed due to its failure to provide independent evidence that the blueberries failed to comply with the contract requirements or establish that Complainant was given timely notice of the alleged breach. Consequently, Respondent is liable to Complainant for the blueberries it accepted in this shipment at the full invoice price of $12,744.00.

Invoice No. 20052735

Respondent states there were not any noted problems on this load and states the invoice should be paid in full for the amount of $2,325.60 (Answer Ex. 2). Accordingly, we find that Respondent owes Complainant $2,325.60 for the blueberries in this shipment.

The total amount due Complainant from Respondent for the eight trucklots of blueberries at issue in the Complaint is $41,107.84.

ERRATA

Next we will consider Respondent's counterclaim, wherein Respondent seeks to recover $80,418.40 in connection with five truckloads of pomegranates that Respondent allegedly sold to Complainant. Respondent states specifically that on or about various dates between June 29, 2010, and January 11, 2011, in the course of foreign commerce, Complainant purchased and accepted five (5) truckloads of pomegranates from Respondent for which it has since failed, neglected and refused to pay Respondent the agreed purchase prices totaling $80,418.40 (Countercl. ¶¶ D, F).

In response to Respondent's allegations, Complainant states there is no money owed to Respondent for the pomegranates shipped to Complainant because Respondent was an active financial contributor and player in a joint project that was started in March 2010, by Complainant, Respondent and a third party, R.K. Foods (Countercl. Resp. ¶ 8). Complainant states the project was the brain child of Mr. Richard Robinson of R.K. Foods, and involved extracting and packing fresh pomegranate arils at a packing/processing facility owned by Complainant, creating a finished fresh product that would then be marketed and distributed in North American markets by Respondent. Complainant states it injected over $100,000 in new and used equipment, labor and the use of its facilities and management to the project, and Mr. Richard Robinson of R.K. Foods contributed close to $20,000 of his time (Countercl. Resp. ¶ 11I). The fresh pomegranate arils, Complainant states, were Respondent's financial contribution to the project (Countercl. Resp. ¶ 11D.) If the project had been successful, Complainant states Respondent would have been paid for the actual volume of pomegranate arils supplied; however, Complainant states the project had to be shut down due to lack of markets, the poor quality of the pomegranates supplied, production issues and cost overruns (Countercl. Resp. ¶ 8).

Respondent's Managing Partner, Mr. Chris Hartmann, submitted a sworn Answering Statement, wherein he acknowledges that ideas were bantered about, but denies that any partnership agreement was ever entered into or executed (Answering Stmt. ¶ 11). We note, however, that during the informal handling of this claim, Mr. Hartmann submitted a letter to the Department wherein he stated, in pertinent part:

> Complaint #2 on the Pomegranate Arils.
> This project was a joint venture of our two companies. All product arrived with some type of issue some with decay, underweight product, short codes on dates. Sungate attempted in some of the problems to repack or clean the product. Again this was a joint venture and ALL of the issues at the time were addressed promptly with either Mr Bains, Simran Bains or our contact Manjinder.

(ROI Ex. E at 1). Moreover, Complainant submitted copies of a number of e-mail messages exchanged between the parties discussing the project, including one sent by Mr. Hartmann to Complainant on December 23, 2010, stating, in pertinent part:

> I have in the neighborhood of 100K invested here now between fruit purchased, Labor and storage fees, Transportation, Travel. Promotions. Samples. and more. Not in tangibles like equipment and such but in perishables [sic] commodities much of which has been lost.
>
> My participation to this level was never my intention, ability, nor our agreement. We were to secure fruit for you and we were to recoup that investment. It wasn't until September that you asked that we take equal cost sharing in any of this.
>
> Sungate purchased for cash some 30K worth of Chilean product much of which you recouped through whole carton sales but I haven't been paid for that fruit.

(Opening Stmt./Countercl. Resp. Ex. 26B at 2). These messages plainly support Complainant's contention that the pomegranate arils which form the basis of Respondent's Counterclaim were part of a joint venture agreement. While there appears to be some dispute as to the details of the venture, the record clearly indicates that a joint venture agreement existed between Complainant, Respondent, and a third party, R.K.

Foods, rather than a simple sale of the pomegranate arils by Respondent to Complainant.

The Secretary may consider a claim for damages under a joint venture agreement where the venture involves the sale of a perishable agricultural commodity and an agreement to share in the proceeds of such sale. *See Eady v. Eady § Associates*, 37 Agric. Dec. 1589, 1592-93 (U.S.D.A. 1978), *citing Lloyd v. Dellartini*, Secretary's Decision 325, PACA Docket No. 366 (1933). We are, however, unable to consider the subject claim for damages because the joint venture involves a third party, R.K. Foods, who has not and cannot be joined in this proceeding. R.K. Foods cannot be joined at this point because any claim filed by or against this firm concerning the joint venture would have to be filed within nine months from the date the cause of action accrued (7 U.S.C. § 499f(a)), which has long since passed for the joint venture in question. Where a joinder is not feasible, Rule 19(b) of the Federal Rules of Civil Procedure states:

> (b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;

> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

While the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture under the Act, in accordance with the Rules of Practice,[5] they provide guidance in making these types of determinations. *In re: Fresh*

[5] *See generally* Morrow v. Dep't of Agric., 65 F.3d 168 (Table) (per curiam) 1995 WL 523336 (6th Cir. 1995), printed in 54 Agric. Dec. 870 (U.S.D.A. 1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re* United Foods, Inc., 57 Agric. Dec. , slip op. at 19-20 (U.S.D.A. Mar. 4, 1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs); *In re* Kreider Dairy Farms, Inc., 57 Agric. Dec., slip op. at 12 (U.S.D.A. Feb. 20, 1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re* Byard, 56 Agric. Dec. 1543, 1559 (U.S.D.A. 1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no **rules of** civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re* Far W. Meats, 55 Agric. Dec. 1045, 1055-56 (U.S.D.A. 1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted under the Rules of Practice); *In re* Far W. Meats, 55 Agric. Dec. 1033, 1039-40 (U.S.D.A. 1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted under the Rules of Practice); *In re* Hickey, 53 Agric. Dec. 1087, 1096-99 (U.S.D.A. 1994) (stating the Federal Rules of Civil Procedure are not applicable to USDA's disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd,* 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (U.S.D.A. 1989); *In re* Shasta Livestock Auction Yard, Inc., 48 Agric. Dec. 491, 504 n.5 (U.S.D.A. 1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before USDA).

Prep, Inc., In re: Lech, In re: Raab, 58 Agric. Dec. 683, 687 (U.S.D.A. 1999).

As we mentioned, the record contains copies of e-mail messages exchanged between the parties discussing the details of the venture, many of which mention how the profit was to be shared among the parties. (Opening Stmt./Countercl. Resp. Ex. 25 at 1-2; Ex. 26A at 1-8.) Given that any amount due Complainant or Respondent under the venture is dependent, at least in part, upon the contribution of and the proceeds due R.K. Foods, an adequate judgment cannot be rendered without the presence of R.K. Foods to provide evidence in this regard. Without such evidence, any judgment rendered would potentially prejudice R.K. Foods, and we cannot lessen any prejudice by shaping the relief as any amount owed to the parties under the joint venture is dependent upon the contribution of and proceeds due R.K. Foods, which cannot be determined in its absence. For these reasons, we conclude that R.K. Foods is a necessary party to this proceeding who cannot be joined. Since R.K. Foods is a necessary party to the counterclaim who cannot be joined, the counterclaim must be dismissed for nonjoinder.

Furthermore, dismissal of the counterclaim is appropriate because Respondent may seek an adequate remedy in state or federal court. Accordingly, we are dismissing Respondent's Counterclaim.

Respondent's failure to pay Complainant $41,107.84 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). The interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant

> maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid $500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice Under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation $41,107.84, with interest thereon at the rate of fifteen percent (15%) per annum from September 1, 2010, until paid, plus the amount of $500.00.

The Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

MEZA SIERRA ENTERPRISES, INC. v. USDA.
No. 12-60816.
Court Decision.
Filed June 20, 2013.

PACA—Rules of Practice—Official notice.

[Cite as: 531 Fed. Appx. 460 (2013)].

United States Court of Appeals,
Fifth Circuit.

Court denied the Petitioner's Petition for Review, finding that the Judicial Officer ("JO") did not err in: (1) affirming the initial Decision and Order by the Administrative Law Judge ("ALJ") in which the ALJ revoked Petitioner's PACA license; (2) rejecting Petitioner's argument that the ALJ lacked jurisdiction to adjudicate the case; and (3) ruling that the ALJ acted properly in taking official notice of documents from proceedings in Texas state court. The Court also held that the Department's Rules of Practice Governing Formal Adjudicatory Proceedings ("Rules of Practice") apply to adjudication of PACA cases instituted under 7 U.S.C. § 499b(4) and that while a finding of liability is required prior to final revocation of a PACA license it is not a prerequisite for mere initiation of a license-revocation proceeding.

Before: BEAVLEY, JOLLY, and DAVIS, Circuit Judges.

OPINION

PER CURIAM:[*]

Respondent Secretary of Agriculture ("the Secretary") moved to revoke the perishable commodities merchant license of Petitioner Meza Sierra Enterprises, Inc. ("Meza Sierra") for its willful, flagrant, and repeated failure to pay for perishable agricultural commodities purchased

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

in interstate commerce. The Administrative Law Judge ("ALJ") found that it possessed subject matter jurisdiction to adjudicate the dispute and that it was proper for it to take official notice of the facts found in a parallel Texas state court proceeding, and accordingly revoked Meza Sierra's license. Finding no error, we DENY the petition for review.

I.

This appeal stems from the alleged failure of Meza Sierra to pay Kingdom Fresh Produce, Inc. ("Kingdom Fresh") $215,385 for tomatoes it purchased and received between November 2008 and January 2009.

Meza Sierra is a Texas corporation licensed by the Department of Agriculture to participate in the wholesale market for perishable agricultural commodities under the Perishable Agricultural Commodities Act ("PACA"). 7 U.S.C. §§ 499a–499s. From November to December of 2008, Meza Sierra placed a series of orders—twelve lots in total—for tomatoes from Kingdom Fresh, which Kingdom Fresh successfully delivered in accordance with the terms of the orders. Kingdom Fresh, however, alleged that Meza Sierra never paid for any of the delivered lots and filed suit against Meza Sierra for breach of contract in Texas state court. The Deputy Administrator,[1] acting on behalf of the Secretary, also filed an administrative complaint alleging that Meza Sierra failed to pay Kingdom Fresh for the twelve lots of tomatoes in violation of 7 U.S.C. § 499b(4).[2] Under the authority of 7 U.S.C. § 499h(a), the Deputy Administrator petitioned the ALJ to permanently revoke Meza Sierra's license for its flagrant and repeated PACA violations.

In lieu of a hearing, the ALJ took official notice of records from the suit between Meza Sierra and Kingdom Fresh in Texas state court.[3] From these records, the ALJ determined that (a) the tomatoes at issue in the Texas state court proceeding were the same tomatoes at issue in the Deputy Administrator's complaint, (b) the Texas state court suit was fully litigated, and (c) Meza Sierra had in fact failed to pay Kingdom

[1] Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

[2] The Deputy Administrator also alleged Meza Sierra failed to pay a separate grower, Grand Produce LTD Co. The ALJ ultimately dismissed the claim pertaining to Grand Produce LTD Co. with prejudice.

[3] Case No. C-1990-09A in the District Court, 92nd Judicial District, Hidalgo County.

Fresh the agreed purchase price of $215,385 for the twelve lots of tomatoes it received. The ALJ ruled that Meza Sierra's failure to pay Kingdom Fresh constituted repeated and flagrant violations of 7 U.S.C. § 499b(4) and ordered the permanent revocation of Meza Sierra's PACA license. Meza Sierra appealed this ruling to the Secretary. The Judicial Officer ("JO"), acting on behalf of the Secretary, affirmed the ALJ's order revoking Meza Sierra's license.[4] The JO rejected Meza Sierra's claims that the ALJ lacked jurisdiction to adjudicate this case and that the ALJ improperly took official notice of the proceedings in Texas state court. Meza Sierra now petitions this court to review that judgment.

II.

Our review of the Department of Agriculture's decision under PACA is limited to the question of whether it was "arbitrary, capricious, or an abuse of discretion." *Faour v. U.S. Dep't of Agric.,* 985 F.2d 217, 219 (5th Cir.1993) (citing 5 U.S.C. § 706(2)(A)). We will also uphold an agency's interpretation of its own regulations unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 359, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)).

III.

A.

Meza Sierra first argues that the ALJ lacked jurisdiction to adjudicate this case because the Department of Agriculture's Rules of Practice Governing Formal Adjudicatory Proceedings ("Rules of Practice") were inapplicable to the Deputy Administrator's complaint. *See* 7 C.F.R. §§ 1.130–1.151.

The Rules of Practice comprise the procedural rules governing an adjudicative proceeding instituted by the Secretary and include the rules of procedure before an ALJ. *Id.* According to § 1.131(a) of the Rules of

[4] The JO vacated the ALJ's alternative sanction, which ordered the publication of the events surrounding Meza Sierra's PACA violation, because the Deputy Administrator did not seek this sanction in its complaint.

Practice, however, the rules only apply to a PACA adjudicatory proceeding if the Deputy Administrator brings the proceeding under the following exclusive list of statutes: 7 U.S.C. §§ 499a(b)(9), 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499h(e), 499i, and 499m(a). Meza Sierra contends that because the only provision of PACA which it allegedly violated, § 499b(4), is not listed in § 1.131(a) of the Rules of Practice, the Rules of Practice are inapplicable to this case.

This argument ignores the structure of PACA's administrative enforcement scheme. As the Deputy Administrator's complaint makes clear, it is moving to revoke Meza Sierra's license "pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a))," a statute which § 1.131(a) of the Rules of Practice explicitly enumerates and under which a violation of § 499b is an element. Section 499h(a) provides in pertinent part,

Whenever ... the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title ... the Secretary may ... by order, revoke the license of the offender.

7 U.S.C. § 499h(a).

A violation of § 499b is thus a prerequisite to license revocation under § 499h(a). However, if the ALJ were not empowered to adjudicate violations of § 499b, then it could never revoke a license under § 499h(a). We decline to adopt an interpretation of the Rules of Practice that would render one of its provisions void.[5] The Deputy Administrator's complaint asserts that Meza Sierra violated § 499b(4) by failing to pay Kingdom Fresh for twelve lots of tomatoes,[6] and unambiguously petitions the ALJ to revoke Meza Sierra's PACA license for its violations pursuant to § 499h(a). Because § 1.131(a) of the Rules

[5] *See Corley v. United States*, 556 U.S. 303, 315, 129 S.Ct. 1558, 173 L.Ed. 2d 443 (2009) (finding that "one of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks omitted)).

[6] Section 499b(4) makes it illegal to "fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C. § 499b(4). Under 7 C.F.R. § 46.2(aa)(11), a buyer fails to make "full payment promptly" if it has not paid the grower within the time indicated by a written agreement between the parties.

of Practice identifies § 499h(a) in its list of applicable statutes, the Rules of Practice apply to this case.

Meza Sierra in turn submits that the Deputy Administrator's reliance on § 499h(a) was premature. Specifically, Meza Sierra argues that § 499h(a) only grants the ALJ the power to revoke a license *after* there has been a separate administrative determination that a person has violated § 499b. Thus, Meza Sierra contends that invoking § 499h(a) in the initial complaint effectively presumed a § 499b determination which had not yet occurred.

This argument, though artful, misconstrues the wording of the statute. Section 499h(a) states only that "Whenever ... the Secretary determines ... that any commission merchant, dealer, or broker has violated any of the provisions of section 499b ..., the Secretary may, by order, revoke the license of the offender." Nothing in this language supports a requirement that there must be some separate ALJ or administrative determination of § 499b liability before the Secretary can file a formal complaint to revoke a merchant's PACA license. While a finding of § 499b liability is a prerequisite to final revocation of a license under § 499h(a), it is not a prerequisite to the mere institution of license revocation proceedings. The ALJ's decision to revoke Meza Sierra's license under § 499h(a) was therefore proper.[7]

[7] Meza Sierra also argues that the Secretary failed to make its determination in accordance with § 499f, as required by § 499h(a), because Kingdom Fresh as the injured party never filed a formal complaint. However, § 499f requires the injured third party to file a complaint within nine months only if the injured party wants to initiate a reparation proceeding, i.e., file a federal PACA claim to compel the delinquent party to pay for the delivered agriculture goods. *See* 7 U.S.C. § 499f(a)(1) ("*Any* person complaining of any violation of any provision of section 499b of this title ... at any time within nine months after the cause of action accrues [may petition the Secretary to file a complaint].") (emphasis added); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 780–81 (D.C.Cir.1983) (concluding that 7 U.S.C. § 499f does not require the injured party to file a complaint unless it chooses to initiate reparation proceedings). But this is not a reparation proceeding because Kingdom Fresh sought pecuniary relief in state court and the Secretary seeks here only to revoke Meza Sierra's PACA license. *See also Melvin Beene Produce Co. v. Agric. Mktg. Serv.*, 728 F.2d 347, 349 (6th Cir.1984)("We find that the nine-month limit applies only to reparations actions ... not disciplinary actions by the Secretary.").

B.

Meza Sierra next argues that the ALJ improperly took official notice of documents from the state court suit before the Texas District Court, 92nd Judicial District, and the Court of Appeals, 13th District of Texas. Those documents establish that Kingdom Fresh obtained a judgment for the purchase price of $215,385 for tomatoes which Meza Sierra had purchased but failed to pay Kingdom Fresh. Meza Sierra alleges, however, that there has not been a final judgment in this suit and consequently it was improper for the ALJ to take official notice of any documents stemming from the suit. [8]

Meza Sierra's contention hinges on what it alleges to be a post-judgment order issued by the Texas state court vacating its judgment against Meza Sierra. Responding to Meza Sierra's Motion to Reconsider the court's summary judgment in favor of Kingdom Fresh, the court issued an order on May 18, 2010, which, due to handwritten alterations to the order, appeared to simultaneously both grant and deny the Motion to Reconsider. Meza Sierra has interpreted this conflicting order as an abatement of the summary judgment that rendered all subsequent decisions in Texas state court a legal nullity.

The full record belies this contention. On April 19, 2010, the 92nd Texas Judicial District issued a Final Summary Judgment in favor of Kingdom Fresh. Though the same court's May 18, 2010 ruling on Meza Sierra's Motion to Reconsider the summary judgment was indeed ambiguous, a May 28, 2010 order clarified the May 18 ruling by unequivocally denying reconsideration of the summary judgment. Though Meza Sierra moved to vacate the May 28, 2010 order, the court denied the motion on September 15, 2010, ruling that the May 28, 2010 motion should remain in full effect. Meza Sierra appealed the summary judgment, but the Texas court of appeals dismissed the appeal for untimely filing.

[8] An ALJ may take official notice of "such matters as are judicially noticed by the courts of the United States and of any matter of technical, scientific, or commercial fact of established character." 7 C.F.R. § 1.141(h)(6). Meza Sierra does not contest whether § 1.141(h)(6) provided the ALJ with sufficient authority to take official notice of records from a state court proceeding.

Both the May 28, 2010 order and the September 15, 2010 order confirm that the ambiguous May 18, 2010 order denied, rather than granted, Meza Sierra's motion to reconsider the summary judgment. With the trial court's rulings unanimously in favor of Kingdom Fresh, the Texas appellate court's denial of Meza Sierra's appeal means that the Texas state court suit of which the ALJ took notice was fully litigated and therefore the ALJ's official notice of facts in those proceedings was proper.

IV.

For the reasons more fully set forth above, the petition for review is DENIED.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: MARKET 52, INC.
Docket No. 13-0011.
Default Decision and Order.
Filed March 8, 2013.

PACA-D.

Shelton S. Smallwood, Esq. for Complainant.
Kaleb L. Judy, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DEFAULT DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Fruit and Vegetable Program, Agricultural Marketing Service, initiated this proceeding against Market 52, Inc. (Respondent) by filing a disciplinary Complaint on October 4, 2012, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 9 sellers of the agreed purchase prices, or balances thereof, in the total amount of $842,429.81 for 48 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. The Complaint alleges the violations occurred in commerce between July 23, 2011, and November 11, 2011 on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference. The Complaint requested that an Administrative Law Judge find that

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances of those violations be published.

As Respondent failed to answer the Complaint, the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 (7 C.F.R. § 1.139) of the Rules of Practice.

Findings of Fact

1. Market 52, Inc., (Respondent), is a corporation organized and existing under the laws of the state of California with a business address in Kingsburg, California. Respondent is out of business and the Complaint was served on Respondent's attorney.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 2011 1238 was issued to Respondent on July 29, 2011. This license status was changed to Active with Bankruptcy on January 27, 2012, and terminated on July 29, 2012, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent failed to submit the required annual renewal fee.

3. Respondent, during the period July 23, 2011, through November 11, 2011, on or about the dates and in the transactions set forth in Appendix A of the Complaint and incorporated herein by reference, failed to make full payment promptly to 9 sellers of the agreed purchase prices, or balances thereof, in the total amount of $842,429.81 for 48 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

4. On January 27, 2012, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court for the Eastern District of California. The petition was designated Case No. 12-10694. Respondent admitted in its Schedule F that all 9 of the sellers listed in Appendix A, hold unsecured claims for unpaid produce debt totaling $839,096.34.[9]

[9] The amount of claims listed on the Schedule F for four of the nine sellers is less than the amount listed in Appendix A to the Complaint. The Schedule F was attached to the Complaint as Attachment A. Complainant, pursuant to section 1.141(h)(6) of the Rules

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, flagrantly and repeatedly violated section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations shall be published.

2. Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceeding 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision and Order shall be served upon the parties.

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of Practice (7 C.F.R. § 1.141(h)(6)), respectfully requested that the ALJ take official notice of that court record.

In re: DELICIAS PRODUCE CO., INC.
Docket No. 12-0469.
Decision and Order.
Filed April 9, 2013.

PACA-D.

Shelton Smallwood, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER WITHOUT HEARING

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Fruit and Vegetable Program, Agricultural Marketing Service, initiated this proceeding against Respondent Delicias Produce Co., Inc. by filing a Complaint on June 13, 2012, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $519,883.71 for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and/or foreign commerce. The Complaint alleges the violations occurred in commerce between September 15, 2010, and July 18, 2011 on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference.

On January 17, 2013, I issued an Order requiring Respondent to demonstrate it made full payment of $519,883.71 owed to 15 sellers, as alleged in the Complaint, by October 18, 2012. In that Order, I informed

Respondent that if it failed to provide such evidence, this case would be treated as a "no pay" case and that a Decision Without Hearing would be issued finding that it had committed willful, flagrant and repeated violations of section 2(4) of the PACA, and ordering that Respondent's violations be published. Respondent failed to respond to the Order. The time for responding to my January 17, 2013 Order having passed, and upon the motion of Complainant for the issuance of a Decision Without Hearing, the following Decision and Order is issued without further procedure or hearing.

Findings of Fact

1. Respondent is a corporation incorporated and existing under the laws of the State of Tennessee.

2. At all times material herein, Respondent operated subject to the licensing requirements of the PACA. License No. 2007 1245 was issued to Respondent on August 28, 2007. This license terminated on August 28, 2010, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent failed to submit the required annual renewal fee.

3. Respondent, during the period of September 15, 2010, through July 18, 2011, on or about the dates and in the transactions set forth in Appendix A attached the Complaint and incorporated herein by reference, failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $519,883.71 for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and/or foreign commerce.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, flagrantly and repeatedly violated section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations shall be published.

2. This Decision will become final without further proceeding 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision and Order shall be served upon the parties.

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In re: PACIFIC RIM ONION, INC.
Docket No. 13-0014.
Decision and Order.
Filed April 17, 2013.

PACA.

Charles L. Kendall, Esq. for Complainant.
Michael C. Petersen, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) ("PACA"), instituted by a Complaint filed on February 27, 2009, by the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture on October 11, 2012. The Complaint alleged that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to two (2) sellers for purchases of 67 lots of perishable agricultural commodities in the course of interstate and foreign commerce in the amount of $340,687.50 during the period September 4, 2008 through February 10, 2009.

Respondent submitted an Answer which stated, "Respondent denies the allegations set forth in paragraphs 3 and 4." (Answer, p. 1 of 2). Subsequent investigation however indicated that as of February 27, 2013, the amount of $340,687.50 due to the two (2) sellers named in the Complaint remained unpaid. Citing the results of that investigation and Respondent's response to the allegations in the Amended Complaint, Complainant filed a Motion requesting an Order Requiring Respondent To Show Cause Why a Decision Without Hearing Should Not Be Issued against Respondent due to its failure to make full and prompt payment for produce purchases, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Department's policy is set forth in *Scamcorp, Inc.*, No. D-95-0502, 57 Agric. Dec. 527, 548-49, 1998 WL 92817 (U.S.D.A. Jan. 29, 1998), which held that when a Complaint is filed alleging the failure to make full payment promptly under the PACA, if the Respondent is not in full compliance with the PACA within 120 days after the complaint is served upon the Respondent or the date of the hearing, whichever occurs first, the case will be treated as a "no pay" case for which the sanction is license revocation. Complainant moved for the issuance of an Order requiring Respondent to demonstrate that it made full payment of the $340,687.50 which the Complaint alleges Respondent owed to two (2) produce sellers, by February 11, 2013 and requested that should Respondent fail to demonstrate that it made full payment of the $340,687.50 by February 11, 2013, a Decision Without Hearing be issued, finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA, and ordering that the facts and circumstances of Respondent's violations be published.

Consistent with the Department's policy set forth in the *Scamcorp* decision, I issued an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued on March 5, 2013, allowing Respondent 30 days from the date of service of the Order to demonstrate that it made full payment of $340,687.50 owed to the two (2) produce sellers, as alleged in the Complaint, by February 11, 2013. Respondent failed to respond to the Order. Accordingly, this case will be treated as a "no pay" case under the policy set forth in the *Scamcorp* decision.

Findings of Fact

1. Pacific Rim Onion, Inc. (Respondent) is a corporation organized and existing under the laws of the State of Oregon; however, Respondent is now out of business.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 2007 1217 was issued to Respondent on August 21, 2007. This license terminated on August 21, 2009, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period September 4, 2008, through February 10, 2009, Respondent failed to make full payment promptly of the agreed purchase price for 67 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce from two (2) sellers, in the total amount of $340,687.50.

4. Subsequent investigation indicated that as of February 27, 2013, the amount of $340,687.50 due to these two (2) sellers remained unpaid.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, repeatedly and flagrantly violated section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations shall be published.

2. This order shall take effect on the 11th day after this Decision becomes final.

3. Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R.

§§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

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In re: CARDILE BROTHERS MUSHROOM PACKAGING, INC.
Docket No. 13-0173.
Default Decision and Order.
Filed April 24, 2013.

PACA-D.

Charles L. Kendall, Esq. for Complainant.
Kenneth Federman, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DEFAULT DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (PACA), instituted by a Complaint filed on January 30, 2013, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period September 26, 2010, through January 23, 2012, Cardile Brothers Mushroom Packaging, Inc., (Respondent) failed to make full payment promptly of the agreed purchase price for 1,806 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce from 126 sellers, in the total amount of $2,988,273.98.

A copy of the Complaint was mailed to the address of Respondent's attorney by certified mail and was delivered on February 4, 2013. Respondent failed to answer the Complaint. The time for filing an Answer expired, and Complainant has moved for the issuance of a Default Order.

Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.) (Rules of Practice).

Findings of Fact

1. Cardile Brothers Mushroom Packaging, Inc., (Respondent) is a corporation organized and existing under the laws of the state of Pennsylvania with a former business address in Avondale, Pennsylvania. Respondent is not currently operating.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 2001 0771 was issued to Respondent on April 3, 2001. The license terminated on April 3, 2012, after Respondent failed to submit the required annual fee, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499g(d)).

3. During the period September 26, 2010, through January 23, 2012, on or about the dates and in the transactions set forth in Appendix A to the Complaint and incorporated therein by reference, Respondent failed to make full payment promptly to 126 sellers of the agreed purchase prices, or balances thereof, for lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate commerce, in the total amount of $2,988,273.98.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, repeatedly and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations shall be published.

2. This Order shall take effect on the 11th day after this Decision becomes final.

3. Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

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In re: MARK SANDLER.
Docket No. 12-0622.
Decision and Order.
Filed June 19, 2013.

PACA-APP.

Petitioner, pro se.
Shelton Smallwood, Esq. and Christopher Young, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a, *et seq.*) (Act) by the petition for review filed by the Petitioner Mark Sandler of the determination made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that he was "responsibly connected" (as that term is defined in Section 1(b)(9) of the Act (7 U.S.C. § 499a(b)(9))) to Sandler Bros., during the period of time that Sandler Bros. violated Section 2 of the Act (7 U.S.C. § 499b).

Sandler Bros., a PACA licensee, was the subject of a disciplinary complaint that resulted in a Default Decision and Order being entered

against it on August 15, 2012.[10] The Default Decision and Order authorized publication of the finding that Sandler Bros. willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 8 sellers of the agreed purchase prices in the amount of $234,385.14 for 314 lots of perishable agricultural commodities which Sandler Bros. purchased, received, and accepted in the course of interstate commerce during the period June 18, 2008 through March 4, 2009.

The matter was set for a telephonic hearing with the Petitioner appearing by telephone from Maine and the Respondent in Washington, DC on June 19, 2013. At the hearing, the Petitioner testified and one witness testified for the Respondent. The certified Agency Records containing 13 exhibits along with one additional exhibit were admitted on behalf of the Respondent.[11] The parties have waived briefs and the matter is now ripe for disposition.

Statutory Background

The Perishable Agricultural Commodities Act, 1930,[12] was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate or foreign commerce.[13] When enacted, the legislation had the approval of the entire organized fruit and vegetable trade, including commission merchants, dealers and brokers, all of whom benefit from the Act's protections.[14] The Act was intentionally a "tough" law enacted for the purpose of providing a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business

[10] Sandler Bros., No. 12-0111, 71 Agric. Dec. 1267, 2012 WL 3877393 (U.S.D.A. Aug. 15, 2012).
[11] Respondent's Exhibits are indicated as "RX 1-14."
[12] 7 U.S.C. § 499a-499s.
[13] H.R. REP. NO. 1041, 71st Cong, 2d Session 1 (1930).
[14] *Id.* 2, 4. In 1949, both the House and Senate found that the PACA regulatory program had "become an integral part of the marketing of fruit and vegetables and it has the unanimous support of both producers and handlers in the fruit and vegetable industry." H.R. REP. NO. 1194, 81st Cong, 1st Session 1 (1949); *accord,* S. REP. NO. 1122, 1st Session 2 (1949).

conduct, and unfair methods are numerous.[15] *Kleiman v. U.S. Dep't of Agric.*, 497 F.3d 681, 693 (D.C. Cir. 2007).

Under the Act, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), and 499d(a). The Act makes it unlawful for a licensee to engage in certain types of unfair conduct and requires regulated merchants, dealers, and brokers to "truly and correctly…account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C § 499b(4).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral consequences in the form of employment restrictions for persons found to be "responsibly connected" with the violator.[16] Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator "in any responsible position.[17]" 1962 amendments replaced the "in any responsible position" language with a "responsibly connected" provision. The term "responsibly connected" is currently defined as follows:

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a

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15 S. REP. NO. 2507, 84th Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; H.R. REP. NO. 1196, 84th Cong, 1st Session 2 (1955).

16 7 U.S.C. § 499h(b). Under the Act, PACA licensees may not employ, for at least one year, any person found "responsibly connected to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b.

17 7 U.S.C. § 499h(b) (1958).

violating licensee or entity subject to license which was the alter ego of its owners. 7 U.S.C. § 499a(9).

A second sentence was added to the provision by a 1995 amendment[18] and affords those who would otherwise fall within the statutory definition of "responsibly connected" an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of decisions, including *Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1196-97 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-67, 1998 WL 1806410 (U.S.D.A. 1998); *Salins*, No. 96-0010, 57 Agric. Dec. 1474, 1482-87, 1998 WL 202147 (U.S.D.A. Feb. 26, 1998); and *Mendenhall*, No. 97-0008, 57 Agric. Dec. 1607, 1615-19, 1998 WL 799194 (U.S.D.A. Nov. 10, 1998).

The amendment created a two prong test for rebutting the statutory presumption of the first sentence:

…the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner must meet at least one of two alternatives: that a petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to license which was the alter ego of its owners. *Salins*, 57 Agric. Dec. 1474, 1487-1488.

Norinsberg articulated the standard for the first prong as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those

[18] Prior to the amendment, the circuits were divided as to whether the presumption of §499a(b)(9) was irrebutable. Most adopted a per se rule. *See, e.g.*, Faour v. U.S. Dep't of Agric., 985 F. 2d 217, 220 (5th Cir. 1993); Pupillo v. United States, 755 F. 2d 638, 643-44 (8th Cir. 1985); Birkenfield v. United States, 369 F.2d 491, 494 (3rd Cir. 1966); Zwick v. Freeman, 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). The D.C. Circuit however had adopted a rebuttable presumption test. *See* Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975), 34 Agric. Dec. 7 (U.S.D.A. 1975).

activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test. *Norinsberg,* 58 Agric. Dec. at 610-11.

This case accordingly turns upon whether the Petitioner met his burden of proof and rebutted the statutory presumption.

Discussion

Initially, it is clear that the statutory threshold contained in the first sentence of § 499a(b)(9) is met in this case as the Petitioner admitted and the evidence is uncontroverted that the Petitioner was an officer and director of Sandler Bros. being referred to as Clerk and later President. RX-1, 6-9.

Petitioner professes a lack of involvement with the violating corporation, indicating that although he was President of the corporation, at the time of the violations, he had nothing to do with the financial side of the business. In view of the obvious fact that he was a signatory on the bank account, signed checks, and knew of the corporation's failure to pay suppliers without taking appropriate action prior to his resignation, any claim that he was only a *nominal* director and officer, lacking any actual, significant nexus with the violating company is clearly without merit. *See Bell v. Dep't of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

Well prior to the 1995 amendment to Section 499(a)(9), the DC Circuit had considered the statutory presumption of the section to be rebuttable. *Quinn v. Butz*, 510 F.2d 743, 757 (D.C. Cir. 1975), 34 Agric. Dec. 7 (U.S.D.A. 1975); *Hart v. Dep't of Agric.*, 112 F.3d 1228, 1230 (D.C. Cir. 1997). Where responsibility was not based on an individual's personal fault, it could be based upon his or her failure to counteract or obviate the fault of others. *Bell*, 39 F.3d at 1201. In the past, knowledge of the violations, whether actual or constructive, was found to be highly significant. In discussing the actual, significant nexus test in *Minotto v.*

U.S. Dep't of Agric., 711 F.2d 406 (D.C. Cir. 1983) the court indicated that "…In order to prove that one was **only** a nominal officer or director, one must establish that one lacked any 'actual, significant nexus with the violating company' and therefore, neither '**knew [n]or should have known of the [c]ompany's misdeeds.**'" *Minotto*, 711 F.2d at 408, 409 (emphasis added). An affiliation would however be considered nominal if a so-called officer was unsophisticated and the position had no powers at all. *Bell*, 39 F.3d at 1201; *Minotto*, 711 F.2d at 408; *Quinn*, 510 F.2d at 756.

A significant difference was found to exist however between situations where the affiliation was purely nominal with the so-called officer having no authorized powers at all and those in which a genuine officer [or director] simply did not use the powers of his office. Quinn, 510 F.2d at 756, n.84. In *Hart v. Dep't of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997), the court made it clear that the Act was designed to strike at persons in authority who acquiesced in the wrongdoing as well as the wrongdoers themselves and that individuals seeking to avoid employment restrictions must demonstrate that they were "powerless to curb" the wrongdoing. *Hart*, 112 F.3d at 1230-31.

Sandler admitted having actual knowledge of the corporation's failure to pay suppliers as early as January or February of 2009, but failed to resign as an officer and director until March 20, 2009. RX-6; *Martino v. U.S. Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986).

Accordingly, on the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Petitioner Mark Sandler is an individual residing in Scarborough, Maine.

2. Sandler Bros. began as a family business originally started by Petitioner's grandfather in 1929 and was later incorporated and operated as a Maine corporation by his father Herbert Sandler and James Sandler, until Herbert Sandler's death in 2006. RX-6.

3. During the period between June 18, 2008 and March 4, 2009, Sandler Bros. was found to have willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 8 sellers of the agreed purchase prices in the amount of $234,385.14 for 314 lots of perishable agricultural commodities which Sandler Bros. purchased, received, and accepted in the course of interstate commerce during the period June 18, 2008 through March 4, 2009.[19]

4. Mark Sandler became a Clerk and/or President and director of Sandler Bros. following his father's death in 2006 and continued to hold such officer until his resignation on March 20, 2009.

5. Despite being an officer and director of the corporation and having knowledge that creditors were not being paid as early as January or February of 2009, he failed to take appropriate action to stop such violations and remained an officer and director until March 20, 2009 when he finally resigned.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Mark Sandler is an individual responsibly connected to Sandler Bros. by virtue of his active participation in corporate operations and his status as an officer and director of the corporation.

3. By virtue of being responsibly connected to a violating corporation, Petro is subject to the employment restrictions of the Act.

ORDER

1. The determination of the Chief of the PACA Branch that Mark Sandler was responsibly connected to Sandler Bros. during the period between June 18, 2008 and March 4, 2009 when the corporation was committing willful, flagrant and repeated violations of the Act is **AFFIRMED.**

[19] Sandler Bros., *supra* note 1.

2. Mark Sandler is accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. § 499d(b) and § 499h(b)).

3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Petitioner, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, 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.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS DECISIONS

DIMARE FRESH, INC. v. CASTRO PRODUCE, LLC.
PACA Docket No. W-R-2011-372.
Decision and Order.
Filed May 8, 2013.

PACA-R.

Supply contract–goods identified

Tomatoes to be provided under a supply contract were not goods "identified to the contract" because the contract did not refer to specified acreage. Therefore, when the distributor failed to deliver tomatoes as required by the contract, its default was not excused under U.C.C. 2-613 or 2-615, and the buyer was entitled to cover damages.

Charles Kendall, Presiding Officer.
Stephen P. McCarron for Complainant.
George Krauja and Hector G. Arana for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) ("PACA"). Complainant instituted this proceeding under the PACA, and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) ("Rules of Practice"), by filing a timely Complaint seeking reparation against Respondent, in the amount of $1,925,229.73, in connection with Respondent's agreement to sell Roma tomatoes to Complainant in interstate and foreign commerce. The Complaint sought reparation for two things: (1) repayment of an advance purchase price of $1,000,000.00 which Complainant had forwarded to Respondent, plus interest and minus the value of tomatoes which Respondent had supplied; and (2) cover damages for tomatoes which Respondent did not supply under the contract.

A copy of the Complaint was served upon Respondent, and Respondent filed an Answer admitting that a portion of the amount claimed by Complainant, for the advance purchase price, was due and owing to Complainant. Complainant filed a Motion for Payment of Undisputed Amount, and Respondent filed a Reply to that Motion. An Order was issued on April 25, 2012, directing Respondent to pay the undisputed amount of $951,140.95, with interest, plus the amount of $500.00. Respondent's liability, if any, for payment of the disputed amount was left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

With its Response to Complainant's Motion for Payment of Undisputed Amount, Respondent also filed a Motion for Judgment as a Matter of Law, arguing that upon Respondent's payment of the undisputed amount to Complainant, Complainant's claims were fully satisfied and Complainant was not entitled to seek further damages. Complainant filed a Reply to Respondent's Motion. On May 23, 2012, an Order Denying Respondent's Motion to Dismiss was issued.

Complainant DiMare's remaining claim, after the Order for payment of the undisputed amount, is for "cover" damages that DiMare allegedly incurred as a result of Respondent Castro's failure to supply Roma tomatoes in accordance with the supply contract between the parties. Respondent asserts that it did not breach the parties' contract, and that the law excuses Respondent from performance under the contract. Complainant additionally claims that the amount awarded in the Order for Payment of Undisputed Amount was incorrectly calculated, such that additional payment is due for interest on the advance purchase price. Respondent disputes that claim as well.

Since the amount claimed as damages exceeds $30,000.00 and 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 Wednesday, October 24, 2012 and Thursday, October 25, 2012 in Tucson, Arizona before Charles L. Kendall, Presiding Officer. The Complainant was represented by Stephen P. McCarron, Esq., of McCarron & Diess, located in Washington, DC, and Respondent was represented by George Krauja, Esq., and Hector G.

Arana, Esq., of Fennemore Craig, PC, located in Tucson and Nogales, Arizona. Complainant presented two witnesses, and offered nine (9) exhibits which were entered into the record (herein designated "CX-1" through "CX-9"). Respondent presented four (4) witnesses, and offered seventeen (17) exhibits which were entered into the record (herein designated "RX-1" through "RX-17").

At the conclusion of the hearing, a schedule was set for filing post-hearing briefs and requests for fees and expenses. 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." The Department's Report of Investigation is considered as evidence in this proceeding, pursuant to section 47.7 of the Rules of Practice (7 C.F.R. § 47.7), and is designated "ROI."

Findings of Fact

1. Complainant, DiMare Fresh, Inc. is a corporation, whose address is 1049 Avenue H, East Arlington, Texas 76011. At the time of the transactions involved in this proceeding, Complainant was licensed under the PACA (ROI, cover sheet).

2. Respondent, Castro Produce LLC, is a limited liability corporation, whose address is 1440 N. Mariposa Ranch Road, Nogales, Arizona 85621. At the time of the transactions involved herein, Castro was licensed under the PACA (ROI, cover sheet).

3. Agricola Pony, LLC ("Agricola Pony") is a grower of Roma tomatoes in Culiacan, Sinaloa, Mexico. Agricola Pony's owners and members were the same as the owners and members of Respondent at the time of the transactions (Tr. at 144, 149-150, 289), but Respondent and Agricola Pony are separate companies (Tr. at 289). Respondent is the exclusive U.S. distributor for Agricola Pony (Tr. at 294), distributing the Pony

label, Paloma label, and Omar label tomatoes produced by Agricola Pony (Tr. at 145-146). The Pony label is a highly regarded (Tr. at 94), premium label (Tr. at 164), and is a registered trademark with the United States Patent and Trademark Office (Tr. at 146).

4. On September 1, 2010, the parties entered into a written contract (CX-1 or RX-1 at 1-3). Under the contract, Complainant advanced $1,000,000 to Respondent by wire transfer on September 3, 2010 (RX-4 at 22), in exchange for anticipated shipments by Respondent of twenty-five (25) pound (lb.) boxes of Pony Label Roma tomatoes. The Supply Calendar, attached as Exhibit A to the contract, called for Respondent to ship the $1,000,000 worth of tomatoes as follows: five (5) loads of large or medium sized Pony Label Roma tomatoes per week for fifteen (15) weeks from February 1, 2011 through May 15, 2011. Respondent was to deliver 118,343 boxes of Pony Label Roma Tomatoes to Complainant at $8.45 per twenty-five (25) pound (lb.) box. The contract also required Respondent to pay Complainant interest of six percent (6%) per annum, in monthly installments at the end of each month, on the then current balance of the advance.

5. On February 3 and 4, 2011, there was a severe freeze in Culiacan, Mexico (RX-8, RX-10; Tr. at 72, 382, 404). Even for vegetable crops grown in shade houses such as those used by Agricola Pony, losses were in the neighborhood of eighty percent (80%) (Tr. at 406-407; RX-14 at 20).

6. On February 7, 2011, Respondent's general manager, Rosendo Flores, sent an email to Complainant's owner, Paul DiMare, notifying Complainant of the freeze and advising that Agricola Pony "had been damaged in a lesser extent than others, but we are still assessing damages. The freeze has set back our program at least 4 weeks, and as of tomorrow morning I will be traveling to Culiacan, to have a more accurate assessment on the impact of our production." (RX-4, pg. 41).

7. On February 23, 2011, Rosendo Flores sent an email to Complainant's Eric Janke, with copies to Paul DiMare and to Complainant's buyer, Sam Licato, regarding the effect of the freeze on the Agricola Pony Roma crop (CX-21-2). The email reported that Respondent has incurred very moderate damages due to the Sinaloa

Freeze on Feb 4th, and would be able to have a very good production, estimating a conservative number of 600,000 packages. Respondent reported to Complainant that Respondent would start supply the next week (thru March 5) with up to 3 loads, and would commit to 5 loads a week starting by the 3d week of March (March 21 2011).

8. In its February 23, 2011 email, Respondent proposed that Complainant advance additional funding of $500,000, and invoice Respondent for tomatoes supplied from that point forward at a rate of market price minus fifteen percent (15%), with a minimum price of $5.85 per box.

9. On March 3, 2011, Complainant, through counsel, declined Respondent's proposed modification of the supply contract, expressed its expectation that Respondent would perform under the existing contract, and advised that if Respondent failed to perform, Complainant would purchase cover loads (RX-5 at 1-2).

10. On March 11, 2011, Respondent, through counsel, notified Complainant that Respondent would not be able to supply Complainant with tomatoes as provided in the Supply Calendar, and further notified Complainant of Respondent's intent to allocate the remaining crop of Pony label Roma tomatoes during the term of the Supply Calendar amongst its customers on a pro-rata basis. Respondent projected that it would allocate approximately 7,423 boxes of tomatoes to Complainant over the remaining term of the Supply Calendar, and stated that it had no duty to provide tomatoes to cover the remaining supply for which the parties had contracted (RX-5 at 3-4).

11. Starting the week of March 7, 2011, and continuing each week through May 15, 2011, Complainant sent purchase orders to Respondent for the tomatoes Complainant had purchased from Respondent under the contract (CX-5; Tr. at 39).

12. Between March 14 and May 16, 2011, Respondent shipped a total of 6,845 boxes of Roma tomatoes to Complainant (CX-6; RB at 6), with a total value of $57,840.25 (6,845 boxes times the contract price of $8.45 per box).

13. Between March 10 and May 18, 2011, Complainant purchased 73,155 boxes of Roma tomatoes, which Complainant intended as cover for the Roma tomatoes Respondent failed to supply (CX-6; CX-7).

14. On November 7, 2011, Complainant filed a Motion for Payment of Undisputed Amount seeking payment of the $1,000,000 advance, plus interest, minus the value of the tomatoes Complainant received from Respondent and the interest payment from Respondent.

15. On April 26, 2012, the Secretary issued an Order requiring Respondent to pay Complainant $951,140.95, plus 0.10 percent interest from May 15, 2011, until paid, plus the amount of $500.00.

16. On May 21, 2012, Respondent wired $952,607.80 to Complainant, as payment of the undisputed amount in accordance with the Order.

17. On June 3, 2011, Complainant filed its informal complaint, which was within nine months of when the cause of action accrued.

Conclusions

The parties agree on these essential facts: (1) that the parties entered into a supply contract under which Complainant gave Respondent an advance purchase price of $1,000,000.00; (2) in exchange for the advance, Respondent would deliver to Complainant 118,343 twenty-five 25) pound (lb.) boxes of medium and large Pony label Roma tomatoes in fifteen (15) weekly deliveries, delivering 8,000 twenty-five (25) pound (lb.) boxes per week for fourteen (14) weeks, and 6,343 boxes in week fifteen (15); (3) that the shipments would take place each week from February 1, 2011 through May 15, 2011; (4) that each box shipped by Respondent would reduce the balance due on the advance by $8.45; (5) that Respondent would pay interest monthly at a rate of six percent (6%) per annum on the balance of the advance, from the time it was received on September 1, 2010 until paid; (6) that Respondent delivered 6,845 boxes of tomatoes to Complainant under the contract.

Complainant seeks damages pursuant to UCC §§ 2-711 and 2-712 (CB at 11), codified in the Arizona statutes[20] as A.R.S. §§ 47-2711 and 47-2712. A.R.S. §§ 47-2711 provides in pertinent part:

A. Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§ 47-2612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:

1. "Cover" and have damages under § 47-2712 as to all the goods affected whether or not they have been identified to the contract;

A.R.S. §§ 47-2712 provides:

A. After a breach within § 47-2711 the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

B. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§ 47-2715), but less expenses saved in consequence of the seller's breach.

C. Failure of the buyer to effect cover within this section does not bar him from any other remedy.

The seller, Respondent, failed to make delivery as required by the supply contract, so Complainant, in addition to recovering so much of the price as has been paid [the advance], may "cover" with reasonable purchases made in good faith and without unreasonable delay.

Respondent identifies the pivotal issue in this case, noting that the ultimate question is whether Complainant is entitled to cover damages (RB at 1). Respondent argues that Complainant is not entitled to cover

[20] The Arizona enactments of the U.C.C. are referenced herein because the contract called for delivery of the goods at Nogales, AZ.

damages because Respondent's performance under the contract was excused under A.R.S. § 47-2613, which addresses casualty to identified goods (RB at 7 *et seq*.), and/or by A.R.S. § 47-2615, which provides for excuse by failure of presupposed conditions (RB at 7 *et seq*.).

A.R.S. § 47-2613 provides:

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (§ 47-2324) then:

1. If the loss is total the contract is voided; and

2. If the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

Two factors, then, determine whether A.R.S. § 47-2613 applies, such that handling under "1)", for total loss, or "2)", for partial loss, is prescribed. First, does the contract require for its performance goods identified when the contract is made; and second, did the goods suffer casualty without fault of either party before the risk of loss passed to the buyer?[21] Both of these conditions must be present in order for A.R.S. § 47-2613 to excuse a seller's failure to supply goods contracted for.

Respondent argues that its contract with Complainant did require for its performance goods identified to the contract (RB at 7 *et seq*.). A.R.S. § 47-2613 itself does not define the term "identified to the contract". Respondent urges that the provisions of A.R.S. § 47-2501(A) apply to the question of whether goods were "identified when the contract is made" for A.R.S. § 47-2613 purposes, citing that section as follows: "Goods can be identified to a contract in several ways: (1) by explicit agreement at any time and in any manner agreed to by the parties; (2)

[21] The alternative basis, for a contract with a "no arrival, no sale" term, is not relevant here.

when goods are already existing and identified when the contract is made; (3) when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers; or (4) when crops are planted or otherwise become growing crops, if the contract is for the sale of crops to be harvested within twelve months or the next normal harvest season (whichever is longer)." (RB at 7).

A.R.S. § 47-2501, however, is titled, "Insurable interest in goods; manner of identification of goods." The first comment to the section states, "The present section deals with the manner of identifying goods to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue." That next section, A.R.S. § 47-2502, provides for, as its title says, "Buyer's right to goods on seller's insolvency." Further, Comment 4 to A.R.S. § 47-2501 notes "the limited function of identification" and makes clear that A.R.S. § 47-2501 and A.R.S. § 47-2502 are protections for a buyer upon seller's default. These sections, then, do not provide a guide to whether goods were "identified when the contract is made" for A.R.S. § 47-2613 purposes.

The issue of identification under U.C.C. § 2-613 has, however, has been addressed under the PACA. In *G. & H. Sales Corp. v. C. J. Vitner Co., Inc*., 50 Agric. Dec. 1892 (U.S.D.A. 1991), the parties entered into a contract calling for the future shipment of potatoes f.o.b. Florida, and potato production in the state of Florida was affected in varying degrees by a freeze. It was found that the potatoes had not been shown to have been "identified goods" within the meaning of U.C.C. § 2-613 at the time of the freeze, and that the potatoes were not contracted to be grown on designated land so as to come within the category of "excuse by failure of presupposed conditions" as contemplated by U.C.C. § 2-615.

Respondent argues that, "As a threshold issue, the requirement of identifying certain crops arises under U.C.C. § 2-615, not Section 2-613 and therefore is inapplicable to Castro's argument its performance is excused under A.R.S. § 47-2613." (RB at 10). While "impossibility" because of the nonexistence of identified goods under U.C.C. § 2-613 might be seen as simply a special case of commercial impracticability due to the failure of presupposed conditions under U.C.C. § 2-615, the test of whether agricultural goods have been identified to a contract has been specifically addressed in regard to an affirmative defense under

U.C.C. § 2-613 not only by USDA but by the courts as well. *Semo Grain Co. v. Oliver Farms, Inc*., 530 S.W.2d 256, 258 (Mo. App. 1975). There, the court held that a farmer's failure to perform in accordance with a supply contract was not excused by U.C.C. § 2-613 because ". . . the contract of the parties makes no reference to soybeans grown (or to be grown) by the defendant on any identified acreage, . . ." *Id.* at 260.

Respondent points out that it is a wholesale distributor, not a farmer, and asserts that therefore the requirement that agricultural goods be identified to specified acreage does not apply (RB at 9). Rather, Respondent urges that the goods at issue were to come from a particular source of supply, as contemplated by Comment 5 to A.R.S. § 47-2615. A.R.S. § 47-2615 provides:

Except so far as a seller may have assumed a greater obligation and subject to § 47-2614 on substituted performance:

1. Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs 2 and 3 of this section is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

2. Where the causes mentioned in paragraph 1 of this section affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

3. The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph 2 of this section, of the estimated quota thus made available for the buyer.

In regard to whether performance is excused under U.C.C. § 2-615 for failure to supply agricultural goods, however, Respondent is not

aided under PACA precedent by the fact that it is a distributor rather than a farmer. We have held:

[The text of UCC section 2-615] must be jointly read with comment No. 9 which states that 'a farmer who has contracted to sell crops to be grown on designated land (emphasis added)' is excused under this section when there is a failure of the specific crop. Most cases adhere to this principle: Harrell v. Olin Price, 31 A.D. 331 (1972) and Holt v. Shipley, 25 A.D. 436 (1966). The impossibility-act of God exemption should have its widest application to farmers, the berth narrowing as one moves in middlemen degrees towards the ultimate consumer. Hence, if designation of the land upon which crops will be grown is contractually mandatory before a farmer will fall within the UCC section 2-615 exemption, **it is even more necessary that land designation apply to dealers before exemption be legally allowed**.

Bliss Produce Co. v. A. E. Albert & Sons, 35 Agric. Dec. 742, 20 UCC Reporting Service 917 (1976). [Emphasis added.]

Respondent argues, in essence, that the "Pony" label uniquely identifies the goods which it contracted to supply. Unlike the farmers who contracted for "Arizona Kennebec potatoes" as in *Bliss*, or for "U.S. No. 1 yellow soybeans" as in *Semo*, Respondent asserts:

The parties' Contract is not for fungible Roma tomatoes. The Contract specifies the brand, type, and size of the tomatoes: "Pony" Label, Roma tomatoes, sizes Medium and Large. As Castro established at trial, Pony Label Roma tomatoes come only from one particular source, grown by Castro's affiliated grower, Agricola Pony, at the Rincón de Guadalupe farm in North Culiacán, Sinaloa, Mexico. [See, e.g., 10/24/12 Tr. at 52:14-53:1; 150:2-16.] "Pony" Label is a registered trademark with the United States Patent and Trademark Office, first used in 1980, and registered since November 21, 2006. [Id. at 145:17-146:19.] As a result, other growers' tomatoes cannot be substituted for Agricola Pony's Pony Label tomatoes. DiMare insisted the Contract be for Pony Label product. DiMare's witness, Sam Licato, admitted the Pony Label is known as a superior quality product and is "if not the best, one of the best Roma [tomato] labels and quality labels and grower[s] in Mexico." [Id. at 94:2-4.]

The evidence at hearing did establish that the Pony label is a premium quality label (Tr. at 94, 291). "Pony" label is a registered trademark with the United States Patent and Trademark Office. Respondent's general manager testified that Pony is a label, not a variety of tomato, and that there is no patent on Pony label tomatoes (Tr. at 291-292). The trademark is held by Respondent, Castro Produce LLC, an Arizona limited liability company licensed under the PACA. As Respondent has noted, Respondent is a wholesale distributor, not a farmer. The trademark gives Respondent, the distributor, the exclusive right to market tomatoes in the United States using the "Pony" label. That fact does not resolve the question of where the tomatoes can or must be grown.

The relevant inquiry is either: whether the contract required for its performance goods identified when the contract was made as per U.C.C. § 2-613; or alternatively stated, whether the goods were contemplated by the parties as coming exclusively from a sole source of supply, as addressed by U.C.C. § 2-615. Respondent cites Comment 5 to U.C.C. § 2-615 as follows (RB at 9):

Where a particular *source of supply* is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular *source of supply* is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting. [Emphasis in RB]

In regard to supply contracts for agricultural commodities, the analysis is the same whether a seller seeks to excuse its failure to perform under U.C.C. § 2-613 or under U.C.C. § 2-615. PACA reparation cases and cases arising outside the PACA have both dealt with the application of these U.C.C. provisions by first resolving the threshold question: Does the contract call for the agricultural products to be supplied to be crops grown on designated land? If so, either of these U.C.C. provisions may apply. If not, they do not. *G. & H. Sales*, 50 Agric. Dec. 1892 (U.S.D.A. 1991); *Semo*, 530 S.W.2d 256, 258 (Mo. App. 1975).

Respondent contends that "Pony" label tomatoes come from only one source, grown by Castro's affiliated grower, Agricola Pony, at the Rincón de Guadalupe farm in North Culiacán, Sinaloa, Mexico. Respondent did not establish, however, that "Pony" label tomatoes *must* come from only one source. Complainant's buyer testified that Complainant had a preference for the "Pony" label because of the quality of the product they consistently had (Tr. at 94) and that both the "Pony" label tomatoes (Tr. at 96) and the tomatoes Complainant purchased for "cover" (Tr. at 97) were eight-five percent (85%) or better U.S. No. 1 quality.

Respondent presented extensive testimony and exhibits related to the Rincón de Guadalupe farm (RX-6, RX-7, RX-9, RX-11). The pertinent question, however, is whether the Rincón de Guadalupe farm was designated land such that the crops therefrom were identified to the contract. Alternatively stated, was the Rincón de Guadalupe farm contemplated by the parties as the sole source of supply when the contract was executed? The contract itself is devoid of any geographic reference. It does not require state of origin, like the Florida potatoes called for in *G. & H. Sales*[22], or even a country of origin. The term "Rincón de Guadalupe" does not appear anywhere in the Department's Report of Investigation, or in any pleadings or filings submitted prior to the hearing.

Respondent, at hearing, sought to establish that the parties contemplated a sole source. For example, Respondent asserts that, "DiMare admits Pony Label Roma tomatoes come from only one source, Agricola Pony. [Id. at 52:14-53:1.]" (RB at 2). The testimony of Complainant's buyer on cross examination which Respondent cites, however, establishes only that Respondent was not a grower itself, but a distributor, and a distributor for Agricola Pony. Complainant's buyer also agreed with the assertion that Respondent was a distributor for only Agricola Pony. Nothing in the record establishes, however, that Respondent was in any way limited or bound to distribute only products from Agricola Pony. Further, Respondent's general manager testified that Agricola Pony itself is not a farm or ranch, but a corporate entity (Tr. at 148-149). Rincón de Guadalupe is the specific farm (Tr. at 149).

[22] 50 Agric. Dec. 1892 (U.S.D.A. 1991).

As we noted above, the requirement that the crops to be supplied must be specified as coming from designated land in order for a delinquent supplier to be excused under U.C.C. § 2-613, or under U.C.C. § 2-615, is even more necessary for dealers than for farmers. Since the contract does not specify designated land, can we infer that the parties contemplated crops from designated land based on extrinsic evidence? Even for a farmer seeking excuse because of adverse weather effects, the 8th Circuit declined to permit that inference. The Court stated, "Obviously, appellee could have fulfilled its contractual obligation by acquiring the beans from any place or source as long as they were grown within the United States. To permit the introduction of parol evidence to show that the beans were to be grown on a particular acreage would completely circumvent the provisions of [the Missouri version of U.C.C. § 2-202]." *Bunge Corp. v. Recker*, 519 F.2d 449, 451 (C.A.Mo. 1975).

Here, Respondent could have fulfilled its contractual obligation by acquiring eighty-five percent (85%) or better U.S. No. 1 medium and large Roma tomatoes from any place or source, applying the Pony label to them, and delivering them to Complainant. Respondent's failure to fulfill its contractual obligation is not excused by U.C.C. § 2-613 or U.C.C. § 2-615.

Since U.C.C. § 2-613 does not apply to excuse Respondent's failure to deliver in accordance with the terms of the supply contract, Complainant is not limited to the option to "either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller." U.C.C. § 2-613(b). Similarly, since U.C.C. § 2-615 does not apply to excuse Respondent's failure, there is no need to assess whether Respondent complied with its duty to allocate in a manner which is fair and reasonable, and to notify the buyer seasonably that there would be delay or non-delivery and of the estimated quota made available for the buyer. Further, since there is no need to assess whether Respondent's purported allocation was fair and reasonable, there is no need to resolve the parties' disagreement as to the extent of crop loss attributable to the Sinaloa freeze.

Complainant, then, has available to it the remedies provided in UCC §§ 2-711 and 2-712. A.R.S. § 47-2712 provides that after a breach

within § 47-2711 the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. Having made such purchases, the buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as defined (A.R.S. § 47-2715), but less expenses saved in consequence of the seller's breach.

Complainant seeks to recover damages for its cover purchases, and has offered a summary spreadsheet of purchases of Roma tomatoes that it made during the eleven (11) weeks from the week of March 7, 2011, through the week of May 16, 2011(CX-6) and the invoices from those purchases (CX-7). Complainant's spreadsheet depicts the total costs of cover purchases above the contract price, with an overall total of $998,201.88. Respondent offered the expert testimony of a certified public accountant, who re-sorted CX-6 by size of Roma tomato purchased, and identified errors and credits due to Respondent. Complainant acknowledges that Respondent is due credits in the amount $5,007.06 for the costs saved on cover loads purchased for less than the contract price (CB at 13; RX-15 at 4). Complainant seeks the total costs of its cover purchases above the contract price minus credits for purchases below the contract price, for a net claim of $993,194.82.

Respondent's expert expressed concern that not all of Complainant's cover purchases were of medium and large Roma tomatoes, but included other sizes (Tr. at 438-440), and thus questioned whether they were comparable replacement products. Complainant asserts (CB at 12):

DiMare Fresh purchased Jumbo, Extra-large and Small Roma tomatoes to fulfill its contractual requirements to its customers because these sizes were substantially similar to the ones sought under the contract. TR 459, 464. Thus, they were "commercially usable a reasonable substitute under the circumstances." §2-712, Comment 2. In addition, the prices DiMare Fresh paid for the Jumbo and Extra-Large were identical to the prices for Large Romas. See RX-15, comparing purchase prices for Jumbo, Extra-Large and Large for April 8, April 14 and April 21, and showing that each of these sizes sold for $34.95/box; TR 462. Similarly, the four (4) loads from Nova Produce, for which no size was specified (RX-15, p.4), were purchased at prices that were

comparable to the prices paid for the other cover loads on the same days. CX-6, p. 3; CX-7, pp. 36, 41, 43 and 45.

Finally, the cover tomatoes were at a reasonable price as can be seen comparing the prices DiMare Fresh paid for the cover tomatoes (CX-6, CX-7), and the prices for Mexican Romas crossing at Nogales. CX-8, CX-9.

We have previously found that the reasonableness of cover purchases of white onions in substitute for yellow onions was shown by the similarity in price for those purchases with the prices given for yellow onions at or about the same times. *Al Campisano Fruit Company, Inc. v. Shelton*, 50 Agric. Dec. 1875, 1883 (U.S.D.A. 1991). A review of the exhibits cited by Complainant indicates that the prices it paid for sizes of Roma tomatoes other than medium and large were comparable to those for medium and large sizes, and that the prices paid by Complainant for its cover purchases were within the range of reported prices at the times of Complainant's purchases (CX-8; CX-9). Therefore, those purchases by Complainant were reasonable under the circumstances.

Complainant's cover purchases were timely, as they coincided (RX-17) with the delivery schedule under the contract (RX-1). Complainant's purchases began after the four-week delay in the supply schedule that Respondent reported to Complainant (RX-4 at 41). Complainant waited for the four (4) weeks, and did not make cover purchases for the first month's missed deliveries from Respondent. Having foregone a portion of cover to which it was theoretically entitled, Complainant covered the remaining missed deliveries in a timely fashion.

Respondent's breach of its supply contract is a violation of section 2 of the Act for which reparation should be awarded to Complainant in the net amount of $993,194.82.

Complainant also claims that the award it received in the Order to Pay Undisputed Amount was incorrectly calculated. Complainant asserts:

By Order dated April 26, 2012, the Secretary awarded DiMare Fresh an undisputed amount of $951,140.95, with interest at the rate of 0.10 percent per annum from May 15, 2011, until paid. However, under the

foregoing authorities, DiMare Fresh was entitled to interest of 6% per annum from May 15, 2011 to April 26, 2012, the date the Order for the undisputed amount was issued. Only after April 26, 2012, would interest be assessed at 0.9% in accord with PGB Int'l, LLC v. Bayche Cos., supra, and Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant's Motion for Payment of Undisputed Amount, however, already had incorporated the 6% interest into its claim. Page 2 of the Motion reads, in relevant part:

7. Therefore, the undisputed amount due totals $951,140.95, which is determined as follows:

Advance payment	$1,000,000.00
Interest accrued at 6% APR	$44,510.38
Less Castro's Interest Payments	($29,787.64)
Less Castro's admitted quantity of tomatoes supplied	($63,581.79)
Total	$951,140.95

Since Complainant only asserted damages, with the six percent (6%) interest already accrued, of $951,140.95 in its Motion, Complainant's award on that matter is limited to the amount originally requested. *Willoughby v. Frito-Lay, Inc.*, 45 Agric. Dec. 1245, 1263 (U.S.D.A. 1986). Complainant did, however, note that Respondent's asserted deduction for the quantity of tomatoes supplied by Respondent, $63,581.79, was applied solely for the purposes of the Motion. Complainant asserted that Respondent only supplied 6,845, rather than the 7,591 boxes figure upon which the deduction in the Motion was based. Respondent's subsequent assertions (RB at 6) supported Complainant's assertion. Therefore, the credit will be reduced, and Complainant's award increased, by an amount of $5,741.54, bringing the amount awarded as reparation in this decision to a total of $998,936.36.

Complainant in this action paid $500.00 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. The $500.00 in this case, however, has already been awarded to Complainant

in the Order to Pay Undisputed Amount, and paid to Complainant by Respondent.

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 (U.S.D.A. 2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc*., 48 Agric. Dec. 707, 715 (U.S.D.A. 1989).

In accordance with 7 CFR § 47.19(d), Mr. Stephen McCarron, attorney for Complainant, timely filed a Claim of Complainant for Fees and Expenses in Connection with Oral Hearing ("Claim"). Respondent entered no objection to the Claim. Mr. McCarron claims total attorneys' fees for hearing preparation of $31,830.00 as detailed in Exhibit 1 to the Claim. There are seventy-seven (77) Line items in Exhibit 1; we will refer to them in order as Lines 1 through 77. Mr. McCarron also claims attorneys' fees for attendance at the hearing itself in the amount of $5,600.00.

Certain work and costs are not recoverable, as they would have been incurred if the case had proceeded under the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.A.R. § 47.20). *Mountain Tomatoes, Inc. v. E. Panamanian & Son, Inc*., 48 Agric. Dec. 707 (U.S.D.A. 1989); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (U.S.D.A. 1977).

Disallowed items, regarding the acquisition, preparation, or review of evidence, or legal research and review, are those listed in Exhibit A as follows: lines 3, 17, 18, 20, 46, 55, 56, 63, 64, 65, 67. This evidence presumably would have been generated and/or reviewed, and these legal issues researched, if the case had proceeded under the documentary procedure, and therefore the costs involved are not recoverable. These items represent a total of $3,073.75, which will not be allowed. After

making the noted adjustments, the attorney fees Complainant may recover in connection with the oral hearing total $34,356.25.

Costs associated with attendance at the hearing are listed in the Claim, both for Mr. McCarron and for Complainant's two (2) witnesses. The enumerated expenses will be allowed. Expenses that Complainant may recover total $5,249.72.

Respondent's breach of its supply contract is a violation of section 2 of the Act for which reparation should be awarded to Complainant in the net amount of $993,194.82. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of Section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages sustained in consequence of such violation." (7 U.S.C. § 499e(a)). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n, Inc*., 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). The interest to be applied

shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos, 65 Agric. Dec. 669, 672-73 (2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25, 133 (Apr. 28, 2006).

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation $998,936.36, with interest thereon at the rate of 0.11 per annum from June 1, 2011, until paid.

Within thirty (30) days from the date of this Order, Respondent shall pay to Complainant, as additional reparation for fees and expenses,

$39,605.97, with interest thereon at the rate of _____ per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

___

MISCELLANEOUS ORDERS

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: OASIS CORPORATION, D/B/A ONE OF A KIND PRODUCE.
Docket No. D-12-0423.
Miscellaneous Order.
Filed January 25, 2013.

PACA.

Charles L. Kendall, Esq. for Complainant.
Rosendo Gonzalez, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DISMISSING PURPORTED APPEAL PETITION

Procedural History

On October 26, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Decision and Order in which the Chief ALJ: (1) concluded Oasis Corporation willfully, flagrantly, and repeatedly violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) ordered publication of the facts and circumstances of Oasis Corporation's violations of the PACA.[1]

On November 5, 2012, the Hearing Clerk served Oasis Corporation with the Chief ALJ's Decision and Order.[2] On November 27, 2012, Oasis Corporation filed "Michelle Iovino's Notice of Appeal Re: Decision and Order Issued on October 26, 2012" [hereinafter Notice of Appeal], which states as follows:

TO THE CHIEF ADMINISTRATIVE JUDGE AND TO THE COMPLAINANT ASSOCIATE DEPUTY ADMINISTRATOR, FRUIT

[1] Chief ALJ's Decision and Order at 7-8.
[2] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7836 8835.

AND VEGETABLE PROGRAM AND AGRICULTURAL MARKETING SERVICE:

Michelle Iovino, a former officer, director and shareholder Oasis Corporation dba One of a Kind Produce, the respondent in this proceeding ("Oasis" or the "Respondent") ("Iovino"), through her counsel, Gonzalez & Associates, A Professional Law Corporation, respectfully submits this notice of the "decision and order" issued on October 26, 2012, and served on October 31, 2012, with respect to the motion filed by the Associate Deputy Administrator, Fruit and Vegetable Program, and Agricultural Marketing Service (collectively, the "Claimant"), seeking a decision without hearing by reason of admissions (the "Motion for Decision") (the "October 2012 Decision"). A copy of the October 2012 Decision is attached hereto and is incorporated herein as Exhibit "1."

Dated: November 26, 2012.

GONZALEZ & ASSOCIATES
A Professional Law Corporation

By: /s/
ROSENDO GONZALEZ
Counsel for Counsel for Michelle Iovino,
Respondent's Representative

By letter dated January 15, 2013, the Hearing Clerk, L. Eugene Whitfield, informed Oasis Corporation that the Chief ALJ's Decision and Order had not been appealed to the Secretary of Agriculture within the allotted time and, in accordance with the applicable rules of practice,[3] the Chief ALJ's Decision and Order had become final and effective on December 10, 2012. On January 22, 2013, Oasis Corporation filed a response to the Hearing Clerk's January 15, 2013, letter, stating as follows:

Dear Mr. Whitfield:

[3] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

I just received a notice from your office that the decision and order issued on October 26, 2012, were "not appealed" and became final on December 10, 2012.

That is not accurate.

On November 26, 2012, we filed and served the notice of appeal. I am enclosing a copy of that notice.

Hence, please provide an explanation why the decision would become final in spite of the timely submitted appeal.

If you have any questions or comments with respect to this matter, please do not hesitate to call me.

Very truly yours,
/s/
Rosendo Gonzalez

On January 24, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The Rules of Practice set forth the requirements for an appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, 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.

7 C.F.R. § 1.145(a). Oasis Corporation's Notice of Appeal does not identify any purported error by the Chief ALJ, does not identify any portion of the Chief ALJ's Decision and Order or any ruling by the Chief ALJ with which Oasis Corporation disagrees, and does not allege any deprivation of rights. In short, Oasis Corporation's Notice of Appeal does not remotely conform to the requirements of 7 C.F.R. § 1.145(a). I have long dismissed filings which are purported to be appeal petitions but which do not remotely conform to the requirements of the Rules of Practice.[4] Since no appeal has been filed which remotely conforms to the requirements of 7 C.F.R. § 1.145(a) and it is now too late to file an appeal, I conclude the Chief ALJ's October 26, 2012, Decision and Order became final and effective 35 days after November 5, 2012, when the Hearing Clerk served Oasis Corporation with the Chief ALJ's Decision and Order.

For the foregoing reasons, the following Order is issued.

ORDER

1. Oasis Corporation's purported appeal from the Chief ALJ's October 26, 2012, Decision and Order is dismissed.

2. The Chief ALJ's October 26, 2012, Decision and Order became final and effective December 10, 2012.

___

[4] Gentry, No. D-07-0152, 68 Agric. Dec. ___, 2009 WL 875371 (U.S.D.A. Mar. 18, 2009) (Order Dismissing Purported Appeal); Breed (Order Dismissing Purported Appeal), 50 Agric. Dec. 675 (1991); Lall, No. 88-28, 49 Agric. Dec. 895, 1990 WL 322153 (U.S.D.A. July 5, 1990) (Order Dismissing Purported Appeal).

In re: CUSTOM CUTS, INC. AND CUSTOM CUTS FRESH, LLC.
Docket Nos. D-12-0443, D-12-0444.
Miscellaneous Order.
Filed February 20, 2013.

PACA.

Shelton S. Smallwood, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Charles W. Parrott, Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on May 21, 2012. 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) [hereinafter the Rules of Practice].

The Deputy Administrator alleges Custom Cuts, Inc., and Custom Cuts Fresh, LLC, willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to produce sellers of the agreed purchase prices, or the balances of the agreed purchase prices, for perishable agricultural commodities which Custom Cuts, Inc., and Custom Cuts Fresh, LLC, purchased in the course of interstate and foreign commerce.[1] On June 8, 2012, Custom Cuts, Inc., and Custom Cuts Fresh, LLC, filed a response to the Complaint, in which Custom Cuts, Inc., and Custom Cuts Fresh, LLC, admitted a majority of the material allegations of the Complaint.

[1] Compl. at ¶¶, III-IV and Apps. A-B.

On June 28, 2012, in accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing by Reason of Admissions and a proposed Decision Without Hearing Based on Admissions. On August 10, 2012, the Hearing Clerk served Custom Cuts, Inc., and Custom Cuts Fresh, LLC, with the Deputy Administrator's Motion for Decision Without Hearing by Reason of Admissions and proposed Decision Without Hearing Based on Admissions.[2] Custom Cuts, Inc., and Custom Cuts Fresh, LLC, failed to file objections to the Deputy Administrator's Motion for Decision Without Hearing by Reason of Admissions and proposed Decision Without Hearing Based on Admissions within 20 days after service, as required by 7 C.F.R. § 1.139.

On September 25, 2012, pursuant to 7 C.F.R. § 1.139, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Decision and Order concluding Custom Cuts, Inc., and Custom Cuts Fresh, LLC, willfully violated 7 U.S.C. § 499b(4) and ordering publication of the facts and circumstances of the PACA violations.[3] On November 14, 2012, the Hearing Clerk served Custom Cuts, Inc., and Custom Cuts Fresh, LLC, with the Chief ALJ's Decision and Order.[4]

On February 15, 2013, Custom Cuts, Inc., and Custom Cuts Fresh, LLC, filed an appeal petition. On February 19, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.[5] The Hearing Clerk served Custom Cuts, Inc., and Custom Cuts Fresh, LLC,

[2] Mem. to File issued by Fe C. Angeles, Legal Technician, Office of the Hearing Clerk, on August 10, 2012.
[3] Chief ALJ's Decision and Order at 4.
[4] Mem. to File issued by Fe C. Angeles, Legal Technician, Office of the Hearing Clerk, on November 14, 2012.
[5] 7 C.F.R. § 1.145(a).

with the Chief ALJ's Decision and Order on November 14, 2012;[6] therefore, Custom Cuts, Inc., and Custom Cuts Fresh, LLC, were required to file their appeal petition with the Hearing Clerk no later than December 14, 2012. Instead, Custom Cuts, Inc., and Custom Cuts Fresh, LLC, filed their appeal petition with the Hearing Clerk on February 15, 2013. Therefore, I find Custom Cuts, Inc., and Custom Cuts Fresh, LLC's appeal petition is late-filed.

Moreover, 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.[7] The Chief ALJ's Decision and Order became final 35 days after the Hearing Clerk served Custom Cuts, Inc., and Custom Cuts Fresh, LLC, with the Decision and Order,[8] namely, December 19,

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[6] *See supra* note 4.

[7] *See, e.g.*, Self, No. D-12-0167, 71 Agric. Dec. ___, 2012 WL 10767600 (U.S.D.A. Sept. 24, 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); Mays, No. 08-0153, 69 Agric. Dec. 631, 2010 WL 10079822 (U.S.D.A. Feb. 5, 2010) (Order Denying Late Appeal) (dismissing the respondent's appeal petition filed 1 week after the administrative law judge's decision became final); Noble, No. 09-0033, 68 Agric. Dec. 1060, 2009 WL 8382895 (U.S.D.A. Dec. 17, 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Edwards, No. D-06-0020, 66 Agric. Dec. 1362, 2007 WL 7277763 (U.S.D.A. Oct. 30, 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); Tung Wan Co., No. D-06-0019, 66 Agric. Dec. 939, 2007 WL 3170291 (U.S.D.A. Jan. 8, 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); Gray, No. 01-D022, 64 Agric. Dec. 1699, 2005 WL 6231833 (U.S.D.A. Mar. 10, 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); Mokos, No. 03-0003, 64 Agric. Dec. 1647, 2005 WL 2251945 (U.S.D.A. Sept. 6, 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); Blackstock, No. 02-0007, 63 Agric. Dec. 818, 2004 WL 1842435 (U.S.D.A. July 13, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); Gilbert, No. 04-0001, 63 Agric. Dec. 807, 2004 WL 2823368 (U.S.D.A. Nov. 30, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Nunez, No. 03-0002, 63 Agric. Dec. 766, 2004 WL 2031430 (U.S.D.A. Sept. 8, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

[8] *See* 7 C.F.R. § 1.139; Chief ALJ's Decision and Order at 4-5.

2012. Custom Cuts, Inc., and Custom Cuts Fresh, LLC, filed their appeal petition on February 15, 2013, 1 month 27 days after the Chief ALJ's Decision and Order became final. Therefore, I have no jurisdiction to hear Custom Cuts, Inc., and Custom Cuts Fresh, LLC'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 Custom Cuts, Inc., and Custom Cuts Fresh, LLC's filing an appeal petition after the Chief ALJ's Decision and Order became final.

Accordingly, Custom Cuts, Inc., and Custom Cuts Fresh, LLC's appeal petition must be denied. For the foregoing reasons, the following Order is issued.

ORDER

1. Custom Cuts, Inc., and Custom Cuts Fresh, LLC's appeal petition, filed February 15, 2013, is denied.

2. The Chief ALJ's Decision and Order, filed September 25, 2012, is the final decision in this proceeding.

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In re: PERFECTLY FRESH FARMS, INC, PERFECTLY FRESH CONSOLIDATION, INC., AND PERFECTLY FRESH SPECIALTIES, INC. (RESPONDENTS); AND JAIME O. REVOLE, JEFFREY LON DUNCAN, AND THOMAS BENNETT, PETITIONERS.
Docket Nos. D-05-0001, D-05-0002, D-05-0003, 05-0010, 05-0011, 05-0012, 05-0013, 05-0014, 05-0015.
Miscellaneous Order.
Filed March 26, 2013.

MISCELLANEOUS ORDERS

PACA-APP.

Christopher Young-Morales, Esq. for Complainant.
Christopher F. Bryan, Esq. for Respondents and Appellant.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER LIFTING STAY ORDER AS TO PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATION, INC.; PERFECTLY FRESH SPECIALTIES, INC.; AND JEFFREY LON DUNCAN

On June 12, 2009, I issued a Decision and Order: (1) concluding Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; and Perfectly Fresh Specialties, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) ordering publication of the facts and circumstances of Perfectly Fresh Farms, Inc.'s; Perfectly Fresh Consolidation, Inc.'s; and Perfectly Fresh Specialties, Inc.'s violations of the PACA; (3) concluding Thomas Bennett was responsibly connected with Perfectly Fresh Farms, Inc., when Perfectly Fresh Farms, Inc., violated the PACA; (4) concluding Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., when Perfectly Fresh Consolidation, Inc., violated the PACA; and (5) subjecting Thomas Bennett and Jeffrey Lon Duncan to the licensing and employment restrictions set forth in 7 U.S.C. §§ 499d(b) and 499h(b).[1]

On July 16, 2009, Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; and Jeffrey Lon Duncan requested a stay of the Order in the June 12, 2009, Decision and Order, pending the outcome of proceedings for judicial review, which I granted on September 2, 2009.[2] On February 12, 2013, the Agricultural

[1] Perfectly Fresh Farms, Inc., Nos. D-05-0001 – D-05-0003, Nos. 05-0010 – 05-0015, 68 Agric. Dec. 507, 2009 WL 1702292 (U.S.D.A. June 12, 2009) (Decision as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; Jeffrey Lon Duncan; and Thomas Bennett).

[2] Perfectly Fresh Farms, Inc. Nos. D-05-0001 – D-05-0003, 68 Agric. Dec. 1311, 2009 WL 8382935 (U.S.D.A. Sept. 2, 2009) (Stay Order as to Perfectly Fresh Farms, Inc.;

Marketing Service, United States Department of Agriculture [hereinafter AMS], filed a Request to Lift Stay Order of Judicial Officer stating proceedings for judicial review of the June 12, 2009, Decision and Order are concluded. No response to the Request to Lift Stay Order of Judicial Officer was filed, and on March 25, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on the Request to Lift Stay Order of Judicial Officer.

As no opposition to AMS' Request to Lift Stay Order of Judicial Officer has been filed and proceedings for judicial review of the June 12, 2009, Decision and Order are concluded, the September 2, 2009, Stay Order is lifted and the Order in the June 12, 2009, Decision and Order as it relates to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; and Jeffrey Lon Duncan, is effective, as follows:

ORDER

1. Perfectly Fresh Consolidation, Inc., has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). The facts and circumstances of Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Consolidation, Inc.

2. Perfectly Fresh Farms, Inc., has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). The facts and circumstances of Perfectly Fresh Farms, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Farms, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Farms, Inc.

3. Perfectly Fresh Specialties, Inc., has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). The facts and circumstances of Perfectly Fresh Specialties, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly

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Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; and Jeffrey Lon Duncan).

Fresh Specialties, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Specialties, Inc.

4. Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., when Perfectly Fresh Consolidation, Inc., willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4). Accordingly, Jeffrey Lon Duncan is subject to the licensing and employment restrictions set forth in 7 U.S.C. §§ 499d(b) and 499h(b), effective 60 days after service of this Order on Mr. Duncan.

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DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Editor's Note: This volume continues 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. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. 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: www.dm.usda.gov/oaljdecisions].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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Docket No. 12-0565.
Default Decision and Order.
Filed January 3, 2013.

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Docket No. 12-0612.
Default Decision and Order.
Filed January 15, 2013.

UNITED POTATO DISTRIBUTORS, INC., D/B/A UNITED DISTRIBUTORS, INC.
Docket No. 12-0555.
Default Decision and Order.
Filed February 5, 2013.

LUCAS BROTHERS, INC.
Docket No. 12-0525.
Default Decision and Order.
Filed February 7, 2013.

FRESHCO FOODSERVICE, INC.
Docket No. 13-0048.
Default Decision and Order.
Filed February 7, 2013.

DEFAULT DECISIONS

MISTER BEE POTATO CHIP COMPANY.
Docket No. 13-0056.
Default Decision and Order.
Filed February 7, 2013.

WORLDWIDE PRODUCE & GROCERIES, INC.
Docket No. 13-0055.
Default Decision and Order.
Filed March 21, 2013.

SUTTON FRUIT AND VEGETABLE COMPANY.
Docket No. 13-0047.
Default Decision and Order.
Filed March 29, 2013.

HUNTS POINT TROPICALS, INC.
Docket No. 12-0276.
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Filed April 9, 2013.

SUPERIOR TOMATO-AVOCADO, LTD.
Docket No. 13-0165.
Default Decision and Order.
Filed April 9, 2013.

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Sam Rodio Produce, LLC.
Docket No. D-12-0593.
Filed January 9, 2013.

Avocado Importers International, Inc., D/B/A Ultimate Avocado.
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Filed February 1, 2013.

AGRICULTURE DECISIONS

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