AGRICULTURE DECISIONS

Volume 78

Book One

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UNITED STATES DEPARTMENT
OF AGRICULTURE

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; 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 & Stockyards Act or to the Perishable Agricultural Commodities Act). Part Two covers decisions and orders relating to the Packers & Stockyards Act. Part Three contains decisions and orders that involve the Perishable Agricultural Commodities Act, including reparation 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, decisions and orders issued by the Judicial Officer on appeal, and selected court decisions; (2) a list of miscellaneous orders and dismissals entered by the Administrative Law Judges and full 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 rulings are available in their entirety, in portable document format (PDF), via the OALJ website: https://oalj.oha.usda.gov/current.

PUBLICATION

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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)].

[1] As of November 2018, Volumes 55 (circa 1996) through 76 (circa 2017) are available online. Volumes 39 through 54 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 made, Volumes 39 through 54 will be uploaded to the OALJ website and made available on the *Agriculture Decisions* Archives page.

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AGRICULTURE DECISIONS

Volume 78

Book One

Part One (General)

Pages 1–164

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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JANUARY – JUNE 2019

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

ANIMAL WELFARE ACT

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FOOD AND NUTRITION ACT

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MISCELLANEOUS ORDERS & DISMISSALS

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

BURNETTE FOODS, INC. v. USDA.
No. 18-1541.
Court Decision.
Filed April 8, 2019.

AMAA – Cherries – Cherry Industry Administrative Board – Consignment, definition of – Direct, definition of – Farming industry – Handlers – Sales constituency – Tart cherries – Tart Cherry Order.

[Cite as: 920 F.3d 461 (6th Cir. 2019)].

United States Court of Appeals,
Sixth Circuit.

The Court ruled that the district court erred in reversing the Secretary's determination that CherrCo does not operate as a "sales constituency" in violation of the applicable regulations and, therefore, is not limited in its number of members that may serve on the Cherry Industry Administrative Board. In so ruling, the Court held that there was substantial evidence to support the Judicial Officer's findings that (1) CherrCo receives consignments of cherries and (2) CherrCo does not direct where cherries are sold. The Court reversed the judgment of the district court and remanded for entry of judgment in USDA's favor.

OPINION

HONORABLE RICHARD ALLEN GRIFFIN, UNITED STATES CIRCUIT JUDGE, DELIVERED THE OPINION OF THE COURT.

Cherries, both tart and sweet, are among the many agricultural products that American farmers proudly produce and American shoppers fondly consume. Every year, half a million or so festival-goers descend upon Traverse City, Michigan for the National Cherry Festival to eat cherries, take part in cherry-pit-spitting and cherry-pie-eating competitions, cheer on three separate parades, crown a "Cherry Queen," and generally celebrate this beloved crop.[1] But regardless of this fruit's treasured status,

[1] *National Cherry Festival Fun Facts*, National Cherry Festival, https://www.cherryfestival.org/p/about/mission-and-vision/302 (last visited Feb.

and much like other crops, the Department of Agriculture heavily regulates the cherry market. It does so through the Cherry Industry Administrative Board. And the Board's composition is the subject of this appeal.

Federal regulations prohibit the Board from having too many members of the same "sales constituency"—i.e., an organization that represents a group of cherry handlers or growers. At one time, eleven of the eighteen Board members were affiliated with CherrCo, Inc., an organization that markets for its members and sets minimum prices for various tart cherry products. Plaintiff, Burnette Foods, Inc., a tart cherry handler that is not a member of CherrCo, claims CherrCo is a "sales constituency," and thus the Board's composition violates the regulations. The Secretary of Agriculture found that CherrCo was *not* a "sales constituency," but the district court disagreed. Because the Secretary had substantial evidence to support his decision and the district court misapplied the law in its review, we reverse and remand for entry of judgment in defendants' favor.

I.

To understand Burnette's claim, we need to understand the relationship between the farming industry (and the cherry farming industry in particular) and the federal government, before turning to the particulars of this dispute.

A.

Seeking to ensure a steady supply and price of food, Congress has exempted American farmers and food producers from many of the prohibitions on anticompetitive business practices and agreements that unreasonably restrain trade. In 1922, for example, Congress passed a law allowing farmers "to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws." *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960) (discussing the Capper-Volstead Act); *see also* 7 U.S.C. § 291 (Capper-Volstead Act of 1922). Congress went a step

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11, 2019); *National Cherry Festival Events*, National Cherry Festival, https://www.cherryfestival.org/events (last visited Feb. 11, 2019).

further during the depths of the Great Depression. In the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. § 602(4), Congress announced a national policy of price stabilization. *Horne v. Dep't of Agric.*, 569 U.S. 513, 516, 133 S.Ct. 2053, 186 L.Ed.2d 69 (2013). "The AMAA authorizes the Secretary of Agriculture to promulgate marketing orders that regulate the sale and delivery of agricultural goods." *Id*. (citing 7 U.S.C. § 608(c); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984)). And the AMAA allows the Secretary to delegate the authority to administer marketing orders to industry committees. *Id*. at 517, 133 S. Ct. 2053.

The AMAA does not regulate farmers; it regulates "handlers." 7 U.S.C. § 608c(1), (13)(B). Handlers are defined as "processors, associations of producers, and others engaged in the handling" of covered agricultural commodities—things like milk, tobacco, hops, honeybees, and numerous fruits (including cherries). § 608c(1)-(2); *see also* 7 C.F.R. § 930.11.

Through this Congressional authorization, the Secretary of Agriculture issued the Tart Cherry Order in 1996. *Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Order Regulating Handling*, 61 Fed. Reg. 49939, 49939 (Sept. 24, 1996) (codified at 7 C.F.R. § 930). The order seeks "to improve producer returns by strengthening consumer demand through volume control and quality assurance mechanisms." *Id*. In plain English, that means emphasizing quality over quantity. One way to accomplish this goal is to cap cherry sales at an "optimum" amount. 7 C.F.R. § 930.50(a).

The Cherry Industry Administrative Board implements the order. Its members hail from nine districts: Northern Michigan, Central Michigan, Southern Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. *See* 7 C.F.R. § 930.20(c). Some districts have multiple Board members. 7 C.F.R. §§ 930.2, 930.20(b). To help achieve "a fair and balanced representation on the Board," the Secretary limits Board membership. In a district with multiple Board members, only one member may be from a given sales constituency (unless it's impossible to avoid a conflict). § 930.20(g).

In 1996, a "sales constituency" was "a common marketing organization or brokerage firm or individual representing a group of handlers and

growers." § 930.16 (1996). CherrCo, a "federated grower cooperative" whose members account for a large share of Michigan's tart cherry production, formed thereafter. *Tart Cherries Grown in the States of Michigan, et al.; Order Amending Marketing Agreement and Order No. 930*, 66 Fed. Reg. 35891, 35893 (July 10, 2001). The Department of Agriculture in 2001 later determined that

> the primary function of CherrCo is to establish minimum prices for certain tart cherry products. The record indicates that CherrCo is not directly involved in the actual sales of its members' products. There is intense competition among its members (as well as between its members and non-members) to sell tart cherries. The competition for sales is on the basis of individual handlers' reputations, on the quality and mix of the products they offer, on any special services they provide to their customers, and on whether or not their processing plants are certified to conform with certain sanitation standards.

Id. Despite this unique purpose, CherrCo arguably qualified as a sales constituency under the then-applicable regulation. This concerned the Department because at the time eleven of the eighteen Board members were affiliated with CherrCo. *Id*. So the Department amended the definition of "sales constituency" to clarify that an organization such as CherrCo was not one. 66 Fed. Reg. at 35,893–94. The amendment said: "An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency." 7 C.F.R. § 930.16. This definition endures today.

To summarize, Congress delegated authority to the Secretary of Agriculture to stabilize food supply and price. The Secretary issued an order to cap cherry sales. The Board implements that order. The Secretary has limited the Board's membership. And the Secretary has changed that limitation to account for entities that hold cherries for growers but don't control where the cherries go once they leave.

B.

With that background in mind, we turn back to this case. Plaintiff Burnette is a Michigan corporation that handles canned tart cherries. It is not a member of CherrCo. Because Burnette specializes in canned cherries, it takes raw cherries and immediately converts them into a finished, canned product, which has a shelf life of about one year. Unlike Burnette, many other cherry handlers freeze their cherries immediately, which gives the cherries a multi-year shelf life.

This shelf-life disparity puts Burnette at a disadvantage when the Board caps cherry sales. While other cherry handlers can freeze their excess cherries, Burnette loses any cherries it doesn't use or sell. This costs Burnette as much as $3 million per year in wasted inventory.

Unhappy with this continual loss of inventory due to the Board's sales restrictions, Burnette sought a legal remedy. In mid-2011, it filed a petition with the Department of Agriculture, alleging numerous complaints with the Tart Cherry Order and related regulations. *See* 7 C.F.R. § 900.52(a). Burnette asked the Secretary of Agriculture to exempt Burnette from the Tart Cherry Order in its entirety. Burnette also sought a declaration that CherrCo was a "sales constituency." Because many Board members were affiliated with CherrCo and some of those members were from the same district, if CherrCo was a "sales constituency," the Board's composition would violate § 930.20(g)'s one-member-per-sales-constituency rule. In other words, Burnette sought to shake up who was on the Board in hopes that new Board members would mean fewer sales restrictions and thus fewer wasted cherries.

The parties appeared before an administrative law judge (ALJ) for a six-day evidentiary hearing. The ALJ determined that CherrCo was not a "sales constituency" under § 930.16, and rejected Burnette's challenge to the composition of the Board. Burnette appealed this ruling to the Department of Agriculture, but a judicial officer affirmed.

Displeased with the outcome of the administrative proceedings, Burnette filed suit in the United States District Court for the Western District of Michigan. It sued the Department of Agriculture and its Secretary, challenging the judicial officer's decision on numerous grounds. Following cross-motions for summary judgment, the district court reversed the administrative findings of fact, concluding that the

judicial officer's decision was not supported by substantial evidence. Specifically, the district court ruled that CherrCo was a sales constituency because it directed where its members' cherries were sold. It did so, said the court, because CherrCo's members sign agreements that allow it to process, prepare for market, handle, pack, store, dry, manufacture, and sell its members' tart cherries. The court also noted that, pursuant to its agreement with sales representatives, CherrCo was listed as the seller for all orders, had the authority to approve all orders, and could reject an order for any reason. So as the district court saw it, these aspects of CherrCo's operation amounted to substantial evidence that CherrCo qualified as a sales constituency under 7 C.F.R. § 930.16. On this basis, the court granted plaintiff's motion for summary judgment and ruled that CherrCo could not have more than one seat on the Board.[2]

Defendants now timely appeal the district court's ruling that CherrCo is a sales constituency and the corresponding grant of summary judgment in plaintiff's favor.

II.

We review de novo a district court's decision on motions for summary judgment. *Keith v. Cty. Of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

But because this lawsuit stems from administrative proceedings, our review is more limited. Like the district court, we review the Secretary's decision—here the judicial officer's decision—only to determine "whether [it] is in accordance with law and whether [it] is supported by substantial evidence." *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1355 (6th

[2] Defendants later asked the district court to amend its ruling because the regulations limit "the affiliation of a sales constituency to members on the [Board] within 'those districts having more than one seat on the Board.' " 7 C.F.R. § 930.20. The district court recognized its error and amended its opinion to clarify that "[n]ot more than one Board member (including an alternate Board member) [could] be from, or affiliated with, CherrCo in those districts having more than one seat on the Board."

Cir. 1994) (quoting *Defiance Milk Prods. Co. v. Lyng*, 857 F.2d 1065, 1068 (6th Cir. 1988)). "The Secretary's decision thus must be upheld if the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support the agency's conclusion.' " *Lehigh Valley Farmers v. Block*, 829 F.2d 409, 412 (3d Cir. 1987) (brackets omitted) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)).

III.

The issue we address and resolve is whether the district court erred in reversing the Secretary's determination that CherrCo is not a "sales constituency" under the applicable regulations.[3] As noted previously, a "sales constituency" is:

> [A] common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

7 C.F.R. § 930.16. So there is both a general definition (the first sentence) and an exception (the second sentence). Defendants have never contended that CherrCo falls outside the general rule; they argue the organization falls within the exception. Thus, we must determine whether the judicial officer had substantial evidence to conclude that CherrCo: (1) receives consignments of cherries from its members and (2) does *not* direct where those consigned cherries are sold.

Receives Consignments of Cherries. The district court and the Secretary's judicial officer agreed that CherrCo receives cherry consignments from its members, but Burnette argues that CherrCo really owns the cherries. The relevant regulations don't define "consignments,"

[3] Defendants also raise whether the prohibition, in multi-member districts, of multiple Board members from the same sales constituency applies to alternate Board members. Because we agree with defendants that there is substantial evidence that CherrCo is not a "sales constituency," we need not reach that issue.

so we give the words "their ordinary, contemporary, common meaning, absent an indication" that they were intended to bear some different meaning. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. Of Mich.*, 369 F.3d 960, 967 (6th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 420, 431–32, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)). The pertinent editions of *Black's Law Dictionary* define "consignment" identically: "The act of consigning goods for custody or sale." *Consignment*, *Black's Law Dictionary* 327 (8th ed. 2004); *Consignment*, *Black's Law Dictionary* 303 (7th ed. 1999). And each defines "consign" identically: "To transfer to another's custody or charge[,] … [t]o give (goods) to a carrier for delivery to a designated recipient[,] … [or] [t]o give (merchandise or the like) to another to sell, usu[ally] with the understanding that the seller will pay the owner for the goods from the proceeds." *Consign*, *Black's Law Dictionary* 327 (8th ed. 2004); *Consign*, *Black's Law Dictionary* 303 (7th ed. 1999).[4]

Given these definitions, the evidence presented during the agency proceedings supports the conclusion that CherrCo "receives consignments of cherries." § 930.16. For example, James Jensen, CherrCo's president, testified that while CherrCo may have control over a member's consigned cherries and can attach a collateral value to them, that product is merely held by CherrCo and remains the fungible property of the member. Glenn LaCross, a member of CherrCo's board of directors representing a grower-member and cherry handler (Leelanau Fruit Company), testified that individual members owned the cherries sold through CherrCo. And James Nugent, a grower-member of the Board and owner of an independent orchard that joined CherrCo (Graceland Fruit, Inc.), specifically testified that members consign their cherries to CherrCo. In short, three witnesses familiar with how CherrCo operates testified that it takes cherries on consignment.

Burnette's arguments on this issue do not negate this evidence of consignment. Burnette claims that Steven Nugent testified that CherrCo

[4] The Secretary amended 7 C.F.R. § 930.16 in 2001, so the seventh and eighth editions of Black's Law Dictionary bookend the amendment and are particularly relevant as contemporary understandings of the term's meaning. See, e.g., Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 78–92 (2012) (discussing the fixed-meaning canon of interpretation).

owns the cherries in its possession. This is a mischaracterization—Nugent testified that the members' product would merely be "transfer[red] … into CherrCo's name and then [the member] could borrow against that inventory." This testimony is consistent with the other evidence suggesting that CherrCo uses its consigned cherry stock as collateral for loans to its members. In short, and as determined at every level of proceedings, substantial evidence supported the judicial officer's determination that CherrCo "receives consignments of cherries." § 930.16.

Direct Where Cherries Are Sold. On this issue, the judicial officer and district court disagreed. The judicial officer found that CherrCo "does not direct where the consigned cherries are sold," *see* 7 C.F.R. § 930.16, while the district court found that CherrCo does. As with the term "consignment," the regulations do not define "direct." Thus, we again must turn to a dictionary to discern the term's plain meaning. *See Grand Traverse Band of Ottawa & Chippewa Indians*, 369 F.3d at 967. Again, the contemporary editions of *Black's Law Dictionary* define the term identically: "To aim (something or someone)[,] … [t]o cause (something or someone) to move on a particular course[,] … [or] [t]o instruct (someone) with authority." *Direct*, *Black's Law Dictionary* 491 (8th ed. 2004); *Direct*, *Black's Law Dictionary* 471 (7th ed. 1999). But these definitions, if applied to the regulation, would make little grammatical sense. One does not "aim" sales, "cause [sales] to move on a particular course," or "instruct [sales] with authority." So we must turn to lay dictionaries. *Webster's*, for example, provides a better definition: "[T]o manage or guide by advice, helpful information, instruction, etc.[;] … to regulate the course of; control[;] … to administer[,] manage[,] supervise[;] [or] to give authoritative instructions to; command; order or ordain[.]" *Direct*, *Random House Webster's Unabridged Dictionary* 558–59 (2001). Thus, we must determine whether the judicial officer had substantial evidence to support a finding that CherrCo did *not* control, manage, or command sales.

And the judicial officer's finding was supported by such evidence. Roy Hackert, the owner of Michigan Food Processors (a CherrCo member), testified that even when CherrCo maintained a security interest in his cherries to cover financing it provided to Michigan Food Processors, CherrCo did not "have the ability to direct the sale of those cherries based on that security interest." James Nugent, again of Graceland Fruit, agreed

that CherrCo "doesn't say [Graceland Fruit] ha[s] to sell to a particular entity," and instead merely sets minimum pricing for Graceland Fruit's products. Glenn LaCross testified that affiliates can sell their product through independent (meaning non-CherrCo) sales agents and that CherrCo's input is limited to invoicing and minimum-sales requirements. In fact, LaCross testified that members pick their own sales agents "based on [their] own business interests" and that the CherrCo board does not even discuss the possibility of telling members how or where to sell their product. LaCross further testified that "[w]e have always [ ] had the right to direct our own sales if it be through a sales brokerage constituent or an independent broker. And James Jensen testified that each member of CherrCo appoints its own, independent agent to sell its product. Jensen also testified that after CherrCo determines that the price and terms of a sale meet its requirements, it holds the product and "authorize[s] a release when a member requests us to release the product to their customer." On the basis of this testimony, the judicial officer's determination that CherrCo is not a "sales constituency" was supported by substantial evidence. *See Lansing Dairy*, 39 F.3d at 1355.

In reaching the opposite conclusion, the district court made two legal errors. First, it flipped the standard of review on its head. The court first found substantial evidence for the conclusion that CherrCo *did* direct the sale of cherries; then it disregarded the judicial officer's contrary determination in a single, conclusory, and legally unsupported sentence: "Th[ere] is substantial evidence that CherrCo 'directs where the consigned cherries are sold' and therefore qualifies as a sales constituency under 7 C.F.R. § 930.16. The Judicial Officer's conclusion was not supported by substantial evidence." As we have long held in appeals from agency determinations, if substantial evidence supports the agency's conclusion, the district court must affirm, even if substantial evidence also exists for the opposite conclusion. *See Defiance Milk Prods. Co.*, 857 F.2d at 1069–70.

Second, the district court conflated whether CherrCo had contractual authority to do things with whether CherrCo actually did them. For example, the district court noted that CherrCo is authorized to sell cherries itself under the "Membership and Marketing Agreement" each affiliate signs, and whether it does so or licenses sales agents to do so is determined solely by its Board of Directors. Yet the record reflects—regardless of

what its members have theoretically authorized CherrCo to do—that CherrCo does not sell cherries on its own. And the "sales constituency" regulation applies to what an organization *does*, not what it could do.

If CherrCo were ever to direct the sales of its members' cherries—as it seems to have the authority to do under the membership and marketing agreements its members sign—a future challenge might well succeed. But that is not the record before us. Here the record contains substantial evidence to support the finding that CherrCo doesn't direct cherry sales. Thus, substantial evidence supports the Secretary's conclusion that CherrCo falls within the exception to the regulatory definition of a "sales constituency," and its numerous members' presence on the Board poses no legal issue.

Because there was substantial evidence to support the judicial officer's finding that CherrCo (1) receives consignments of cherries and (2) does not direct where the consigned cherries are sold, the district court erred in overruling the judicial officer's conclusion that CherrCo is not a sales constituency. And because the judicial officer's conclusion was permissible, there is no limit on the number of CherrCo members who can serve on the Board. *See* 7 C.F.R. § 930.20(g).

IV.

For these reasons, we reverse the district court's judgment and remand for entry of judgment in defendants' favor.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: LINDA L. HAGER, an individual; and EDWARD E. RUYLE, an individual.
Docket Nos. 17-0226, 17-0227.
Decision and Order.
Filed February 22, 2019.

AWA – Civil penalties – Dealer – Good faith – License, operating without – Summary disposition.

Charles L. Kendall, Esq., for Complainant.
Respondents Linda L. Hager and Edward E. Ruyle, *pro se*.
Initial Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.
Decision and Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER DENYING RESPONDENTS' PETITION FOR APPEAL OF SUMMARY DISPOSITION AND ORDER AND AFFIRMING DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DISPOSITION

Introduction

This is an administrative enforcement proceeding under the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*) ("AWA" or "Act") and the regulations promulgated thereunder (9 C.F.R. §§ 1.1 *et seq.*) ("Regulations"), wherein Administrative Law Judge Channing D. Strother ("ALJ") issued an August 17, 2018 Decision and Order granting Complainant's motion for summary disposition ("Decision and Order") and finding that Linda L. Hager and Edward E. Ruyle ("Respondents") operated as "dealers" in violation of section 2134 of the AWA[1] by selling regulated animals without a license between the dates of July 13, 2015 and January 18, 2017. On September 27, 2018, Respondents filed an appeal to the Judicial Officer.

[1] 7 U.S.C. § 2134.

For the reasons discussed more fully herein below, Respondents' petition for "Appeal of Summary Disposition and Order Denying Motion to Dismiss All Charges [and Compelling Respondents to] Cease and Desist" is denied, and the Decision and Order issued by ALJ Strother on August 17, 2018 is affirmed.

Relevant Procedural History

On March 2, 2017, the Administrator of the Animal and Plant Health Inspection Service ("APHIS" or "Complainant") filed a complaint alleging that between January 2015 and January 2017,[2] Respondents committed multiple willful violations of the AWA and Regulations.[3] Specifically, Complainant alleged that Respondents, operating as "dealers" without the required license, sold approximately 238 puppies and ten cats, on forty-eight separate dates, in violation of section 2134 of the AWA[4] and section 2.1 of the Regulations.[5] On April 4, 2017, Respondents filed their "Answer" thereto.

On March 14, 2018, the ALJ conducted a telephone conference with the parties, and on March 23, 2018, issued a "Summary of Telephone Conference with Parties and Order Setting Procedures" finding that there were reasons sufficient to consider obviating a hearing on particular issues in the case. The ALJ provided the parties an opportunity to brief the relevant issues and ordered Complainant to submit a motion for summary

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[2] Complainant alleged that Respondent committed multiple violation of the AWA between January 2015 and January 2017; however, the ALJ's Decision and Order does not address alleged violations committed between February 3, 2015 through June 27, 2015. *See* Decision and Order Granting Complainant's Motion for Summary Disposition, Denying Respondent's Motion to Dismiss All Charges, and Compelling Respondents to Cease and Desist at 2.

[3] The above-captioned cases are a second, later set of cases in which a complaint was filed by Complainant alleging violations of the AWA against both Respondents. These two sets of cases have not been consolidated. The ALJ's Decision and Order grants summary disposition only in the instant cases, Docket Nos. 17-0226 and 17-0227.

[4] 7 U.S.C § 2134.

[5] 9 C.F.R. § 2.1.

disposition. On May 22, 2018, Complainant filed "Complainant's Motion for Summary Disposition in Response to Order Setting Procedures," and on June 22, 2018, Respondents filed their "Answer to [C]omplainant[']s [M]otion for Summary Disposition, and Motion to Dismiss [A]ll [C]harges." Complainant submitted no reply, nor did it answer Respondents' motion to dismiss.

On August 17, 2018, the ALJ issued a "Decision and Order Granting Complainant's Motion for Summary Disposition, Denying Respondents' Motion to Dismiss All Charges, and Compelling Respondents' to Cease and Desist" ("Decision and Order"). The ALJ found that there were no material issues of fact to be resolved before issuing a decision and concluded that Respondents violated section 2134 of the AWA[6] by selling regulated animals without a license. Specifically, the ALJ found that Respondents were active "dealers," offering for sale, delivering for transportation or transporting, and selling, in commerce, approximately 206 puppies and kittens, on thirty-four separate dates on or about July 13, 2015 through on or about January 18, 2017, in violation of the AWA and its Regulations. Furthermore, the ALJ assessed a civil penalty in the amount of $25,600, revoked and permanently disqualified Respondents from obtaining an AWA license, and issued a cease and desist order directing Respondents to refrain from violating the AWA. On September 27, 2018, Respondents filed an appeal to the Judicial Officer.

Discussion

I. Respondents Violated the AWA by Operating as Dealers Without a License.

In his Decision and Order, the ALJ found that Respondents violated section 2134 of the AWA[7] by selling regulated animals without a license between the dates of July 13, 2015 and January 18, 2017. The ALJ concluded that Respondents' admissions and failure to deny the specific allegations in the Complaint left no material allegations of fact at issue regarding the AWA violations. On appeal, Respondents do not challenge

[6] 7 U.S.C. § 2134.

[7] *Id.*

the ALJ's findings as to whether they operated as dealers in violation of the AWA; rather, they contest the number of violations committed and argue that from July 13, 2015 through February 2016 they sold a total of sixty-eight puppies and cats. Moreover, Respondents assert that they received no compensation for the cats they delivered and contend that the cats were "simply feral cats" that were donated to a pet store.

Congress enacted the AWA, in relevant part, to ensure "that animals intended for use in research facilities, for purposes of exhibition and for use as pets are provided humane care and treatment."[8] To achieve this purpose, a "dealer" who sells, delivers, or transports regulated animals under the AWA is required to obtain a license through APHIS.[9] The AWA provides:

> No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary [of Agriculture] and such license shall not have been suspended or revoked.[10]

Under AWA provisions, the term "dealer" is defined as:

> 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. Such term does not include a retail pet store (other than a retail

[8] 7 U.S.C. § 2131(1).

[9] 7 U.S.C. § 2134.

[10] *Id.*

pet store which sells any animals to a research facility, an exhibitor, or another dealer).[11]

Additionally, the Regulations provide an exemption from the licensing requirement to the following persons:

(i) Retail pet stores as defined in part 1 of this subchapter;

(ii) Any person who sells or negotiates the sale or purchase of any animal except wild or exotic animals, dogs, or cats, and who derives no more than $500 gross income from the sale of such animals during any calendar year and is not otherwise required to obtain a license;

(iii) Any person who maintains a total of four or fewer breeding female pet animals as defined in part 1 of this subchapter, small exotic or wild mammals (such as hedgehogs, degus, spiny mice, prairie dogs, flying squirrels, jerboas, domesticated ferrets, chinchillas, and gerbils), and/or domesticated farm-type animals (such as cows, goats, pigs, sheep, llamas, and alpacas) and sells only the offspring of these animals, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively maintains a total of more than four of these breeding female animals, regardless of ownership, or to any person maintaining such breeding female animals on premises on which more than four of these breeding female animals are maintained, or to any person acting in concert with others where they collectively maintain a

[11] 7 U.S.C § 2132(f) (definition of dealer).

total of more than four of these breeding female animals, regardless of ownership;

(iv) Any person who sells fewer than 25 dogs and/or cats per year, which were born and raised on his or her premises, for research, teaching, or testing purposes or to any research facility and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively sells 25 or more dogs and/or cats, regardless of ownership, nor to any person acting in concert with others where they collectively sell 25 or more dogs and/or cats, regardless of ownership. The sale of any dog or cat not born and raised on the premises for research purposes requires a license;

(v) Any person who arranges for transportation or transports animals solely for the purpose of breeding, exhibiting in purebred shows, boarding (not in association with commercial transportation), grooming, or medical treatment, and is not otherwise required to obtain a license;

(vi) Any person who buys, sells, transports, or negotiates the sale, purchase, or transportation of any animals used only for the purposes of food or fiber (including fur);

(vii) Any person who maintains a total of eight or fewer pet animals as defined in part 1 of this subchapter, small exotic or wild mammals (such as hedgehogs, degus, spiny mice, prairie dogs, flying squirrels, jerboas, domesticated ferrets, chinchillas, and gerbils), and/or domesticated farm-type animals (such as cows, goats, pigs, sheep, llamas, and alpacas) for exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person acting

> in concert with others where they collectively maintain a total of more than eight of these animals for exhibition, regardless of possession and/or ownership;
>
> (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[.][12]

Respondents have made no assertion in their Answer, or in any subsequent filing, that they have not sold regulated animals without the required AWA license. In their petition for appeal, Respondents in no way substantively address the ALJ's findings as to whether they violated the AWA by operating as a dealer without a license. Nor do Respondents effectively request appropriate relief from the Judicial Officer. No genuine issue of fact exists in this case that would require a hearing.[13] Under these circumstances, a decision and order granting Complainant's motion for summary disposition, finding of AWA violations, and assessment of sanctions was appropriate. *See* 7 C.F.R. § 1.139; *H.M Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984).

The ALJ's finding that Respondents violated section 2134 of the AWA by offering for sale, delivering for transportation or transporting, and selling, in commerce, approximately 206 puppies and kittens without license, on thirty-four separate dates on or about July 13, 2015 through on or about January 18, 2017, is fully supported by the record and is hereby affirmed. The record shows that Respondents have repeatedly admitted that they sold regulated animals without the required license. As the ALJ found, Respondent Linda L. Hager voluntarily terminated and surrendered her AWA license in May 2014, and Respondent Edward E. Ruyle has never had a license under the AWA. However, Respondents have

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[12] 9 C.F.R. § 2.1(a)(3).

[13] *See Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("Common sense suggests the futility of hearings when there is no factual dispute of substance.").

admittedly sold animals on multiple occasions to a pet store after Respondent Hager terminated her license.[14]

I note that Respondents' contention that they continued to make sales without an AWA license is based on the advice of a state official that they could legally continue to sell animals to pet stores. However, the ALJ found that it would be unreasonable for Respondent to rely on what a state official is alleged to have said, after being served with an agency complaint in 2016 enforcing violations under the AWA for selling regulated animals without a license.

I further note that Respondents argue that "USDA" [APHIS] does not regulate pet stores.[15] Respondents provide no legal analysis whatsoever that their operation falls within the retail pet-store exemption from the AWA license requirement under 9 C.F.R. § 2.1(i). While pet stores are exempted from the license requirement under AWA, the record shows that Respondents were not operating as a retail pet store but rather as a dealer within the meaning of the Act. Dealers under the AWA are required to have a license administered by APHIS.[16] Therefore, Respondents' contention has no legal basis and is unsupported by the record.

II. Assessment of Civil Penalties

The appropriateness of the civil penalties should be determined "with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations."[17]

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[14] *See* Answer at 5.

[15] *See* Appeal Petition at 3.

[16] *See* 7 U.S.C. § 2134.

[17] 7 U.S.C. § 2149(b). Although this part of the regulation is entitled "Violations by licenses" and neither Respondent currently holds a license, it has been held that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *See Bhd. of R.R. Trainmen v. Balt. & O.R. Co.*, 331 U.S. 519, 528-29 (1947).

The AWA provides for a civil penalty of up to $10,000 per violation.[18] Complainant requested a civil penalty of $50,000. ALJ Strother assessed a civil penalty in the amount of $25,600 for Respondents' violations, revoked and permanently disqualified Respondents from obtaining an AWA license and issued a cease and desist order compelling Respondents from refraining to violate the AWA.

On appeal, Respondents do not deny that they engaged in commercial sales of puppies and cats without license in violation of the AWA; rather, they contest the number of violations committed and argue that from July 13, 2015 through February 2016 they sold a total of sixty-eight puppies and cats. Moreover, Respondents assert that they received no compensation for the cats they delivered and assert that the cats were "simply feral cats" that were donated to a pet store. Respondents further argue that they acted in good faith throughout these proceedings and were not required to have a license under AWA because they continued to make sales based on a state official's advice that they could legally continue to sell animals to pet stores.

The Judicial Officer previously determined that a petitioner's business is large when its volume of sales is 956 dogs sold in the market after nineteen months.[19] In this case, the ALJ properly found that Respondents' business is moderately sized based on a volume of sales of 206 dogs over a period of eighteen months.

I have determined in previous cases that failure to obtain an AWA license is a grave violation of the statute.[20] "The licensing requirements of the Act are at the center of this remedial legislation. . . . [C]ontinuing to operate without a license, with full knowledge of the licensing requirements, strikes at the heart of the regulatory program."[21] Given the many transactions and continuation of violations over a period of eighteen

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[18] 7 U.S.C. § 2149(b).

[19] *See Horton*, 72 Agric. Dec. 180, 185-86 (U.S.D.A. 2013), *aff'd sub nom. Horton v. U.S. Dep't of Agric*., 559 F. App'x 527 (6th Cir. 2014) (not selected for publication in the Federal Reporter).

[20] *See, e.g.*, *Bradshaw*, 50 Agric. Dec. 499, 509 (U.S.D.A. 1991).

[21] *Id.*; *see also Ennes*, 45 Agric. Dec. 540, 546 (U.S.D.A. 1986).

months, ALJ Strother correctly found that the gravity of Respondents' violations is serious.

Moreover, Respondents' arguments as to their good faith during the proceedings is not persuasive. I find that Respondents' actions were not made in good faith, as previously discussed. I find that it would be unreasonable for Respondents to rely on what a state official is alleged to have said, after being served with an agency's complaint in 2016 enforcing violations under the AWA for selling regulated animals without license. As the ALJ correctly found, there is no justification for any good-faith reliance on erroneous advice that such sales were legal under these circumstances. Respondents clearly have a history of ongoing illegal sales, even after complaints from the agency were received.

Lastly, the amount of civil penalty is subject to adjudicatory discretion within the statutory limits at the time of the violation and justified with a purpose of deterring future violations.[22] Here, the amount of civil penalties assessed by ALJ Strother is within the statutory parameters in effect at the time of Respondents' violations.[23]

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[22] *See Horton v. U.S. Dep't of Agric.*, 559 F. App'x 527, 535-36, 73 Agric. Dec. 77, 90-91 (6th Cir. 2014) (not selected for publication in the federal reporter) (finding that the Judicial Officer's determination of $200 per dog sale was within his discretion and appropriately applied with the intent to deter future violations); *see also Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 463-64 (5th Cir. 2015) (finding that the penalty of $200 per AWA violation was below statutory maximum); *Ramos*, 75 Agric. Dec. 24, 56 (U.S.D.A. 2016) (concluding that a $5,000 civil penalty was "appropriate and necessary to ensure [the respondent'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").

[23] *See* 7 U.S.C. § 2149(b) (2008) ("Any dealer . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation[.]"); 7 C.F.R. § 3.91(b)(2)(ii) (2010) ("Civil penalty for a violation of the Animal Welfare Act, codified at 7 U.S.C. § 2149(b), has a maximum of $10,000."); *cf.* 7 C.F.R. § 3.91(b)(2)(ii) (2018) ($11,390 maximum for violations occurring after March 14, 2018).

After carefully considering the factors for the appropriateness of a civil penalty, I find that the amount of the civil penalties assessed by ALJ Strother and the sanctions imposed in his determination are fully supported by record and are hereby affirmed.

Conclusion

For the foregoing reasons, Respondents' petition for appeal is **DENIED.** The Decision and Order issued by the Administrative Law Judge Channing D. Strother on August 17, 2018 is **AFFIRMED**.

ORDER

1. Respondents' petition for "Appeal of Summary Disposition and Order Denying Motion to Dismiss All Charges Cease and Desist" is DENIED.

2. The finding that Respondents committed willful violations of section 2134 of the AWA (7 U.S.C. § 2134) is fully supported by the record and is AFFIRMED.

3. Respondents are assessed a joint civil penalty totaling $25,600. Respondents shall send a certified check or money order in the amount of twenty-five thousand, six-hundred dollars ($25,600.00), payable to the Treasurer of the United States, to:

   United States Department of Agriculture
   APHIS, Miscellaneous
   P.O. Box 979043
   St. Louis, MO 63197-9000

   within sixty (60) days from the effective date of this order. The certified check or money order shall include the docket numbers (17-0226 and 17-0227) of this proceeding in the memo section of the check or money order.

4. Respondent Linda L. Hager's AWA license, No. 47-A-0410, is permanently revoked, and Respondents are permanently disqualified from obtaining a license in accordance with the AWA and its Regulations.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in all of the dockets identified herein above.

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In re: SIDNEY JAY YOST, an individual; and AMAZING ANIMAL PRODUCTIONS, INC., a California corporation.
Docket No. 12-0294, 12-0295.
Decision and Order.
Filed March 11, 2019.

AWA – Business, size of – Civil penalties – Gravity of violations – Good faith – Handling – Health certificates – Noncompliance, pattern of – Recordkeeping – Standards, compliance with – Summary judgment – Veterinary care – Willful violations – Written record, decision on.

Colleen A. Carroll, Esq., for APHIS.
James D. White, Esq., for Respondents.
Initial Decision and Order entered by
Decision and Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER AFFIRMING INITIAL DECISION AND ORDER

I. Summary of Relevant Procedural History[1]

The U.S. Department of Agriculture ("USDA") has authority over animal exhibitors and animals used or intended for use in exhibition. The USDA regulates the commercial transportation, purchase, sale, housing, care, handling, and treatment of such animals by exhibitors through the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*) ("AWA" or "Act") and its regulations and standards (9 C.F.R. §§ 1.1 *et seq.*) ("Regulations and Standards").

On March 16, 2012, the Administrator of the Animal and Plant Health Inspection Service ("APHIS" or "Complainant") filed a complaint alleging that Sidney Jay Yost and Amazing Animal Productions, Inc. ("Respondents") violated the Regulations on multiple occasions from

[1] Adopted from Complainant's Response to Order Affirming in Part and Denying in Part Exceptions on Appeal filed in the above-captioned dockets on February 22, 2019.

March 2008 through August 2010. In an answer filed May 16, 2012, Respondents generally denied each of the allegations in the Complaint.

This matter was assigned to Administrative Law Judge Jill S. Clifton ("Judge"). On June 20, 2013, Complainant moved for summary judgment. On October 21, 2013, Respondents filed an opposition thereto. On May 8, 2014, the Judge issued a ruling on summary judgment granting in part and denying in part Complainant's motion ("Ruling on MSJ"). Specifically, the Judge granted summary judgment with respect to the violation of 9 C.F.R. § 2.131(b)(1) by Respondent Yost as alleged in paragraph 12 of the corrected Complaint.[2]

On October 27, 2014 and November 19, 2014, APHIS filed notices of correction of the Complaint to correct five erroneous citations to subsections of the handling Regulations made in paragraphs 7, 9, 12, 16, and 20 of the Complaint. On December 16, 2014, the Judge filed a "Ruling Accepting Corrections."

On December 16, 2014, Complainant filed a second motion for summary judgment. On December 23, 2014, Respondents filed an opposition thereto. On December 24, 2014, the Judge filed a "Ruling on APHIS's Second Motion for Summary Judgment" ("Ruling on Second MSJ"). The Judge granted the motion in part and denied the motion in part. The Judge upheld her "previous ruling on summary judgment, that Sidney Jay Yost, an individual, committed one willful violation of 9 C.F.R. § 2.131(b)(1) on April 4, 2009, at Utica, Illinois."[3] The Judge also found that Complainant's proposed findings of fact in paragraphs 1, 2, 3, 5, 6, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 were proven.[4] The Judge found that there remained two proposed findings of fact that were wholly in dispute, namely, proposed findings of fact 7 and 10, stating that "[g]enuine issues of material fact exist as to remaining allegations; the

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[2] Ruling on MSJ at 10 ("A violation of 9 C.F.R. § 2.131(b)(1) by the individual Respondent is proved through Summary Judgment based on material facts that are not disputed.").

[3] Ruling on Second MSJ at 5.

[4] *Id.* at 3-5.

Hearing remains necessary." [5] On July 1, 2015, Respondents filed "Respondents' Stipulations as to Facts." On August 4, 2016, the Judge filed an order entitled "Further Instructions," in which she stated, in part:

> 1. More than a year ago the parties through counsel discussed with me during telephone conferences the remaining details required for me to finalize a decision on the written record. There is no agreement regarding the amount, if any, of civil penalties (money) to be imposed as part of the remedy (sanction). There is no agreement regarding whether Respondents' use of a cane while handling the monkey Rowdy or the lion Romeo or the use of a "pig stick" with the tigers constituted physical abuse. Nevertheless, taking testimony will not be required so long as Declarations or Affidavits provide additional evidence, so that I may proceed with a decision on the written record rather than proceed to an oral hearing.
>
> 2. The remedies (sanctions) I will impose in a decision on the written record will include cease and desist orders and license revocation. APHIS asks for civil penalties in addition; the Respondents ask that no civil penalties be imposed. Of particular interest to me would be support for/objection to imposition of particular amounts of civil penalty, broken out separately for the various offenses or types of offenses before me.

Further Instructions at 1-2. The Judge set deadlines for the parties to file "anything additional for my consideration as I finalize a decision on the written record." [6] On September 13, 2016, Complainant filed "Complainant's Submission in Response to 2016 Further Instructions." On October 18, 2016, Respondents filed "Respondents' Submission in Response to 2016 Further Instructions."

On December 14, 2017, the Judge filed an initial "Decision and Order on the Written Record" ("Initial Decision and Order" or "IDO") finding

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[5] *Id.*

[6] Further Instructions at 2.

multiple instances in which Respondents violated the Regulations as alleged in the Complaint. The Judge ordered AWA license 93-C-0590 revoked, assessed Respondents civil penalties totaling $30,000 to be paid in monthly installments over a five-year period, and ordered Respondents to cease and desist from future violations.[7]

On January 16, 2018, Respondents filed a petition for appeal ("Appeal") and supporting brief ("Appeal Brief"), setting forth three general assignments of error, to wit: (1) the Judge erred in issuing a decision on the record; (2) the Judge erred in assessing $30,000 in civil penalties; and (3) the Judge erred in "failing to fully correct" the Initial Decision and Order.[8] On December 20, 2017, the Judge held a conference call with the parties at Respondents' request. Among other things, Respondents indicated that they wanted to propose "corrections" to the Initial Decision and Order.[9] On January 9, 2018, Respondents sent to the Judge, the Judge's assistant, and Complainant's counsel, by email, a handwritten markup of the Initial Decision and Order and a document entitled "Respondents Requests for Corrections to the Decision and Order on the Written Record."

On February 13, 2018, Complainant filed Complainant's response to the Appeal. In addition to arguments related to Respondents' Appeal, Complainant requested:

> [t]hat the petition for appeal be denied, and either (A) the Judicial Officer issue a final decision and order of the Secretary consistent with the evidence, the Act and Regulations, and the case law, or (B) that the IDO be adopted as the final decision of the Secretary of Agriculture in this proceeding, with necessary modifications, including, specifically:

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[7] IDO at 18-19.

[8] Appeal at 1-3; Appeal Brief at 3-9.

[9] Contrary to Respondents' assertion, Complainant has not "concurred that the phrase 'suffices for these noncompliances' should be added at the last sentence" of paragraph 24 of the Initial Decision and Order. JO Order at 11.

> (1) that respondents operate a moderately-sized business and there is no evidence of good faith (IDO ¶ 11);
>
> (2) that the Judge's statement in IDO ¶ 11, that "the maximum civil penalty is $3,750 for each violation," be corrected;
>
> (3) that the second and third-to-last sentences in IDO ¶ 13 be deleted;
>
> (4) that the second-to-last sentences in IDO ¶¶ 15, 17, 18, 24 and 28 be deleted;
>
> (5) that IDO ¶ 16 be corrected to reflect that the complainant did not amend paragraph 8 of the complaint, and any later citation to subsection (b)(1) - instead of (b)(2) – was a typographical error, as is apparent from the text; and
>
> (6) that any order assessing a civil penalty provide that the civil penalty be made payable within 60 days after service on respondents of the final decision in this case.

Complainant's Response to Appeal at 11-12.

On February 14, 2018, Complainant filed Complainant's response to Respondents' requests for "corrections" to the Initial Decision and Order.

On December 13, 2018, in my capacity as the Judicial Officer ("JO"), I issued an "Order Affirming in Part and Denying in Part Exceptions on Appeal" ("JO Order" or "my Order"), which, *inter alia*, held that the Judge's findings of fact and conclusions of law in the Initial Decision and Order as to the "multiple instances wherein Respondents violated the AWA and the Regulations as alleged in the Complaint" are "fully supported by the record" and "affirmed and adopted," except with respect to the assessment of civil penalties.[10] In my Order, I also found that the

[10] *Id.* at 8-9.

Judge's filing of a decision on the record was permissible and the Judge's definition of "willful" was not error.[11]

I also adopted three of Respondents' requested modifications of the Initial Decision and Order, to wit: (1) to add a statement about Respondent Yost's non-renewal of his exhibitor's license; (2) to add "and/or" to paragraph thirteen of the Initial Decision and Order[12] to comport "more accurately with the applicable provision in the Complaint and in the relevant Regulation"[13]; and (3) to find that during a December 20, 2017 telephone conference "all sides concurred that the phrase 'suffices for these noncompliances' should be added at the end of the last sentence" of paragraph 24 of the Initial Decision and Order.[14]

I also granted Complainant's request to correct paragraph 16 of the Initial Decision and Order "to reflect that Complainant did not amend paragraph 8 of the Complaint, and any later citation of subsection (b)(2) . . . was a typographical error, as is apparent from the text."[15] However, I denied without prejudice "Complainant's remaining requests for modification" of the Initial Decision and Order "in as much as the issue of the appropriateness of the civil money penalty remain[ed] in dispute."[16]

Finally, the Order instructed the parties to file cross-motions for summary judgment with respect to the assessment of civil penalties because "the record as currently developed is insufficient to support a civil money penalty assessment of $30,000."[17] As explained in my Order, my primary concern pertained to the analysis of the factors required to be considered in 7 U.S.C. § 2149(b).

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[11] *Id.* at 7-8.

[12] *See* Complainant's Response to Appeal at 11.

[13] JO Order at 10-11.

[14] *Id.*

[15] *Id.* at 10.

[16] *Id.* Complainant's fourth proposal – "that the second-to-last sentences in IDO ¶¶ 15, 17, 18, 24 and 28 be deleted" – would have had no bearing on the issue in dispute. Complainant's Response to Appeal at 12.

[17] JO Order at 9.

On January 31, 2019, Respondents filed a Response to my Order but failed to provide any new information helpful to me in my consideration of the sole issue remaining for adjudication, namely the appropriateness of the assessment of civil penalties.

On February 22, 2019, Complainant filed its Response to Order Affirming in Part and Denying in Part Exceptions on Appeal ("Complainant's Response"), which provided specific references to the existing record developed by the Judge below regarding the appropriateness of the civil penalties assessed by the Judge.

II. Request to Reconsider Instruction to File Cross-Motions for Summary Judgment

Complainant requests that I reconsider the instruction to file cross-motions for summary judgment (along with supporting evidence) as to the assessment of the civil penalties, for the JO's consideration in advance of issuing a decision and order pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)) or that I remand this case to the Judge for further proceedings with respect to the assessment of the civil penalties.[18]

Complainant's request that I reconsider the instruction to file cross-motions for summary judgment (along with supporting evidence) as to the assessment of civil penalties is supported by good cause and is ***granted***. As noted by Complainant, in my Order I ruled on all issues except the civil penalties requested by Complainant and as assessed by the Judge. Upon my initial review, I found that the record was insufficiently developed to permit a decision as to the appropriateness of the civil penalty assessment and instructed the parties to file summary judgment motions accompanied by supporting evidence on the civil penalty issue. However, Complainant's February 22, 2019 Response to my Order provided additional guidance, supported by specific references back to the existing record developed by the Judge below, which sufficiently addressed my concerns regarding the appropriateness of the civil penalties assessed by

[18] Complainant's Response to JO Order at 5.

the Judge to enable me to move forward with a ruling affirming the Judge's Initial Decision and Order[19] without the need to take additional evidence.

In this case, in my December 13, 2018 Order I affirmed and adopted the Judge's Initial Decision and Order as to the allegations in the Complaint that Respondents violated the Regulations and Standards, as well as to two of the three sanctions ordered by the Judge: the revocation of AWA license 93-C-0590 and the cease-and-desist order. The sole remaining issue to be decided was the third sanction requested by Complainant and ordered by the Judge: the assessment of the civil penalties.

Complainant's February 22, 2019 Response to my Order provided specific references to the existing record developed by the Judge below regarding the appropriateness of the civil penalties assessed by the Judge and demonstrated that the photographic, documentary, and testimonial evidence, even construed in the light most favorable to Respondents, measured against: (1) the applicable statutory provisions; (2) departmental case law; and (3) the remedial purposes of the Act, supports a finding that the Judge's assessment of a joint and several civil penalty of not less than $30,000 is reasonable and appropriate and should be affirmed.

III. Undisputed Facts Related to Civil Penalties

1. The maximum civil penalty for a single violation of the Act or its Regulations occurring between June 23, 2005 and June 17, 2008 is

[19] *See* 7 C.F.R. § 1.132 ("*Judge* means any Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 and assigned to the proceeding involved.") ("*Judicial Officer* means an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture . . . to perform the function involved (§ 2.35(a) of this chapter), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary.") ("*Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.").

$3,750.[20] The maximum civil penalty for a single violation of the Act or its Regulations occurring between June 18, 2008 and December 4, 2017 is $10,000.[21] The maximum civil penalty for a single violation of the Act or its Regulations occurring between December 5, 2017 and March 13, 2018 is $11,162.[22] Under the Act, each violation and each day during which a violation continues constitutes a separate offense.[23]

2. In my December 13, 2018 Order, I affirmed and adopted the findings of fact and conclusions of law made by the Judge in the Initial Decision and Order, affirming that Respondents willfully violated the Regulations alleged in the Complaint as summarized in paragraphs 3 through 7 below.

3. Willful violations of the Regulations governing the handling of animals:

a. 9 C.F.R. § 2.131(c)(1). On or about February 29, 2008, at Burbank, California, Respondents failed to handle a lion during public exhibition, so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the lion and the general viewing public so as to assure the safety of the lion and the

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[20] Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum penalty from $2,500 to $3,750. 7 C.F.R. § (b)(2)(ii) (2006). "This maximum civil penalty was in effect until June 18, 2008, when the Animal Welfare Act was amended to authorize the Secretary of Agriculture to assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations." *White*, 73 Agric. Dec. 114, 152-53 n.6 (U.S.D.A. 2014).

[21] 7 C.F.R. § 3.91(b)(2)(ii) (2008); *see White*, 73 Agric. Dec. at 152-53 n.6.

[22] 7 C.F.R. § 3.91(b)(2)(ii) (2017). Effective March 14, 2018, the maximum civil penalty for a violation of the Animal Welfare Act (7 U.S.C. § 2149(b)) occurring after March 14, 2018 is $11,390. 7 C.F.R. § 3.91(b)(2)(ii) (2018).

[23] 7 U.S.C. § 2149(b).

public.[24]

b. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131(c)(2). On or about September 2008, November 3, 2008, and December 18, 2008, at Devore Heights, California, and January 10, 2009, at Los Angeles, California, Respondents: (1) failed to handle animals as carefully as possible in a manner that would not cause physical pain, stress, or discomfort; and (2) failed to handle animals during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public.[25]

c. 9 C.F.R. § 2.131(b)(1). On multiple occasions between approximately January 11, 2009 and March 2009, Respondents failed to handle animals as carefully as possible in a manner that did not cause trauma, stress, physical harm, or unnecessary discomfort, and, specifically, used a wooden cane and the potential application of physical force to handle animals.[26]

d. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131 (c)(2). In approximately February 2009, at Wrightwood, California, Respondents: (1) failed to handle a mountain lion as carefully as possible in a manner that would not cause physical pain, stress, or discomfort; and (2) failed to handle a mountain lion during public exhibition, so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of the animal and the public.[27]

e. 9 C.F.R. § 2.131(b)(1). On or about March 13, 2009, in Colorado, Respondents failed to handle four animals (a mountain lion, a tiger, and two wolves) as carefully as possible in a manner that would not cause

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[24] IDO ¶ 13 (one violation per Respondent).

[25] IDO ¶ 15 (eight violations per Respondent).

[26] IDO ¶ 16 (at least two violations per Respondent).

[27] IDO ¶ 17 (two violations per Respondent).

trauma, stress, physical harm, or unnecessary discomfort.[28]

f. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131 (c)(2). On April 4, 2009, at Utica, Illinois, Respondents: (1) failed to handle a wolf as carefully as possible in a manner that would not cause physical pain, stress, or discomfort; and (2) failed to handle a wolf 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 wolves and the general viewing public so as to assure the safety of the animals and the public.[29]

g. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131 (c)(2). On or about June 10, 2009, at Site 003 and at off-site locations, Respondents failed to handle animals (large felids) as carefully as possible in a manner that would not cause physical pain, stress, or discomfort and failed to handle large felids during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animal and the public.[30]

h. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131 (c)(2). On or about October 21, 2009, at Site 002, and at off-site locations, Respondents: (1) failed to handle animals (large felids) as carefully as possible in a manner that would not cause physical harm, stress, or unnecessary discomfort; and (2) failed to handle large felids during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animal and the public.[31]

4. Willful violations of the Regulations governing recordkeeping:

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[28] IDO ¶ 18 (eight violations per Respondent).

[29] IDO ¶ 20 (two violations per Respondent).

[30] IDO ¶ 24 (two violations per Respondent).

[31] IDO ¶ 28 (two violations per Respondent).

a. 9 C.F.R. § 2.75(b). On or about April 9, 2009, at Utica, Illinois, Respondents failed to maintain accurate and complete records of the acquisition and disposition of six animals, as required.[32]

b. 9 C.F.R. § 2.75(a) and 9 C.F.R. § 2.75(b). On or about October 21, 2009, at Site 002, Respondents failed to maintain accurate and complete records of the acquisition and disposition of dogs (wolf hybrids), ferrets, a non-human primate, and a fox, as required.[33]

5. Willful violations of the Regulations governing health certificates:

a. 9 C.F.R. § 2.78(a)(1). On or about April 9, 2009, at Utica, Illinois, Respondents transported two domestic dogs, two hybrid wolves, and one nonhuman primate without any accompanying health certificates.[34]

6. Willful violations of the Regulations governing veterinary care:

a. 9 C.F.R. § 2.40(b)(2). On or about October 21, 2009, at Site 002, Respondents failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent diseases.[35]

7. Willful violations of the Regulation requiring compliance with the Standards:

a. 9 C.F.R. § 2.100(a). On or about March 18, 2008, at Site 003, Respondents: (i) failed to provide animals with uncontaminated food (9 C.F.R. § 3.54(a)); (ii) housed incompatible animals in single enclosure (9 C.F.R. § 3.58); (iii) housed an animal in an enclosure containing a buildup of food debris (9 C.F.R. § 3.75(c)(1)); (iv) failed to provide animals with adequate nutritious food (9 C.F.R. § 3.82(a)); (v) failed to provide an animal with

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[32] IDO ¶ 21 (six violations per Respondent).

[33] IDO ¶ 27 (twelve violations per Respondent).

[34] IDO ¶ 22 (five violations per Respondent).

[35] IDO ¶ 26 (one violation per Respondent).

adequate shelter from inclement weather (9 C.F.R. § 3.127(b)); (vi) failed to construct an adequate perimeter fence around enclosures housing dangerous animals (9 C.F.R. § 3.127(d)); (vii) failed to maintain and repair perimeter fence (9 C.F.R. § 3.127(d)); (viii) failed to provide an animal with adequate space (9 C.F.R. § 3.128); and (ix) failed to maintain an animal enclosure in good repair (9 C.F.R. § 3.131(a)).[36]

b. 9 C.F.R. § 2.100(a). On or about June 10, 2009, at Site 003, Respondents: (i) failed to provide dogs with sufficient space (9 C.F.R. § 3.6(a)(2)); (ii) failed to ensure that food for animals was wholesome, palatable, and free from contamination (9 C.F.R. § 3.129(a)); (iii) failed to keep food preparation and storage areas clean (9 C.F.R. § 3.131(c)); and (iv) failed to establish and maintain an effective pest control program (9 C.F.R. § 3.131(d)).[37]

c. 9 C.F.R. § 2.100(a). On or about October 21, 2009, at Site 002, Respondents: (i) failed to provide dogs housed outdoors with sufficient space (9 C.F.R. § 3.4(b)); (ii) failed to maintain a primary enclosure for dogs in good repair (9 C.F.R. § 3.6(a)); (iii) failed to construct and maintain an enclosure for an animals so that it securely contained the animal (9 C.F.R. § 3.125(a)); (iv) failed to construct an adequate perimeter fence around an enclosure housing a dangerous animal (9 C.F.R. § 3.127(d)); and (v) failed to provide adequate space for animals (9 C.F.R. § 3.128).[38]

d. 9 C.F.R. § 2.100(a). On or about August 24, 2010, Respondents: (i) failed to store food supplies in a manner that would protect them from deterioration and contamination (9 C.F.R. § 3.125(c)); and (ii) failed to clean facilities used for food storage (9 C.F.R. § 3.131(c)).[39]

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[36] IDO ¶ 14 (nine violations per Respondent).

[37] IDO ¶ 25 (four violations per Respondent).

[38] IDO ¶ 29 (five violations per Respondent).

[39] IDO ¶ 30 (two violations per Respondent).

IV. The Assessment of Civil Penalties Is Appropriate in This Case Based on the Statute, the Case Law, and the Evidence

Complainant's February 22, 2019 Response to the JO Order provided specific references to the existing record developed by the Judge below regarding the appropriateness of the civil penalties assessed by the Judge and demonstrated that the civil penalties assessed by the Judge against Respondents in the case are consistent with the evidence, with the case law, and with the remedial purposes of the Act.

The Judge concluded that Respondents committed multiple willful violations of the Regulations. I affirmed and adopted the Judge's findings of fact and conclusions of law. Based on the Initial Decision and Order and my Order, Complainant calculates that the total minimum number of established willful violations by each Respondent is seventy-one (71) (twenty-seven violations of the handling Regulations, eighteen violations of the record-keeping Regulations, one violation of the veterinary care Regulations, five violations of the health certificate Regulations, and twenty violations of the Regulations requiring compliance with the Standards). Ten of the established willful violations occurred before June 18, 2008. The maximum civil penalty for each of those violations is $3,750, for a total of $37,500 per Respondent.[40] The remaining sixty-one violations occurred between June 18, 2008 and December 4, 2017. The maximum civil penalty for each of those violations is $10,000, for a total of $610,000.[41] Effective June 18, 2008, Congress amended section

[40] 7 C.F.R. § (b)(2)(ii) (2006); *see supra* note 20.

[41] 7 C.F.R. § 3.91(b)(2)(ii) (2008); *see supra* notes 20 and 21. "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) (2006)). 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 agency by increasing the 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) of the Act to increase the maximum civil penalty for a single violation of the Act or the Regulations (per day) to $10,000.[42]

Complainant's February 22, 2019 Response to my Order provided specific references to the existing record developed by the Judge below regarding the appropriateness of the civil penalties assessed by the Judge and demonstrated that the assessment was warranted based on an application of the factors required to be considered in assessing a civil penalty, which was the basis for my concern in considering the appropriateness of the assessment on appellate review.

First, Complainant demonstrates that under departmental precedent, Respondents should be considered to operate a moderate-size business. In *Mitchell*, the JO found that, like Respondents here, Mr. Mitchell and his corporation "jointly operate[d] a moderate-size business that owns lions, tigers, and other animals," generating revenue through public appearances and work in the entertainment industry:

> The record establishes that Mr. Mitchell and Big Cat Encounters' animals have appeared in movies; television shows; commercials; photographs in magazines, such as Vogue and Elle; Las Vegas, Nevada, conventions and trade shows; and rock videos (Tr. 509; CX 6, CX 16)

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))." *Knapp*, 72 Agric. Dec. 766, 782 (U.S.D.A. 2013) (Order Den. Pet. for Recons.).

[42] 7 U.S.C. § 2149(b). The civil penalties for violations of the AWA and the Regulations and noncompliance with cease-and-desist orders were recently increased, effective March 14, 2018. *See* 7 C.F.R. § 3.91(a)(1)-(2) (2018) ("The Secretary will adjust the civil monetary penalties, listed in paragraph (b) of this section, to take account of inflation as mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, as amended. . . . Any increase in the dollar amount of a civil monetary penalty listed in paragraph (b) of this section applies only to violations occurring after March 14, 2018."); 7 C.F.R. § (b)(2)(ii) (2018) ("Civil penalty for a violation of the Animal Welfare Act, codified at 7 U.S.C. § 2149(b), has a maximum of $11,162, and knowing failure to obey a cease and desist order has a civil penalty of $1,674.").

> indicating that Mr. Mitchell and Big Cat Encounters' jointly-operated business generates revenues.

Mitchell, AWA Docket No. 09-0084, 2010 WL 5295429, at **3, 9 (U.S.D.A. Dec. 21, 2010).

In another similar case, the JO again found that the respondent operated a moderately-sized business based on the number and type of public exhibitions.

> Respondent has at least a moderate-sized operation, and certainly one where the maximum civil penalty would be appropriate. In 1994, Respondent was involved in the exhibition of animals at least a half dozen times, including the training of animals for use in movies, commercials, and photography sessions. (Tr. 353-59.) In 1993, Respondent was involved in the exhibition of animals on at least three occasions, including the training of animals for three motion pictures. (Tr. 359-60.) The period that Respondent was occupied for just one of these 1993 motion pictures, Iron Will, was from November 1992, to the beginning of April 1993, during which period Respondent was paid $1,850 per week. (Tr. 360-62.).

Vergis, 55 Agric. Dec. 148, 164 (U.S.D.A. 1996).

Like the respondents in Mitchell and Vergis, Respondents here operated a moderate-size business based upon the number of their exhibitions and use of animals in the entertainment industry (movies and television) and for personal appearances. *See, e.g.*, CX 2 (Respondents identified their business as "animal acts" on forms submitted to the Secretary); CX 11 (Respondents describe their work in movies and television); CX 59 (Respondents describe their "Walk on the Wild Side" business as providing the public with an opportunity to learn from "[o]ur team of movie and television industry animal trainers" how to handle wild and exotic animals); CX 106 (Respondents' brochure offering training courses at their "Amazing Animals Teaching Zoo and Affection Training Center" states that their "instructors are expert consultants for the media, providing animals and trainers for on-set studio work, still photo shoots,

commercials, feature films, live events and animal educational programs"). Respondent Yost appears to continue to operate an extensive animal business.[43]

The Secretary has also based a finding that a respondent's business was moderately-sized on the number and kinds of animals exhibited:

> Respondent operates a 25-acre park in which an "animal area" is located. (Respondent's Appeal Petition, p. 1.) Respondent exhibits approximately 24 deer, (Respondent's Appeal Petition, attachment 7), approximately 20 chickens, (Respondent's Appeal Petition, attachment 1), and an unspecified number of rabbits, (Respondent's Appeal Petition, p. 2), at its facility. The annual licensing fee regulations, (9 C.F.R. § 2.6), classify exhibitors by the number of animals exhibited. Under this scheme, Respondent's facility is considered moderate-sized.

In re City of Orange, Cal., Cmty. Servs. Dep't, 55 Agric. Dec. 1081, 1087 (U.S.D.A. 1996).

> Respondent has a medium-size business. At all times material to this proceeding, Respondent held, on average, 30 animals for exhibition or resale (including spider monkeys, capuchin monkeys, baboons, rhesus monkeys,

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[43] *See, e.g.*, Attachment A to Complainant's Submission in Response to 2016 Further Instructions and Attachment A hereto. *See also McCall*, 52 Agric. Dec. 986, 1009 (U.S.D.A. 1993) ("The second case, *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986), involved an exhibitor that was one of the nation's largest suppliers of wild animals for exhibition in motion picture and television productions. In that case, the Judicial Officer affirmed the Administrative Law Judge's assessment of a $15,300 civil penalty and the permanent revocation of the respondent's license. The Administrative Law Judge's conclusion was based upon the number and gravity of the respondent's violations and the consideration that the respondent conducted a large and once extremely profitable business as an animal exhibitor.") (internal citations omitted)).

> vervet monkeys, kinkajous, cavies, kangaroos, porcupines, a blackbuck antelope, and a camel).

Morgan, 65 Agric. Dec. 849, 855 (U.S.D.A. 2006).

> When the size of Respondent's business is examined, it is revealed that 84 animals were on hand during the May 13, 1989, inspection: 11 dogs, 21 cats, 4 primates, 2 guinea pigs, 5 rabbits, 7 prairie dogs, 12 rodent species, 4 ferrets, 3 foxes, 1 bear, 2 lions, 1 cougar, 6 pygmy goats, 2 raccoons, 1 woodchuck, 1 opossum, and 1 Vietnamese pot-bellied pig (CX 3). Additionally, the record shows totals of 114 animals on hand on June 1, 1989 (CX 4), and 78 on July 18, 1989 (CX 5). Even though Respondent argues that gross sales for 1989 were only $11,468, I do not find this persuasive on the issue of size. The regulations require licensing of dealers who gross in excess of $500 annually, placing Respondent beyond small dealers who nonetheless are covered by the Act, and must comply with the regulations. Moreover, the complexity of a facility to house these many, varied and somewhat- exotic animals must be taken into consideration, making it difficult to see how such an operation could be considered small. Thus, I conclude that Respondent operated a moderate-sized facility, and certainly one where the civil penalty in question would not be inappropriate.

Pet Paradise, Inc., 51 Agric. Dec. 1047, 1071-72 (U.S.D.A. 1992).

Second, Complainant demonstrates that under departmental precedent, the gravity of Respondents' twenty-seven violations of the handling Regulations is considered to be great for purposes of 7 U.S.C. § 2149(b).[44] The Secretary has found that violations based on an exhibitor's failure to handle dangerous animals with sufficient distance and/or barriers are serious, can result in harm to animals and people, and merit assessment of "the maximum, applicable civil penalty for each handling violation."

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[44] Respondents' other violations are also not insignificant.

> On the same days as Mr. Mitchell and Big Cat Encounters exhibited animals without an Animal Welfare Act license (April 17, 2004, February 1, 2008, February 2, 2008, a day in June 2009, and August 22, 2009), they also failed to handle animals, during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, in violation of 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1) (2005). Mr. Mitchell and Big Cat Encounters' violations of the handling provisions were serious and could have resulted in harm to Mr. Mitchell and Big Cat Encounters' animals or to the people viewing those animals. Therefore, I assess Mr. Mitchell and Big Cat Encounters the maximum, applicable civil penalty for each handling violation that occurred on April 17, 2004, February 1, 2008, February 2, 2008, a day in June 2009, and August 22, 2009, for a total of $30,250.

Mitchell, 2010 WL 5295429 at *8.

> The ALJ states she kept in mind the gravity of Mr. Perry and PWR's violations. I agree with the ALJ that Mr. Perry and PWR's violations of the Animal Welfare Act and the Regulations are grave. I find particularly grave Mr. Perry and PWR's violations of the handling regulations (9 C.F.R. § 2.131) and the veterinary care regulations (9 C.F.R. § 2.40) because those violations thwarted the Secretary of Agriculture's efforts to protect the health and well-being of exhibited animals. Mr. Perry and PW's violations of the handling regulations and the veterinary care regulations resulted in the very harm these regulations are designed to prevent; namely, the death of animals and injuries to members of the public.

Perry, 72 Agric. Dec. 635, 649 (U.S.D.A. 2013).

> Respondent willfully violated 9 C.F.R § 2.131(b)(1). Respondent's violation was extremely serious and resulted in the very harm that compliance with the regulation is designed to prevent. The record clearly demonstrates that Respondent failed to handle Sarang, a 450-pound male Bengal tiger, so that there was minimal risk of harm to Sarang and to members of the public, in willful violation of 9 C.F.R § 2.131(b)(1).

Vergis, 55 Agric. Dec. at 164.

In this case, "the maximum, applicable civil penalty for each handling violation" totals $270,000. That neither animals nor persons were harmed in certain of the instances that were found to be violations of the handling Regulations does not minimize the gravity of the violations:

> The purpose of 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1) (2005) is to reduce the risk of harm to animals and to the public. The fact that no harm actually resulted from Mr. Mitchell and Big Cat Encounters' violations does not affect my view of the gravity of the violations; therefore, I disagree with the ALJ's reliance on the fact that no harm resulted from Mr. Mitchell and Big Cat Encounters' violations when determining the amount of the civil penalty to be assessed, and I assess Mr. Mitchell and Big Cat Encounters the maximum civil penalty that may be assessed for their violations of 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1) (2005).

Mitchell, 2010 WL 5295429 at *12.

Third, Complainant demonstrates that under departmental precedent, Respondents have not shown good faith for purposes of 7 U.S.C. § 2149(b). In 2004, Respondent Yost was advised by APHIS not to handle or exhibit animals without sufficient distance and/or barriers, yet he persisted in doing so, to the detriment of the public and the animals in Respondents' custody. CX 109 at 1-4. The JO has rejected findings of a respondent's good faith in the face of repeated noncompliance:

> The record does not support the ALJ's assessment of Mr. Perry's good faith. I do not find the length of time that Mr. Perry held an Animal Welfare Act license or Mr. Perry's courage, expertise, and success establish his good faith. Efforts to comply with the Animal Welfare Act and the Regulations and instructions to employees to comply with the Animal Welfare Act and the Regulations are relevant to good faith. However, the record establishes that Mr. Perry repeatedly violated the Animal Welfare Act and the Regulations during the period September 10, 2000, through June 15, 2005.

Perry, 72 Agric. Dec. at 650. Respondents also instructed participants in their training school not to answer any questions by USDA inspectors, stating: "If USDA shows up on the property, you must call Sid immediately. Do not allow them into the ranch and do not answer any questions or show them around!. . . . Remember, do not answer ANY questions for USDA."[45]

Fourth, Complainant demonstrates that although there have not been previous administrative proceedings against Respondents, under departmental precedent the JO has held that a respondent's ongoing pattern of noncompliance is sufficient to establish a history of violations, for purposes of 7 U.S.C. § 2149(b).

> Mr. Staples is deemed to have admitted the allegations in the Complaint that he operated a moderately large zoo and animal act, that his violations are serious, and that he resolved two previous Animal Welfare Act cases in accordance with the stipulation procedures set forth in 9 C.F.R. § 4.11.18. Moreover, Mr. Staples is deemed to have admitted that he committed the 19 violations of the Animal Welfare Act and the Regulations alleged in the Complaint. This ongoing pattern of violations establishes a "history of previous violations" for the purposes of 7 U.S.C. § 2149(b) and a lack of good faith.

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[45] CX 109 at 5.

Staples, 73 Agric. Dec. 173, 189 (U.S.D.A. 2014).[46]

CONCLUSION AND ORDER

Complainant, the Administrator of the Animal and Plant Health Inspection Service, filed the Complaint in this case on March 16, 2012 alleging that Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. violated the Regulations on multiple occasions from March 2008 through August 2010. The Complaint allegations have been fully adjudicated and based on the photographic, documentary, and testimonial evidence contained in the record developed by the Judge below, Respondents have been found to have committed multiple willful violations of the Regulations. More specifically, based on the Judge's Initial Decision and Order and the JO Order, Complainant calculates that the total minimum number of established willful violations by each of the Respondents is seventy-one (71) (twenty-seven violations of the handling Regulations, eighteen violations of the record-keeping Regulations, one violation of the veterinary care Regulations, five violations of the health certificate Regulations, and twenty violations of the Regulations requiring compliance with the Standards).

For the foregoing reasons, the photographic, documentary, and testimonial evidence contained in the existing record developed by the Judge below supports a finding that the Judge's assessment of a joint and several civil penalty of not less than $30,000 is reasonable and appropriate under applicable statutory provisions, departmental case law, and the remedial purposes of the Act. Accordingly, the Judge's assessment of a joint and several civil penalty of not less than $30,000 is affirmed. Specifically, I find that the Judge's assessment of a joint and several civil penalty of not less than $30,000 is reasonable and appropriate under the facts and circumstances of this case 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 . . ." to ensure Respondents' "compliance with the Animal Welfare Act and the Regulations in the future, to deter others

[46] *See also Perry*, 72 Agric. Dec. 635, 651 (U.S.D.A. 2013) ("Finally, Mr. Perry and PWR have a history of violations. An ongoing pattern of violations establishes a history of previous violations for the purposes of 7 U.S.C. § 2149(b).").

from violating the Animal Welfare Act and the Regulations, and to thereby fulfill the remedial purposes of the Animal Welfare Act." *Perry*, 72 Agric. Dec. 635, 652-53 (U.S.D.A. 2013).

Accordingly, the Judge's initial "Decision and Order on the Written Record" filed in the above captioned dockets on December 14, 2017 is hereby affirmed and adopted with the modifications discussed herein above and in my December 13, 2018 Order. Respondents' AWA license number 93-C-0590 is revoked, Respondents are ordered to cease and desist from violating the Act and the Regulations, and Respondents are assessed a joint and several civil penalty of not less than $30,000 to be paid within sixty (60) days of final decision in this matter.[47]

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in each of the dockets identified herein above.

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[47] The Judge ordered AWA license 93-C-0590 revoked, ordered Respondents to cease and desist from future violations, and assessed Respondents civil penalties totaling $30,000 to be paid in monthly installments over a five-year period. IDO at 18-19. A five-year payment period is unwarranted and contrary to established departmental precedent. To the extent that the payment plan in the Initial Decision and Order was based on an assumption of Respondents' ability to pay a civil penalty, it is well-settled that an alleged inability to pay a civil penalty is not considered in determining civil penalties under the AWA. *See, e.g.*, *Mielke*, 64 Agric. Dec. 1295, 1315-16 (U.S.D.A. 2005) ("Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondents' inability to pay the civil penalties assessed is not a basis for reducing the civil penalties."); *Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1076 (U.S.D.A. 1992) ("Under some of the USDA-administered statutes which impose civil penalties, Congress has made penury a consideration; however, the Animal Welfare Act is not one of them[.]").

In re: SPLISH SPLASH II, LLC, an Oklahoma limited liability company.
Docket No. 19-J-0050.
Decision and Order.
Filed June 5, 2019.

AWA – Civil penalty, payment of – Exhibitor – License application, denial of – New hearing – Revocation – Summary judgment.

Stephen P. Gray, Esq., for Petitioner.
Colleen A. Carroll, Esq., for APHIS.
Initial Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.
Decision and Order entered by Bobbie J. McCartney, Judicial Officer.

DECISION AND ORDER DENYING PETITIONER'S REQUEST FOR NEW HEARING AND PETITION FOR APPEAL

Introduction

This is a proceeding under the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*) ("AWA" or "Act"); the regulations promulgated pursuant to the AWA (9 C.F.R. §§ 1.1 *et seq.*) ("Regulations"); and 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"). On April 12, 2019, Chief Administrative Law Judge Channing D. Strother ("Chief Judge") issued a decision and order granting summary judgment in favor of the Animal and Plant Health Inspection Service ("APHIS") and affirming APHIS' denial of Splish Splash II, LLC's application for a Class C exhibitor's license. On May 3, 2019, Splish Splash II, LLC appealed the Chief Judge's Decision and Order to the Judicial Officer and requested a new hearing on the ground that "the basis for the prohibition of [Splish Splash II, LLC] obtaining a license is no longer appropriate."[1]

For the reasons discussed more fully herein below, Splish Splash II, LLC's petition for appeal and request for new hearing are denied, and the Decision and Order issued by the Chief Judge on April 12, 2019 is

[1] Appeal Petition at 1.

affirmed and ***adopted*** as the final decision of the Secretary.

Relevant Procedural History

On February 21, 2019, Mr. Joseph M. Estes filed a petition for review and request for hearing ("Petition") on behalf of Splish Splash II, LLC ("Petitioner") in accordance with section 2.11(b) of the Regulations.[2] Attached to the Petition was a February 5, 2019 letter ("APHIS Denial Letter") from the Assistant Deputy Administrator of APHIS ("Respondent") denying Petitioner's application for a Class C exhibitor's license[3] on the basis that Mr. Estes has had an AWA license revoked.[4] Petitioner seeks reversal of APHIS' denial.[5]

On February 26, 2019, Respondent filed a motion for summary judgment ("Motion"), including a memorandum of points and authorities ("Memorandum") that attached several exhibits based on section 1.143(d) of the Rules of Practice[6] and on all the pleadings, documents, points, and authorities filed as part of the Motion. Petitioner did not file a response to Respondent's Motion.

On April 12, 2019, the Chief Judge issued a Decision and Order granting summary judgment in favor of APHIS. The Chief Judge ruled "there [were] no material issues of fact requiring a resolution before issuing a decision" and found that: (1) Mr. Estes's previous AWA exhibitor's license (No. 73-C-0133) was revoked; (2) Mr. Estes has a

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[2] 9 C.F.R. § 2.11(b). *See* Petition at 1 ("This letter is to appeal revoke Licenseing [sic] due to payment was made. I request a hearing in accordance with section 2.11b[.]").

[3] On or about March 15, 2018, APHIS received an application for an AWA license from an applicant named "Splish Splash II, LLC." The application was signed by Mr. Estes, who identified himself as "President" of the corporation. *See* Response to Appeal Petition at 4.

[4] *See* APHIS Denial Letter at 1 ("We are denying this application based on sections 2133 and 2131 of the AWA (7 U.S.C. §§ 2133, 2151), and section 2.11(a)(3) of the AWA regulations (9 C.F.R. § 2.11(a)(3)).").

[5] *See* Petition at 1.

[6] 7 C.F.R. § 1.143(d).

substantial interest, financial or otherwise, in Splish Splash, II, LLC; and (3) APHIS properly found Petitioner unfit to be licensed under the AWA and Regulations due to Mr. Estes's previous license revocation.[7] Accordingly, APHIS' denial of Petitioner's license application was affirmed.

On May 3, 2019, Stephen P. Gray, Esq. filed on Petitioner's behalf an Entry of Appearance and "Petitioner's Appeal of Decision and Order Granting Respondent's Motion for Summary Judgment" ("Appeal Petition"). The Appeal Petition states, in pertinent part, as follows:

> . . . Mr. Joseph M. Estes . . . hereby requests a new hearing and an appeal of the Decision and Order Granting Respondent's Uncontested Motion for Summary Judgment that was entered on April 12, 2019. The purpose of this appeal is brought in good faith in that the basis for the revocation of Mr. Joe Estes' license was a failure to timely pay a fine of $10,000.00. Said fine was ultimately paid. Hence, the basis for the prohibition of him obtaining a license is no longer appropriate. Mr. Estes and his company would like to present further evidence to this Court to prove this assertion so that the Court may reverse its Order granting the Motion for Summary Judgment, and to allow him to proceed with his application to obtain a license.
>
> **WHEREFORE**, premises considered, the Petitioner would respectfully request that the Court set this matter for hearing to entertain new evidence showing that Mr. Estes is in good standing to obtain a license.

Appeal Petition at 1.

On May 16, 2019, Respondent filed its "Response to Petition for Appeal and for a New Hearing." On May 21, 2019, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

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[7] Chief Judge's Decision and Order at 2.

DECISION

Statutory and Regulatory Framework

The AWA authorizes the Secretary of Agriculture to issue licenses to dealers and exhibitors, upon application, in such form and manner as the Secretary of Agriculture may prescribe and to promulgate such rules, regulations, and orders as the Secretary of Agriculture may deem necessary in order to effectuate the purposes of the Act.[8] The Regulations preclude issuance of an AWA license to any person who has had an AWA license revoked, as well as to any legal entity in which a person who has had a license revoked has a substantial interest, as follows:

> **§ 2.9 Officers, agents, and employees of licensees whose licenses have been suspended or revoked.**
>
> Any person who has been or is an officer, agent, or employee of a licensee whose license has been suspended or revoked and who has responsible for or participated in the violation upon which the order of suspension or revocation was based will not be licensed within the period during which the order of suspension or revocation is in effect.
>
> **§ 2.10 Licensees whose licenses have been suspended or revoked.**
>
> . . . .
>
> (b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.
>
> **§ 2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:

[8] *See* 7 U.S.C. §§ 2133, 2151.

> . . .
> (3) Has had a license revoked or whose license is suspended, as set forth in § 2.10[.]

9 C.F.R. §§ 2.9, 2.10(b), 2.11(a)(3).

Discussion

The Chief Judge correctly concluded that the material facts of this case are not in dispute.[9] The sole issue is whether APHIS properly denied Petitioner's March 2018 license application on the grounds that Mr. Estes is "an applicant who . . . [h]as had a license revoked, as set forth in § 2.10."[10] APHIS' denial letter, which is addressed to Mr. Estes, states:

> [T]he application materials indicate you are the president of Splish Splash II, LLC. Pursuant to 2.10(b), because you have a revoked AWA exhibitor's license, you shall not be licensed in your own name or in any manner, including but not limited to a corporation in which you have a substantial interest, financial or otherwise.

APHIS Denial Letter at 1-2.

The record clearly establishes – and Petitioner admits[11] – that Mr. Estes previously held an AWA exhibitor's license that was revoked by the Secretary of Agriculture on December 1, 2003.[12] The Regulations provide that an AWA license will not be issued to an applicant who has had an

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[9] Chief Judge's Decision and Order at 12.

[10] APHIS Denial Letter at 1 (citing 9 C.F.R. § 2.10(b)).

[11] *See* Appeal Petition at 1.

[12] APHIS Denial Letter at 1. Mr. Estes was required, pursuant to the terms of a consent decision, to pay a civil penalty of $10,000 in full by November 30, 2003. *See Estes*, AWA Docket No. 02-0026 (U.S.D.A. June 11, 2003) (Consent Decision and Order). When that payment was not made, Mr. Estes's AWA exhibitor's license (No. 73-C-0133) was "revoked automatically on December 1, 2003." APHIS Denial Letter at 1.

AWA license revoked;[13] therefore, APHIS' denial of Petitioner's license application was proper, and there are no genuine issues of fact to be heard.

The Rules of Practice do not specifically provide for the use or exclusion of summary judgment; however, the Judicial Officer has consistently held that hearings are futile and summary judgment is appropriate in proceedings in which there is no factual dispute of substance.[14] I conclude that the Chief Judge correctly denied Petitioner's request for a hearing and that a "new hearing," which Petitioner has requested on appeal, is not necessary in this case.[15] Furthermore, I adopt as the final order in this proceeding the Chief ALJ's April 12, 2019 Decision and Order Granting Summary Judgment in which the Chief Judge found the material facts in this proceeding are not in dispute, entered a summary judgment in favor of APHIS, and affirmed APHIS' denial of Mr. Estes's March 2018 AWA license application.

Splish Splash II, LLC's Request for New Hearing

Petitioner requests that the Judicial Officer "set this matter for hearing to entertain new evidence showing that Mr. Estes is in good standing to

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[13] 9 C.F.R. §§ 2.10(b), 2.11(a)(3).

[14] *See, e.g.*, *Knaust*, 73 Agric. Dec. 92, 99 (U.S.D.A. 2014); *Pine Lake Enter, Inc.*, 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); *Bauck*, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *Animals of Mont., Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009). *See also Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of allegations).

[15] *See Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir. 1996) (stating that an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 519 U.S. 913 (1996); *Veg-Mix, Inc.*, 832 F.2d at 607-08 (stating that an agency may ordinarily dispense with a hearing when no genuine dispute exists); *Cmty. Nutrition Inst. v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) (stating that a request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held), *cert. denied*, 475 U.S. 1123 (1986).

obtain a license."[16] Petitioner seeks to present "further evidence" that an outstanding civil penalty – which was "the basis for the revocation of Mr. Joe Estes's license" in the past – "was ultimately paid. Thus, the basis for the prohibition of him obtaining a license is no longer appropriate."[17]

With regard to new hearings, the Rules of Practice provide:

> **§ 1.146 Petition for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite--* (1) *Filing; service; ruling.* A petition for reopening the hearing to take further evidence, or for rehearing or reargument of the proceeding, or for reconsideration of the Judicial Officer, must be made by petition with the Hearing Clerk.
>
> (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)(1), (2). Petitioner's request fails to meet these requirements and must therefore be denied.

Petitioner's request for a new hearing fails to state the nature of evidence to be adduced and that such evidence is not merely cumulative.[18] Petitioner submits that the purpose of its request is to present evidence

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[16] Appeal Petition at 1.

[17] *Id.*

[18] *See* 7 C.F.R. § 1.146(a)(2).

"showing that Mr. Estes is in good standing to obtain a license."[19] However, merely stating a desire to present evidence to show "good standing," without more, is insufficient grounds for rehearing.

Although it is unclear what Petitioner's new evidence would consist of,[20] Petitioner seems to suggest the evidence would prove that the $10,000 civil penalty "was ultimately paid."[21] I conclude that such evidence would be "merely cumulative."[22] APHIS' Denial Letter already acknowledges that "Mr. Estes paid the civil penalty in several installments, making the last installment in 2006."[23] Moreover, the Chief Judge addressed the subject of payment in his April 12, 2019 Decision and Order:

> Because Petitioner did not answer Respondent's motion for summary judgment, it is unknown what "payment" referenced in its Petition Petitioner might contend "was made" or how Petitioner might contend the circumstance would allegedly support the Petition. Perhaps Petitioner is simply stating that it has paid the civil penalties previously imposed on Mr. Estes. Payment of those penalties would not entitle it to a license.

Chief Judge's Decision and Order at 9.

I agree with the Chief Judge and find that evidence of Mr. Estes's civil-penalty payment would be inconsequential here.

> [A]t issue is not the revocation of a license. The

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[19] Appeal Petition at 1.

[20] *Cf. Paradise Corner, LLC*, 75 Agric. Dec. 687, 688-89 (U.S.D.A. 2016) (Remand Order) (where a filing that did not identify any error by the ALJ, identify any portion of the ALJ's Decision and Order or any ruling which the petitioner disagreed, or allege any deprivation of rights was not an appeal petition but "a petition for reopening the hearing to admit as evidence the documents attached to" the filing).

[21] Appeal Petition at 1.

[22] 7 C.F.R. § 1.146(a)(3).

[23] APHIS Denial Letter at 1 n.2.

> revocation of Mr. Estes['s] previous exhibitor's license became final and unappealable long ago. No payment at any time could alter that revocation. What is at issue here is the denial of a license to Splish Splash II, LLC, on the grounds set out herein, which are essentially the previous revocation of Mr. Estes' license. I find no payment could affect that denial or the grounds therefore.

Chief Judge's Decision and Order at 9-10. Revocation of licensure is a permanent remedy that affords no opportunity for reinstatement.[24] Therefore, I affirm the Chief Judge's finding and conclude that payment of a civil penalty has no bearing on the license denial at issue.

Additionally, Petitioner's request for a new hearing must be denied because it fails the good-cause requirement of the Rules of Practice.[25] Petitioner had an opportunity to present its evidence in a response to the Motion for Summary Judgment but elected not to file a response or to present any evidence whatsoever and failed to explain why.[26] As the Chief Judge noted: "Petitioner and Mr. Estes have failed to file any pleadings rebutting Respondent's Motion for Summary Judgment."[27] Thus,

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[24] *See Kollman v. Vilsack*, No. 8:14-CV-1123-T-23TGW, 2015 WL 1538149, at *3-*4 (M.D. Fl. Apr. 7, 2015) (upholding the Department's interpretation of "revoke" "to mean not only a permanent revocation but a prohibition against applying for another license").

[25] *See* 7 C.F.R. § 1.146(a)(2) ("A petition to reopen a hearing . . . shall set forth a good reason why such evidence was not adduced at the hearing.").

[26] *See Holt v. Blakely*, 167 F. App'x 86, 89 (11th Cir. 2006) ("If the party seeking summary judgment meets its burden, the burden shifts to the non-moving party to submit evidence to rebut the showing with affidavits or other relevant and admissible evidence."); *Rosberg*, 74 Agric. Dec. 384, 391-92 (U.S.D.A. 2015) ("If the moving party supports its motion for summary judgment, the burden shifts to the nonmoving party, who may not rest upon mere allegations, denials, speculation, or conjecture to defeat summary judgment but must, instead, resist the motion for summary judgment by setting forth specific facts, in affidavits, deposition transcripts, exhibits, or other evidence, that raise a genuine issue for trial.").

[27] Chief Judge's Decision and Order at 9. *See Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993) ("While we view the record in the light most favorable to

Petitioner's "failure to set forth a good reason why such evidence was not adduced at the hearing" justifies denial of its request for rehearing.[28]

Splish Splash II, LLC's Appeal Petition

On appeal, Petitioner requests that the Judicial Officer reverse the Chief Judge's Decision and Order granting summary judgment because "the basis for the prohibition of [Petitioner] obtaining a license is no longer appropriate."[29] The Rules of Practice set forth the requirements for filing 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 before the Judge may be relied upon in an appeal. Each issue shall 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.

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the nonmoving party, the party opposing summary judgment may not rest on its pleadings but must set forth specific fats showing there is a genuine issue for trial[.]") (internal quotation omitted).

[28] 7 C.F.R. § 1.146(a)(2).

[29] Appeal Petition at 1.

7 C.F.R. § 1.145(a).

At the outset, Petitioner's Appeal Petition fails to comply with the requirements of the Rules of Practice. The Appeal Petition does not identify any portion of the Chief Judge's Decision and Order or any ruling by the Chief Judge with which Petitioner disagrees, and it does not allege any deprivation of rights.[30] Furthermore, the issues and arguments are not separately numbered; the issues and arguments are not plainly stated; and the Appeal Petition contains no citations to the record, statutes, regulations, or case law in support of Petitioner's arguments.[31] The Judicial Officer has consistently dismissed purported appeal petitions that do not conform to the requirements of 7 C.F.R. § 1.145(a).[32] Thus, denial of the instant Appeal Petition is appropriate.

Petitioner's appeal seems to turn on the mistaken belief that Mr. Estes's belated payment of a civil penalty somehow reversed the Secretary's previous revocation of his AWA exhibitor's license. As previously discussed, the Chief Judge addressed the "payment" referred to in the Petition for Review:

> Because Petitioner did not answer Respondent's motion for summary judgment, it is unknown what "payment" referenced in its Petition Petitioner might contend "was made" or how Petitioner might contend the circumstance would allegedly support the Petition. Perhaps Petitioner is simply stating that it has paid the civil penalties previously imposed on Mr. Estes. Payment of those penalties would not entitle it to a license. I am unaware of any payment that would support or otherwise be relevant to the Petition here, and thus find that there is

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[30] *See id.*

[31] *See id.*

[32] *See, e.g.*, *Sims*, 75 Agric. Dec. 184, 188 (U.S.D.A. 2016); *Tierney*, 73 Agric. Dec. 574, 576 (U.S.D.A. 2014) (Order Dismissing Purported Appeal Pet.); *Kasmiersky*, 73 Agric. Dec. 275, 278 (U.S.D.A. 2014) (Order Dismissing Purported Appeal Pet.); *Oasis Corp.*, 72 Agric. Dec. 480, 483 (U.S.D.A. 2013) (Order Dismissing Purported Appeal Pet.).

> none. Moreover, as set out herein, at issue is not the revocation of a license. The revocation of Mr. Estes['s] previous license became final and unappealable long ago. No payment at any time could alter that revocation. What is at issue here is the denial of a license to Splish Splash II, LLC, on the grounds set out herein, which are essentially the previous revocation of Mr. Estes'[s] license. I find no payment could affect that denial or the grounds therefore.

Chief Judge's Decision and Order at 9-10.

On appeal, Petitioner simply reasserts that payment of a prior civil penalty obviated Mr. Estes's license revocation but provides no support for its position. Petitioner's argument neither describes an error by the Chief Judge nor independently sets forth a question of error.[33] Petitioner's apparent disagreement with the Chief Judge's evaluation of evidence, application of the Regulations, findings, and conclusions, without more, is not a basis for overturning the Decision and Order.[34] In fact, the Chief Judge correctly applied the law to the facts of this case and specifically correctly addressed the regulatory implications of the revocation of Mr. Estes's license.[35] It is indisputable that the Regulations preclude issuance of a license to a person who has had a license revoked, as well as to any legal entity in which a person who has had a license revoked has a substantial interest, financial or otherwise.[36] The Chief Judge rendered a thorough, well-reasoned decision that is supported by the record.

Conclusion

Based on careful consideration of the record, I find no change or

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[33] *See supra* notes 20-24 and accompanying text.

[34] *See Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 187 (6th Cir. 1983) ("The appellants' arguments, reduced to essentials, are merely disagreement with the evidentiary findings of the ALJ.").

[35] *See* Chief Judge's Decision and Order at 8-10.

[36] 9 C.F.R. §§ 2.9, 2.10(b), 2.11(a). *See Drogosch*, 63 Agric. Dec. 623, 648-49 (U.S.D.A. 2004) (explaining that a cancelled license may be revoked).

modification of the Chief Judge's April 12, 2019 Decision and Order is warranted. The Rules of Practice provide that when the Judicial Officer finds no change or modification of the administrative law judge's decision and order is warranted, the Judicial Officer may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

> **§ 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.

7 C.F.R. § 1.145(i).

Based on the foregoing, the following Order is entered.

ORDER

1. Splish Splash II, LLC's Request for a New Hearing is DENIED.

2. Splish Splash, II LLC's Petition for Appeal is DENIED.

3. The Chief Judge's April 12, 2019 Decision and Order Granting Respondent's Motion for Summary Judgment is ADOPTED as the final decision of the Secretary.

RIGHT TO SEEK JUDICIAL REVIEW

Splish Splash II, LLC 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. Splish Splash II, LLC must seek judicial review within sixty (60) days after entry of the

Order in this Decision and Order.[37] The date of entry of the Order in this Decision and Order is June 5, 2019.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each party, with courtesy copies provided via email where available.

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[37] 7 U.S.C. § 2149(c).

In re: SPLISH SPLASH II, LLC, an Oklahoma limited liability company.
Docket No. 19-J-0050.
Decision and Order.
Filed April 12, 2019.

AWA.

Pro se Petitioner Splish Splash II, LLC, represented by Joseph M. Estes, also known as Joe Estes.
Colleen A. Carroll, Esq., for APHIS.
Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Introduction and Background

This case was initiated by *pro se* Petitioner, Splish Splash II, LLC, represented by Mr. Joseph M. Estes, also known as Joe Estes, via a Petition to "appeal revoke Licenseing [*sic*] due to payment was made" and requesting "a hearing in accordance with section 2.11b" filed on February 21, 2019. Petition at 1. Attached to the Petition was a letter ("APHIS Denial Letter") to Mr. Estes from the Assistant Deputy Administrator for the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), dated February 5, 2019, denying Mr. Estes's application for a Class C exhibitor's license under the Animal Welfare Act ("AWA"), sections 2133 and 2151 (7 U.S.C. §§ 2133, 2151), and sections 2.11(a)(3) and 2.10(b) of the AWA regulations (9 C.F.R. §§ 2.11(a)(3), 2.10(b)) due to revocation of Mr. Estes's previous AWA exhibitor's license number 73-C-0133. APHIS Denial Letter at 1.

Respondent, the Administrator of APHIS, filed Respondent's Motion for Summary Judgment ("Motion"), including a Memorandum of Points and Authorities that included several exhibits, on February 26, 2019, based on section 1.143(d) of the Rules of Practice (7 C.F.R. § 1.143(d)) and all pleadings, documents, and points and authorities filed as a part of the Motion. The Hearing Clerk's records to date reflect that Petitioner has not

filed a response to Respondent's Motion. All filed documents are hereby admitted to the record.

Based on careful review of the pleadings and evidence before me, I find that there are no material issues of fact requiring resolution before issuing a decision. As outlined further below, I find that 1) Mr. Joseph M. Estes's, also known as Joe Estes, previous AWA exhibitor's license number 73-C-0133 was revoked; 2) Mr. Joseph M. Estes, also known as Joe Estes, has a substantial interest, financial or otherwise, in Petitioner Splish Splash II, LLC; and 3) that APHIS properly found Splish Splash II, LLC unfit to be licensed under the AWA and Regulations due to Mr. Estes's previous license revocation. Therefore, Respondent's Motion for Summary Judgment is hereby GRANTED and Respondent APHIS's denial of Applicant Splish Splash II, LLC's Class C exhibitors license application is AFFIRMED.

Jurisdiction

The AWA was promulgated to insure the humane care and treatment of animals intended for use in research facilities, exhibition, or as pets. 7 U.S.C. § 2131. Congress provided for enforcement of the AWA by the Secretary of Agriculture, USDA. 7 U.S.C. §§ 2131-59. Regulations promulgated under the AWA are in the Code of Federal Regulations, part 9, sections 1.1 through 3.142.

Applicable Statutory Provisions

Congress enacted the AWA, in relevant part, because it is necessary

> to insure that animals intended for intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment; . . .

7 U.S.C. § 2131.

To achieve this purpose, Congress provided (emphasis added):

> The Secretary shall issue licenses to dealers and exhibitors upon application therefor **in such form and**

> **manner as he may prescribe** and upon payment of such fee established pursuant to 2153 of this title . . .

7 U.S.C. § 2133.

Further, the corresponding regulations mandate, in pertinent part:

> **§ 2.10 Licensees whose licenses have been suspended or revoked.**
>
> . . . .
>
> (b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed. . . . .
>
> **§ 2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
>
> . . . .
>
> (3) Has had a license revoked or whose license is suspended, as set forth in § 2.10; . . . .

9 C.F.R. §§ 2.10(b), 2.11(a)(3).

Summary of the Evidence

Documentary Evidence:

CX 1 — August 14, 2006 Consent Decision and Orders in *Estes and Safari Joe's Wildlife Ranch, Inc.*, AWA Docket No. 04-B032; and in *Estes and Safari Joe's Wildlife Ranch, Inc*., AWA Docket No. 05-0027 (where Mr. Estes admitted to violating the AWA and was subjected to a probation period during which he would "not engage in any activity for which such a license under the Act is required" (at 8) and which states, at 3, that Mr. Estes's

AWA license (No. 73-C-0133) was revoked on December 1, 2003).

CX 2 — March 20, 2014 initial Decision and Order in *Estes*, AWA Docket No. 11-0027 (which references, at 1, that Mr. Estes's license was revoked in 2003, orders that "Respondent Joseph M. Estes, an individual and agent for Safari Joe's Wildlife Ranch, Inc., his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating 9 C.F.R. § 2.10(c), including but not limited to delivering for transportation any animal (as defined in 9 C.F.R. § 2.1), even an animal to be used as a pet, even when there is no sale or trade," and assesses a civil penalty of $2,650.00 (at 7-8)).

CX 3 — The June 12, 2014 Order Dismissing Purported Appeal Petition and Cross-Appeal in *Estes*, USDA Docket No. 11-0027 (which adopts and makes final the administrative law judge's March 20, 2014 Decision and Order in that case).

CX 4 — The March 15, 2018 AWA exhibitors license application from applicant "Splish Splash II, LLC".

CX 5 — Filings submitted by Mr. Estes to the Oklahoma Secretary of State pertaining to Splish Splash II, LLC, and its parent, Safari Joes H20 (electronically signed by Mr. Estes (as "Joe M Estes"), titled Limited Liability Company, at 1; signed by Mr. Estes (in print as "Joe M Estes, President"), at 3; and signed electronically by Mr. Estes (as "Joe Estes"), titled "Managing Member," at 4).

CX 6 — APHIS's February 5, 2019 Denial Letter.

On or about February 21, 2019, Petitioner Splish Splash II LLC, submitted an application for an AWA Class C exhibitor's license. CX 4. The application names Mr. Estes (as "Joe Estes"), titled as "President" in

Box 3[1] and is signed by Mr. Estes, titled "President" and dated March 15, 2018 in Boxes 10, 11, and 12. The application also includes "Safari Joes H20" in Box 2,[2] including two separate addresses in Tulsa, Oklahoma, and the same phone number provided for Splish Splash II LLC; has "N/A" written in answer to both questions in Box 4 which are: "(A) Previous USDA License Number: (if any)" and "(B) Active USDA License Number in which you have an interest"; and in Box 9 lists 2 nonhuman primates as the "largest number of animals that you have held, owned, leased, or exhibited at any one time during the previous business year."

By letter dated February 5, 2019 and addressed to Mr. Estes, APHIS denied Petitioner's AWA application for a Class C exhibitor's license on the grounds that Petitioner is "an 'applicant who. . . [h]as had a license revoked. . . as set forth in § 2.10'" (citing 9 C.F.R. § 2.10(b)) and stating that Petitioner "previously held AWA exhibitor's license number 73-C-0133. That license was revoked by order of the Secretary of Agriculture. *In re Joe Estes, et al., Consent Decision and Order, AWA Docket No. 02-0026*, June 11, 2003." CX 6 at 1. The APHIS letter further stated that "the application materials indicate [Mr. Estes is] the president of Splish Splash II, LLC. Pursuant to 2.10(b), because you have a revoked AWA exhibitor's license, you shall not be licensed in your own name or in any manner, including but not limited to a corporation in which you have a substantial interest, financial or otherwise." CX 6 at 2.

Mr. Estes filed letter to appeal the AWA license application denial on February 20, 2019. The top of the letter states "Joe Estes AWA 73-c-0133", and the body of the letter reads "This letter is to appeal revoke Licesneing [*sic*] due to payment was made . [*sic*] I request a hearing in accordance with section 2.11b Thank you Joe Estes." Mr. Estes attached a

[1] *See* CX-4 at 1. Box 3 directs "IF THE APPLICANT IS A CORPORATION, PARTNERSHIP OR OTHER BUSINESS ENTITY, LIST THE ENTITY'S PARTNERS OR OFFICERS AND AGENT FOR SERVICE OF PROCESS."

[2] Box 2 directs "ALL BUSINESS NAMES AND LOCATION ADDRESSES HOUSING ANIMALS."

copy of the APHIS denial letter but provided no further argument nor documentation therein.

Discussion

The Secretary of Agriculture is authorized by the AWA to "issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe." 7 U.S.C. § 2133. Accordingly, the Secretary of Agriculture has promulgated regulations prescribing the form and manner of AWA licensing procedure. *See* 9 C.F.R. §§ 2.1-.12. The present case was initiated by Petitioner who seeks an appeal of an application for a Class C AWA exhibitor's license which was denied due to a revocation of Petitioner's representative's, Joseph M. Estes, also known as Joe Estes (herein referred to as "Mr. Estes") previous AWA exhibitor's license.[3]

Respondent APHIS seeks summary judgment of this matter, contending that there is no factual dispute for which a hearing is needed. Motion at 6. Respondent contends that it has met its burden by showing:

> First, there is no dispute that the license applicant is a legal entity in which a person who has had an AWA license revoked (like Mr. Estes), has a substantial interest, financial or otherwise. There is no dispute that Mr. Estes had an AWA license that was revoked. There is also no dispute that Mr. Estes has a substantial interest in the license applicant. 9 C.F.R. § 2.10(b).
>
> Second, the Administrator has determined, with good cause, that the license applicant, Splish Splash II, LLC, by virtue of that fact that Mr. Estes is its principal, is unfit to be licensed and that the issuance of a license would be contrary to the purposes of the Act. . . .
>
> Third, the issuance of a license to this applicant, Splish Splash II, LLC, would circumvent the Secretary's order

[3] Under AWA Regulations, revocation of a license is permanent. *See* 9 C.F.R. § 2.10.

> revoking the license previously held by Mr. Estes, as it would be tantamount to issuing a license directly to Mr. Estes. 9 C.F.R. § 2.11(d).

Motion at 6-7.

Petitioner has not responded to Respondent's Motion for Summary Judgment.

The legal standard for summary judgment in a proceeding before a USDA Administrative Law Judge, well-articulated by then Chief Administrative Law Judge Davenport, is as follows:[4]

> The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (the Rules or the Rules of Practice) set forth at 7 C.F.R., Subpart H, apply to the adjudication of this matter. While the Rules do not specifically provide for the use or exclusion of summary judgment, the Department's Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance. *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Bauck*, 868 Agric. Dec. 853, 858-59 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987).
>
> While not an exact match, "no factual dispute of substance" may be equated with the "no genuine issue as to any material fact" language found in the Supreme Court's decision construing Fed. R. Civ. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). [Citation omitted.] An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is

[4] *Agri-Sales, Inc.*, 73 Agric. Dec. 327, 328-30 (U.S.D.A. 2014), *aff'd* by the Judicial Officer and adopted as the final order in the proceeding, 73 Agric. Dec. 612 (U.S.D.A. 2014).

> "material" if under the substantive law it is essential to the proper disposition of the claim. [Citation omitted.] The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. [Citation omitted.] . . .

The facts in this case are not in dispute and a hearing is not necessary. APHIS has properly denied Petitioner's application for an AWA Class C exhibitor's license based on sections 2133 and 2151 of the AWA (7 U.S.C. §§ 2133, 2151), and section 2.11(a)(3) of the AWA regulations (9 C.F.R. § 2.11(a)(3)). Specifically, APHIS denies Petitioner's AWA license application on the grounds that Mr. Estes is "an 'applicant who . . . [h]as had a license revoked. as set forth in § 2,10,'" and that, because Mr. Estes has had an AWA license previously revoked, Petitioner "shall not be licensed in [Mr. Estes's] own name or in any manner, including but not limited to a corporation in which you have a substantial interest, financial or otherwise" (CX 6 at 1-2) (citing 9 C.F.R. §§ 2.11(a)(3), 2.10(b)).

The record is clear that Mr. Estes is a "person whose license has been revoked" within the meaning of 9 C.F.R. §§ 2.10(b) and 2.11(a)(3). *See* CX 1 at 3 (stating that Mr. Estes's AWA license (No. 73-C-0133) was revoked on December 1, 2003); and CX 2 at 1 (which states that Mr. Estes's license was revoked in 2003 and orders that Mr. Estes "his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating 9 C.F.R. § 2.10(c)").

The record is also clear that Mr. Estes, a former AWA license holder whose license was revoked in 2003, has "a substantial interest, financial or otherwise" in the legal entity applying for an AWA exhibitor's license. *See* CX 4 (where Mr. Estes (as "Joe Estes") is titled as "President" in box 3 and the application is signed by Mr. Estes, titled "President"); CX-5 (where the documents filed with Oklahoma Secretary of State is electronically signed by Mr. Estes (as "Joe M Estes"), titled Limited Liability Company (at 1), signed by Mr. Estes (in print as "Joe M Estes,

President") (at 3), and signed electronically by Mr. Estes (as "Joe Estes"), titled "Managing Member" (at 4)).

Further, the record shows that Mr. Estes is the only individual named in the AWA license application and the business documents filed on behalf of Petitioner and associated businesses with the Oklahoma Secretary of State. As Respondent contends, "the issuance of a license to this applicant, Splish Splash II, LLC, would circumvent the Secretary's order revoking the license previously held by Mr. Estes, as it would be tantamount to issuing a license directly to Mr. Estes. 9 C.F.R. § 2.11(d)." (quoting and citing *Lion's Gate Center, LLC,* 70 Agric. Dec. 783, 787-88 (U.S.D.A. 2011)). Petitioner and Mr. Estes have failed to file any pleadings rebutting Respondent's Motion for Summary Judgment. The Administrator of APHIS has properly determined, based on good cause, that Splish Splash II, LLC is unfit to be licensed under the AWA due to the revocation of Mr. Estes' AWA exhibitor's license in 2003.

Because Petitioner did not answer Respondent's motion for summary judgment, it is unknown what "payment" referenced in its Petition Petitioner might contend "was made" or how Petitioner might contend that circumstance would allegedly support the Petition. Perhaps Petitioner is simply stating that it has paid the civil penalties previously imposed on Mr. Estes. Payment of those penalties would not entitle it to a license. I am unaware of any payment that would support or otherwise be relevant to the Petition here, and thus find that there is none. Moreover, as set out herein, at issue is not the revocation of a license. The revocation of Mr. Estes previous exhibitor's license became final and unappealable long ago. No payment at any time could alter that revocation. What is at issue here is the denial of a license to Splish Splash II, LLC, on the grounds set out herein, which are essentially the previous revocation of Mr. Estes's license. I find no payment could affect that denial or the grounds therefore.

Based upon the foregoing, I find that the record is sufficiently developed to conclude that the entry of summery judgment in Respondent's favor is appropriate. I also find that a hearing is not

necessary in this matter. Accordingly, Petitioner's request for a hearing is denied.

Findings of Fact

1. On December 1, 2003, an AWA exhibitor's license held by Joseph M. Estes (No. 73-C-0133) was revoked pursuant to the terms of the June 11, 2003 Consent Decision and Order issued by the Secretary in *Estes*, *an individual doing business as Safari Joe's Wildlife Rescue, a/k/a Safari Joe's Exotic Wildlife Rescue, a/k/a Safari Joe's Zoological Park, an unincorporated association or sole proprietor*, AWA Docket No. 02-0026 (issued by Chief Administrative Law Judge James W. Hunt, wherein Mr. Estes admitted multiple violations of the AWA and its regulations).

2. On August 14, 2006, Administrative Law Judge Jill S. Clifton issued a Consent Decision and Order in two administrative enforcement cases: *Estes and Safari Joe's Wildlife Ranch, Inc.*, AWA Docket No. 04-B032; and *Estes and Safari Joe's Wildlife Ranch, Inc.*, AWA Docket No. 05-0027 (in which respondents admitted multiple violations of the AWA and its regulations). *See* CX 1.

3. On March 20, 2014, Judge Clifton filed an initial Decision and Order in *Estes*, AWA Docket No. 11-0027, in which she found that Mr. Estes violated the AWA regulations. *See* CX 2. On May 14, 2014, the USDA Judicial Officer issued an Order in that case dismissing a filing by Mr. Estes that purported to be a petition for appeal. *See* CX 3.

4. On or about March 15, 2018, APHIS received an application for an AWA license from an applicant named "Splish Splash H, LLC." CX 4. The application was signed by Mr. Estes, who identified the applicant as a corporation, and himself as its "President." CX 4 at Blocks 3, 7, 11. The application does not mention Mr. Estes's previous AWA license. CX 4 at Block 4.

5. APHIS has determined that according to the Oklahoma Secretary of State, Splish Splash II, LLC, is a limited liability company, and Mr. Estes is its "Managing Member." CX 5.

6. On February 5, 2019, APHIS sent a letter to Mr. Estes and Splish Splash II, LLC, denying the license application and setting forth the reasons therefor, specifically that APHIS regulations prohibit the issuance of a license to a legal entity in which a person who has had an AWA license revoked (like Mr. Estes), has a substantial interest, financial or otherwise. CX 6.

7. On February 21, 2019, Mr. Estes filed a request for hearing on behalf of Splish Splash II, LLC.

Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. The material facts involved in this matter are not in dispute, and the entry of summary judgment in favor of Respondent is appropriate.

3. APHIS's denial of a license to Petitioner, pursuant to 9 C.F.R. §§ 2.10(b) and 2.l l (a)(6), promotes the remedial nature of the AWA and is hereby AFFIRMED.

ORDER

1. Respondent's Motion for Summary Judgment is hereby **GRANTED**.

2. APHIS's denial of a license to Petitioner, pursuant to 9 C.F.R. §§ 2.10(b) and 2.l l (a)(6), is hereby **AFFIRMED**.

3. Petitioner's request for a hearing is hereby **DISMISSED**, with prejudice.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondents, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice (7 C.F.R. § 1.145) applicable to this proceeding.

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

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FOOD AND NUTRITION ACT

DEPARTMENTAL DECISIONS

In re: STATE OF VERMONT, DEPARTMENT FOR CHILDREN AND FAMILIES.
Docket No. 18-0060.
Decision and Order.
Filed June 18, 2019.

FNA.

Heidi Morea, Esq., for Petitioner.
Michael Gurwitz, Esq., for FNS.
Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.

DECISION AND ORDER DISMISSING CASE

Background and Summary of Decision

This case was initiated by Petitioner,[1] State of Vermont, Department for Children and Families ("DCF") by a Notice of Appeal filed on July 9, 2018, and Appeal of Assigned Payment Error Rate for Federal Fiscal Year 2017 ("Appeal Petition") along with the Declaration of Heidi Moreau in Support of Appeal of Assigned Payment Error Rate ("Declaration of Moreau") filed on August 27, 2018. Specifically, Petitioner DCF filed the Appeal Petition pursuant to 7 C.F.R. § 275.23(b)(2)(ii) requesting "relief from the assignment of a quality control payment error rate of 7.68 percent control imposed by" Respondent Food and Nutrition Service ("FNS") under the Supplemental Nutrition Assistance Program ("SNAP") "by letter dated June 28, 2018 and received by DCF on June 28, 2018." Appeal Petition at 3.

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[1] Precedent indicates "Petitioner" and "Respondent" are the more proper designations of the respective parties in this type of proceeding, rather than "Appellant" and "Appellee." *See Dep't of Public Health & Soc. Serv., Guam*, 75 Agric. Dec. 163, 163 n.l (U.S.D.A. 2016) (stating that the "terms 'Appellant' and 'Appellee' refer to appeals of initial decisions and orders by USDA Administrative Law Judges to the Judicial Officer for the Secretary of the United States Department of Agriculture.").

In response, Respondent FNS filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss") on October 17, 2018. In summary, Respondent FNS moved to dismiss for lack of subject matter jurisdiction, contending that FNS "did not establish a liability amount for Vermont" and therefore, pursuant to the Food and Nutrition Act of 2008 ("FNA"), as amended (7 U.S.C. 2011-2036), specifically 7 U.S.C. § 2025(c)(7)(B), "the Secretary lacks subject matter jurisdiction to hear this appeal." *See* Motion to Dismiss, 7-9.

Petitioner DCF filed a Memorandum of Law in Opposition to Appellee's Motion to Dismiss ("Response") on October 29, 2018, contending, at 2, that the "SNAP statute and regulations do not prohibit appeals of either the USDA's decision that a state has failed to meet quality control reporting requirements, or the methodology used to calculate the assigned payment error rate" and that "[e]ven if there were no statutory or regulatory basis to appeal the methodology used to calculate the assigned payment error rate, the USDA is equitably estopped from asserting lack of subject matter jurisdiction on this issue." As discussed herein, Petitioner DCF's contention is based on certain communications from FNS to DCF that included statements that DCF had certain rights to appeal FNS's determinations below. FNS now states those statements were incorrect statements of the law.

Based on careful review of the statutes and regulations governing administrative and judicial review of quality control payment error rates under the SNAP, as well as the undisputed facts before me, I find that subject matter jurisdiction for USDA administrative law judge review of 1) determination of the payment error rate of a state agency, 2) whether the payment error rate exceeds 105 percent of the national performance measure for payment error rates (i.e. whether the payment error rate is "excessive"), and 3) the assessment of an error rate by FNS assigning a payment error rate to a state under 7 C.F.R. § 275.23(b)(2)(ii), **is not triggered** unless and until a claim or liability amount for the fiscal year has been established in accordance with 7 U.S.C. § 2025(c)(1)(C). Here, FY 2017 is the first year that an excessive payment error rate has been assigned to Petitioner DCF. As a result, there has not been a liability amount established against Petitioner DCF for FY 2017. In these circumstances, as Respondent FNS contends, the applicable statutes and

regulations are clear and express that I have no authority to review this case. The FNS earlier misstatements of DCF's rights to appeal FNS's determinations cannot create review authority where none exists. This case is therefore DISMISSED, as discussed herein.

Background of Supplemental Nutrition Assistance Program and Quality Control Measures

The instant matter falls under the Food and Nutrition Act of 2008 ("FNA") (7 U.S.C. §§ 2011 *et seq*.) and involves the Respondent FNS's, administration of the Supplemental Nutrition Assistance Program ("SNAP"). SNAP is a federal aid program that provides nutrition benefits with the mission "[t]o alleviate . . . hunger and malnutrition" among Americans by allowing "low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. § 2011. The FNA authorizes the Secretary of Agriculture to pay each State[2] fifty percent (50%) of all administrative costs associated with the administration of the program, while the federal government funds one-hundred percent (100%) of the cost of the SNAP benefits.[3]

In administering the SNAP, the Secretary, through FNS, is charged with carrying out a quality control ("QC") system that "enhances payment accuracy and improves administration by establishing fiscal incentives that require State agencies with high payment error rates to share in the cost of payment error."[4] The SNAP QC system entails FNS review of data reported by the State, and/or data compiled by FNS where State reporting is found to be insufficient, in order to make determinations as to the accuracy of State eligibility and benefit determinations, and where

[2] Throughout the FNA and the regulations promulgated thereunder, "State," "State Agency," and "State or territory" are used interchangeably. Hereafter, references to "State" will be deemed to include "State Agency" and "territory" or "territories." *See* 7 U.S.C. § 2012(r)-(s).

[3] 7 U.S.C. § 2025(a).

[4] 7 U.S.C. § 2025(c)(1)(A)(i).

improper payments (underpayment or overpayment)[5] to households occurred. The SNAP QC system also establishes a process for the establishment and payment of a "liability amount" for a State with high payment error rates to share in the cost of those payment errors.[6]

The review process begins when FNS conducts an annual validation review of the State's monthly collection of sample cases in which the State identified payment errors.[7] After identifying cases in which FNS disagrees with the State's conclusions about specific cases, FNS is to share the results of its review with the State and provide it an opportunity to contest FNS's findings.[8]

States may request binding arbitration of such an FNS quality control validation review if the State contests FNS findings.[9]

Thereafter, FNS is to determine the State's payment error rates based on "(1) Reports submitted to FNS by the State; (2) FNS reviews of State agency operations; (3) State performance reporting systems and corrective action efforts; and (4) Other available information such as Federal audits and investigations, civil rights reviews, administrative cost data, complaints, and any pending litigation."[10] FNS will typically "validate each State agency's estimated payment error rate by re-reviewing the State agency's active case sample and ensuring that its sampling, estimation,

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[5] Improper payments can occur in three ways: an over- or under-payment to an eligible recipient, a payment made to a recipient incorrectly determined to be eligible, and a payment that is insufficiently (including not at all) documented. *See* 7 U.S.C. § 2025(c)(2)(B).

[6] *See Quality Control Error Rates*, USDA.GOV, https://www.fns.usda.gov/snap/quality-control (last visited May 19, 2019).

[7] 7 C.F.R. § 275.2.

[8] 7 C.F.R. §§ 275.3(c); 275.14(b).

[9] 7 C.F.R. § 275.3(c)(4).

[10] 7 C.F.R. § 275.23(a).

and data management procedures are correct" according to the regulatory formula.[11]

However, where FNS determines that a State has provided inadequate or inaccurate data, or has a deficient QC data management system, and where FNS cannot correct the State's deficiency, FNS may assign the State a payment error rate based on "the best information available."[12]

A State is deemed to have an "excessive payment error rate" for the first full fiscal year ("FFY") in which FNS determines that a 95 percent (95%) statistical probability exists that the State's payment error rate exceeds 105 percent (105%) of the national performance measure ("NPM"). When FNS determines an excessive payment error rate for a first FFY, whether the payment error rate is assigned or based on the State's QC review reports, no liability amount is assigned. Rather the State is put on notice that if its performance error rate exceeds the NPM in the immediately subsequent FFY, FNS will establish a liability amount against the state for the subsequent FFY.[13] A liability amount is to be established when, for the second or subsequent FFY, FNS determines there is an excessive payment error rate.[14] In the current situation, FNS assigned Vermont DCF an excessive payment error rate for FFY 2017 and determined that the assigned excessive payment error rate was the first year that "places the State in a position of potential future liability."[15] Thus, under the FNA and implementing regulations, FNS did not and could not establish a liability amount for FFY 2017.

Applicable Statutory Provisions

The FNA, and the regulations promulgated by the Secretary thereunder, provide the following authority for administrative and judicial

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[11] *See* 7 C.F.R. § 275.23(b)(2).

[12] 7 C.F.R. § 275.23(b)(2)(ii).

[13] 7 U.S.C. § 2025(c)(1)(C); 7 C.F.R. § 275.23(c).

[14] 7 U.S.C. §§ 2025(c)(1)(C)-(D).

[15] June 28, 2018 FNS Letter at 2 (Notice of Appeal at 4).

review of State appeals regarding financial claim or liability amounts assessed against a State:

> **(7) Administrative and judicial review**
>
> **(A) In general**
>
> Except as provided in subparagraphs (B) and (C), **if the Secretary asserts a financial claim against or establishes a liability amount with respect to a State agency under paragraph** (1), **the State may seek administrative and judicial review** of the action pursuant to section 2023 of this title.
>
> **(B) Determination of payment error rate**
>
> With respect to any fiscal year, a determination of the payment error rate of a State agency or a determination whether the payment error rate exceeds 105 percent of the national performance measure for payment error rates **shall be subject to administrative or judicial review only if the Secretary establishes a liability amount with respect to the fiscal year under paragraph (1)(C).**
>
> **(C) Authority of Secretary with respect to liability amount**
>
> An action by the Secretary under subparagraph (D) or (F)(iii) of paragraph (1) **shall *not* be subject to administrative or judicial review.**

7 U.S.C. § 2025(c)(7) (emphasis added).

> *Right to appeal payment error rate liability.* Determination of a State agency's **payment error rate** or whether that payment error rate exceeds 105 percent of the national performance measure **shall be subject to administrative or judicial review *only if* a liability amount is established *for that fiscal year***. Procedures for

> good cause appeals of excessive payment error rates are addressed in paragraph (f) of this section. **The established national performance measure is not subject to administrative or judicial appeal, nor is any prior fiscal year payment error rate subject to appeal as part of the appeal of a later fiscal year's liability amount.** However, **State agencies may address matters related to good cause in an immediately prior fiscal year that impacted the fiscal year for which a liability amount has been established. The State agency will need to address how year 2 was impacted by the event(s) in the prior year.**

7 C.F.R. § 275.23(d)(3) (emphasis added).

> If FNS determines that a State agency has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system, FNS will correct the State agency's payment and negative case error rates based upon a correction to that aspect of the State agency's QC system which is deficient. **If FNS cannot accurately correct the State agency's deficiency, FNS will assign the State agency a payment error rate** or negative case error rate **based upon the best information available**. After consultation with the State agency, the assigned payment error rate will then be used in the liability determination. After consultation with the State agency, the assigned negative case error rate will be the official State negative case error rate for any purpose. **State agencies shall have the right to appeal assessment of an error rate in this situation in accordance with the procedures of Part 283 of this chapter.**

7 C.F.R. § 275.23(b)(2)(ii) (emphasis added).

> *Good cause.* When a State agency with otherwise effective administration exceeds the tolerance level for payment errors as described in this section, **the State agency may seek relief from liability claims that would**

> **otherwise be levied** under this section on the basis that the State agency had good cause for not achieving the payment error rate tolerance. **State agencies desiring such relief must file an appeal with the Department's Administrative Law Judge (ALJ)** in accordance with the procedures established **under part 283** of this chapter.

7 C.F.R. § 275.23(f) (emphasis added).

The scope of the rules of practice for proceedings concerning "Appeals of Quality Control ("QC") Claims", 7 C.F.R. part 283, is:

> **Scope and applicability.**
>
> The rules of practice in this part, shall be applicable to appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year ("FY") 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c).

7 C.F.R. § 283.2.

The FNA also provides the following standard of review:

> (8) The Secretary may not limit the authority of such judges presiding over determinations regarding claims made pursuant to section 2025(c) of this title.

7 U.S.C. § 2023(a)(8).

> (H) In considering a claim or liability amount under this paragraph, the administrative law judge shall consider all grounds for denying the claim or liability amount, in whole or in part, including the contention of a State agency that the claim or liability amount should be waived, in whole or in part, for good cause.

7 U.S.C. § 2025(c)(8)(H).

The FNA provides a "two-year rule" for establishing a liability amount for States whose payment error rate has exceeded the NPM:

> With respect to fiscal year 2004 and any fiscal year thereafter **for which the Secretary determines that, for the second or subsequent consecutive fiscal year**, a 95 percent statistical probability exists that the payment error rate of a State agency exceeds 105 percent of the national performance measure for payment error rates announced under paragraph (6), **the Secretary shall establish an amount for which the State agency may be liable** (referred to in this paragraph as the "liability amount").

7 U.S.C. § 2025(c)(1)(C) (emphasis added).

Discussion

Petitioner DCF's Notice of Appeal stated, at 1, that DCF was "appealing the assignment of a 7.68 percent payment error rate as calculated by FNS . . . assigned . . . after a Quality Control Integrity Review cited findings of . . . noncompliance." In the Notice of Appeal, at 1, Petitioner DCF also stated that the letter from FNS, attached to the Notice of Appeal, notified DCF of the assigned payment error rate and "was signed by a designee of the appellant [FNS] on June 28, 2018 and received by the appellant via email on June 28, 2018."

The June 28, 2018 FNS Letter, attached to Petitioner DCF's Notice of Appeal at 4, stated in pertinent part (emphasis added):

> FNCS has determined that there is a 95 percent statistical probability that Vermont's assigned payment error rate of 7.68 percent exceeds the 105 percent of the national performance measure for FY 2017. Therefore, **FY 2017 is the first year that Vermont's excessive payment error rate places the State in a position of potential future liability**. No liability amount is being established for this FY. However, if there is also a 95

> percent statistical probability that Vermont's payment error rate exceeds 105 percent of the national performance measure for FY 2018 and exceeds 6 percent, a liability amount may be established for your State for FY 2018. In such an event, Vermont will be able to appeal the FY 2018 determination and its associated liability amount. **FNS' assignment of a FY 2017 error rate can be administratively appealed. Such an appeal is limited to the issue of whether a rational basis exists for the methodology used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate.**

Respondent FNS's Motion to Dismiss, at 6, states that the language in the June 28, 2018 FNS Letter, which states that the "FY 2017 error can be administratively appealed," was "standard boilerplate for all states receiving an assigned payment error rate" and "was an incorrect statement of applicable law." Respondent FNS contends, *id.* at 11, that although FNS "concedes that the letter of June 28, 2018, contained a statement erroneously advising all states receiving notices of assigned payment error rates . . . that they could file an appeal limited to the issue of whether a rational basis exists for the methodology used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate" the statement in the June 28, 2018 FNS Letter was "contrary to the statute and regulation on administrative appeals of quality control claims" and the "statement does not—cannot—waive the statutory and regulatory authority."

In the Motion to Dismiss, Respondent FNS contends that 1) there is no statutory authority for this appeal, 2) there is no regulatory authority for this appeal, and 3) there can be no waiver of, nor consent to, subject matter jurisdiction.

In response, Petitioner DCF contends that there is subject matter jurisdiction to hear this appeal because 1) administrative and judicial review of the Secretary's determination that a State has failed to meet established reporting requirements is not prohibited by 7 U.S.C. § 2025; 2) administrative and judicial review of the methodology used to calculate a State's assigned payment error rate is not prohibited by 7 U.S.C. § 2025;

and 3) Respondent FNS is equitably estopped from asserting lack of subject matter jurisdiction.

Legal Standard of Review

Respondent FNS's Motion to Dismiss contends that the Secretary, and in particular the administrative law judge presiding over this case, lacks subject matter jurisdiction to review the payment error rate assigned by FNS under the FNA.[16] By analogy to the district courts, "[t]he party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008).[17] "In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).[18] "The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*[19]

USDA Administrative Law Judge Jurisdiction Under the FNA

USDA administrative law judges ("ALJs") provide for a of limited jurisdiction. This jurisdiction is limited to that provided by statute and regulation.[20] Congress expressly provided statutorily for administrative and judicial review of financial claims, liability amounts, determination of State payment error rates, and determination of whether a State's payment

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[16] 7 U.S.C. § 2025(c)(7)(B).

[17] Citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

[18] Citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Trentacosta v. Frontier Pacific Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987).

[19] Citing *Trentacosta*, 813 F.2d at 1558.

[20] 5 U.S.C. §§ 554(a), 556(b)(3).

error rate is excessive in the FNA[21] but expressly restricted administrative or judicial review of financial claims, liability amounts, determination of State payment error rates, and determination of whether a State's payment error rate is excessive to instances where the Secretary has established a claim or liability amount "with respect to the fiscal year" pursuant to 7 U.S.C. § 2025(c)(1)(C).[22] The Secretary of Agriculture delegates authority to administrative law judges ("ALJs") pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(b)(3), to hold hearings and perform related duties in proceedings under the FNA.[23] An ALJ's jurisdiction is expressly limited to adjudicatory authority conferred by Congress.[24]

Respondent FNS contends, Motion to Dismiss at 9, that the FNA mandates an unambiguous "statutory prerequisite for filing administrative

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[21] 7 U.S.C. § 2025(c)(7).

[22] 7 U.S.C. § 2025(c)(7)(B).

[23] *See* 7 C.F.R. §§ 2.27(a)(1), 275.23(d)(3), 275.23(b)(2)(ii), 275.23(f), 283.2 (limiting the scope and applicability of pt. 283 to "appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year ("FY") 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c).").

[24] 5 U.S.C. §§ 554(a); 556(b)(3). *See also* 5 U.S.C. § 706(2)(C) (a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *Corey Lea, Corey Lea Inc., Start Your Dream Inc., & Cowtown Found., Inc.*, 70 Agric. Dec. 384, 390 (U.S.D.A. 2011) ("Petitioners refer to the APA as the authorizing statute for OALJ's jurisdiction, but fail to state with any specificity how the APA vests OALJ with statutory or regulatory jurisdiction. The APA provides a framework for agencies to follow to assure due process in adjudicatory proceedings, but the statute allows broad latitude to agencies to establish their own procedures within that framework. See, 5 U.S.C. § 554. The right to a hearing under the APA exists only so long as another statute provides for such right. 5 U.S.C. § 551 et seq. USDA has promulgated regulations governing adjudications before OALJ where prevailing statues require a hearing on the record. Petitioners' request for a hearing does not involve any of those statutes, which are enumerated at 7 C.F.R. § 1.131. Absent specific statutory authority, the APA does not vest OALJ with jurisdiction to hold a hearing in Petitioners' complaints."); *Burlington N. R.R. Co.-Order for Just Comp.-Nat'l R.R. Passenger Corp. (Amtrak)*, 7 I.C.C.2d 74, 77 (I.C.C. 1990) ("The

and judicial appeals—a liability amount" and that the evidence, specifically the June 28, 2018 FNS Letter, demonstrates that Petitioner DCF "has not met this prerequisite and consequently, the Secretary lacks subject matter jurisdiction to hear this appeal." I agree with Respondent FNS that the FNA unambiguously requires FNS to have established a claim or liability amount against a State before FNS's determination of an error rate or FNS's determination of an excessive error rate can be administratively or judicially reviewed.[25]

Petitioner DCF, in its Response at 3, states that the "absence of statutory language allowing actions against the federal government alone is not grounds for dismissal."[26] First, Petitioner DCF contends, *id.* at 4, that "[t]itle 7 U.S.C. § 2025 does not prohibit administrative or judicial review of the USDA Secretary's decision that a State has failed to meet established reporting requirements." Petitioner DCF states, *id.*, that Congress "defined three specific areas that are not subject to administrative or judicial review: 7 U.S.C. §§ 2025(c)(6)(D), (c)(7)(C),

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Commission's general powers to issue declaratory orders to eliminate controversy among parties under the APA and its inherent authority to issue declarations concerning matters within its regulatory jurisdiction cannot, as suggested by petitioner, be resorted to override an express Congressional withholding of jurisdiction to resolve the controversy at issue."); *Califano v. Sanders*, 430 U.S. 99, 107 (1977), (Where Respondent contended that Section 10 of the APA (5 U.S.C. §§ 701-706) conferred judicial jurisdiction, the Supreme Court held it was the statute (28 U.S.C. § 1331(a)) and not the APA that confers subject matter jurisdiction, stating at 107 "Congress' explicit entry into the jurisdictional area counsels against our reading the APA as an implied jurisdictional grant designed solely to fill such an interstitial gap" and concluding that "the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.").

[25] 7 U.S.C. § 2025(c)(7)(B); 7 C.F.R. § 275.23(d)(3).

[26] Citing *Richlin Sec. Serv. Co. v. Chenoff*, 553 U.S. 571, 589 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474,493 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Navajo Nation*, 537 U.S. 488, 503, 123 (2003); *Scarborough v. Principi*, 541 U.S. 401, 420 (2004).

and (d)(4)" but that "[u]nlike these sections, § 2025(c)(4) does not contain a provision barring administrative review or judicial review."

Second, Petitioner DCF contends that "[t]itle 7 U.S.C. § 2025 does not prohibit administrative or judicial review of the methodology used to calculate a State's assigned payment error rate." *Id.* Petitioner DCF differentiates appeal of the methodology used to calculate a State's assigned payment error rate from 7 U.S.C. § 2025(c)(7)(B), where appeal of the assignment of a payment error rate is restricted from being administratively or judicially reviewed until a liability amount has been assessed.

Petitioner's contention that administrative or judicial review of subject matter that is not expressly prohibited must be permitted is contrary to the canon of statutory construction applicable here—*expressio unius est exclusio alterius* ('the expression of one thing is the exclusion of another')—because Congress has specified instances where administrative or judicial review are authorized.[27] A USDA ALJ's subject matter jurisdiction arises under statutory authority for administrative hearings and is derived with set procedure for such hearings from regulations promulgated by the Secretary thereunder.[28] Congress provides statutory authority to the Secretary to hear administrative appeals under the FNA.[29] The Secretary, as previously mentioned, has delegated authority to ALJs pursuant to the APA[30] to hold hearings and perform related duties in proceedings under the FNA.[31]

The "rules of practice" promulgated by the Secretary under the FNA for "appeals of Quality Control (QC) Claims," 7 C.F.R. pt. 283, are limited to addressing "appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year ("FY") 1986 and subsequent

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[27] *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. 269, 270 (1871) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

[28] *See* 5 U.S.C. §§ 556(b)(3), 554(a), 706(2)(C).

[29] *See* 7 U.S.C. § 2025(c)(7).

[30] 5 U.S.C. § 556(b)(3).

[31] *See* 7 C.F.R. §§ 2.27(a)(1), 275.23(d)(3), 275.23(b)(2)(ii), 275.23(f), pt. 283.

fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c)." Part 283 (7 C.F.R. pt. 283), is divided into two limited types of appeals: "Subpart B – Appeals of QC Claims of $50,000 or More"[32] and "Subpart C – Summary Procedure for Appeals of QC Claims of Less Than $50,000."[33]

It is noteworthy that the "usual" procedural rules, the "Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary" ("Standard Rules of Practice"), 7 C.F.R. §§ 1.130-.151, do not apply to any hearings under the FNA.[34]

While I agree with Petitioner DCF that administrative and judicial review of the Secretary's decision that a State has failed to meet established reporting requirements and of the methodology used to calculate a State's assigned payment error rate is not expressly prohibited by the FNA, Congress has expressly limited administrative or judicial review, and in turn the Secretary has limited delegated adjudicatory authority to USDA ALJs, to instances where a claim or liability amount has been assessed.

The regulations are express that USDA ALJ jurisdiction to preside over appeals of assigned error rates in "situations," such as the present matter, where "FNS determines that a State agency has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system" and where "FNS cannot correct the State agency's deficiency," resulting in FNS assigning "the State agency a payment error rate or negative case error rate based upon the best information available" must be conducted "in accordance with the procedures of Part 283." The scope of Part 283[35] consists of "sections 14(a) and 16(c)" of the FNA, 7 U.S.C.

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[32] 7 C.F.R. § 283.4-.23.

[33] 7 C.F.R. § 283.24-.32.

[34] *See* 7 C.F.R. § 1.131.

[35] 7 C.F.R. § 283.2.

§ 2023(a) and 2025(c). Therefore, Part 283 is necessarily limited to appeals where a claim or liability amount is assessed.

I acknowledge Petitioner DCF's efforts to differentiate its challenge to the methodology used by FNS "to calculate the assigned payment error rate" as opposed to challenging the "mere fact of the assignment of payment error rate." However, there exists no statutory or regulatory authority for a USDA ALJ to preside over a hearing of either such challenge unless a claim or liability amount has been established for the FFY.

The statute and regulations provide that once a claim or liability amount has been established for an FFY, "the administrative law judge shall consider all grounds for denying the claim or liability amount, in whole or in part, including the contention of a State agency that the claim or liability amount should be waived, in whole or in part, for good cause."[36] Therefore, once a claim or liability amount is established for an FFY, FNS's decision that a State has failed to meet established reporting requirements, as well as review of the methodology used to calculate a State's assigned payment error rate, may be considered pursuant to 7 C.F.R. § 275.23(b)(2)(ii).[37] Thus, the statute and regulations do not entirely preclude ALJ review of contentions that a State has failed to meet established reporting requirements or of the methodology used to calculate a State's assigned payment error rate for an FFY for which no liability amount has been assessed. However, the review is limited to situations where a liability amount has been established for the FFY.

I recognize that this finding does not address administrative review of an assigned excessive payment error rate that may negatively affect a

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[36] 7 U.S.C. § 2025(c)(8)(H). "Good Cause" contentions are defined at 7 U.S.C. § 2025(c)(9) and 7 C.F.R. § 275.23(f).

[37] However, note that 7 C.F.R. § 275.23(d)(3) expressly states: "The established national performance measure is not subject to administrative or judicial appeal, nor is any prior fiscal year payment error rate subject to appeal as part of the appeal of a later fiscal year's liability amount. However, State agencies may address matters related to good cause in an immediately prior fiscal year that impacted the fiscal year for which a liability amount has been established."

State's ability to qualify for a "high performance bonus."[38] But subject matter jurisdiction for ALJ review cannot be presumed where Congress has not otherwise provided such by statute. I do note, however, that States have the opportunity to seek administrative review within FNS, or arbitration, of QC validation reviews.[39]

Estoppel, Waiver, and Consent

Respondent FNS further contends, Motion to Dismiss at 11-12, that there can be no waiver of, or consent to, subject matter jurisdiction. Respondent FNS concedes, *id.* at 11, that the June 28, 2018 FNS Letter "contained a statement erroneously advising all States receiving notices of assigned payment error rates . . . that they could file an appeal limited to the issue of whether a rational basis exists for the methodology used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate." Respondent FNS contends, however, that the erroneous statement in the June 28, 2018 FNS Letter "does not—cannot—waive the statutory and regulatory authority."[40]

Petitioner DCF, Response at 5, contends that Respondent FNS is equitably estopped from asserting lack of subject matter jurisdiction because FNS "has stated, in three separate, official communications with [Petitioner], that [Respondent] could appeal the methodology used by the Secretary to establish the FFY 2017 assigned payment error rate" (citing Petitioner DCF's Appeal, exhibits E, G, and J). Petitioner DCF contends, Response at 6, that "[t]he federal government cannot repeatedly represent

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[38] *See* 7 U.S.C. § 2025(d); 7 C.F.R. § 275.24. As an additional note, review of the Secretary's determinations "whether, and in what amount, to award a performance bonus" is not subject to administrative or judicial review. 7 U.S.C. § 2025(d)(4).

[39] 7 C.F.R. §§ 275.3(c); 275.14(b).

[40] Citing *Simon v. Wal-Mart Stores, Inc*., 193 F.3d 848, 850 (5th Cir. 1999) ("A party may neither consent to nor waive federal subject matter jurisdiction."); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court.").

that the right to an appeal exists and then later assert lack of subject matter jurisdiction by claiming that these representations were 'standard boilerplate' and 'erroneous advice.'"[41]

In the instant case Petitioner DCF avers that it filed the instant Appeal Petition due to FNS's erroneous advice, including advice of the Office of General Counsel ("OGC"), that an appeal is available "limited to the issue [of] whether a rational basis exists for the Secretary's exercise of section 16(c)(4) of the Food and Nutrition Act of 2008."[42] However, while equitable estoppel is a defense that can, on limited occasion, be brought against the government for "affirmative misconduct," *see Penny v. Giuffrida*, 897 F.2d 1543, 1547 (10th Cir. 1990),[43] here FNS's erroneous advice cannot rise to "affirmative misconduct" as Petitioner DCF is an entity "who deal[s] with the Government[,] [is] expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc*., 467 U.S. 51, 63 (1984).[44] Moreover, Petitioner DCF does not aver that its filing of this appeal based on FNS's erroneous advice caused it any cognizable harm. Petitioner DCF may claim it incurred the out-of-pocket cost of preparing, filing, and defending its Appeal Petition, but DCF does not contend that in doing so it forewent any alternative legal rights. Petitioner DCF simply

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[41] Citing *Oil Shale Corp v. Morton*, 370 F. Supp. 108, 126 (D. Colo. 1973) ("[S]ome forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement."); *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("[T]he collateral estoppel doctrine can properly be applied in this situation where the erroneous advice was in the form of a crucial misstatement in an official decision . . . [A]dministrative regularity must sometimes yield to basic notions of fairness."

[42] Response at 6, citing Appeal Petition, Exhibit J (internal quotations omitted).

[43] *See also Charleston Housing Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 739 (8th Cir. 2005).

[44] *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc*., 467 U.S. 63 ("Justice Holmes wrote: 'Men must turn square corners when they deal with the Government.' *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government's money.").

never had a legal right to appeal in the manner it attempts to do. Jurisdiction for me to hear Petitioner's appeal does not exist.

FNS passed an erroneous statement of the law on to Petitioner DCF on multiple occasions. However, such erroneous advice does not and cannot create nor confer subject matter jurisdiction.[45] Therefore, Petitioner DCF's contention that Respondent FNS is equitably estopped from asserting lack of subject matter jurisdiction is rejected.

Conclusions of Law

1. The Secretary lacks subject matter jurisdiction for review of DCF's notice of appeal. 7 U.S.C. §2025(c)(7).

2. There is no subject matter jurisdiction for administrative review of the Secretary's decision that a State has failed to meet established reporting requirements, as well as review of the methodology used to calculate a State's assigned payment error rate, where a claim or liability amount has not been established. 7 U.S.C. § 2025(c)(7); 7 C.F.R. §§ 275.23(d)(3), 275.23(b)(2)(ii), part 283.

ORDER

WHEREFORE, as no liability amount has been established against Petitioner Vermont DCF for the fiscal year 2017, I find that I have no jurisdiction to hear DCF's Appeal Petition and, therefore, Docket No. 18-0060 is **DISMISSED**.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order.

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

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[45] *See supra* note 24. *See also Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

In re: LOUISIANA DEPARTMENT OF CHILDREN AND FAMILY SERVICES.
Docket No. 18-0063.
Decision and Order.
Filed June 18, 2019.

FNA.

Celia M. Williams-Alexander, Esq., and Karen Yarbrough, Esq., for Petitioner.
Chu-Yuan Hwang, Esq., and Michael Gurwitz, Esq., for FNS.
Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.

DECISION AND ORDER DISMISSING CASE

Background and Summary of Decision

This case was initiated by Petitioner,[1] Louisiana Department of Children and Family Services ("DCFS") by a Notice of Appeal filed on July 26, 2018. Specifically, Petitioner DCFS filed the Notice of Appeal stating, at 1, "DCFS is appealing the assignment of the 6.56 percent payment error rate as calculated by" Respondent Food and Nutrition Service ("FNS") under the Supplemental Nutrition Assistance Program ("SNAP"). Petitioner DCFS stated, *id.*, that the "period covered by the assigned payment error rate is October 2016 – September 2017," that the FNS letter "notifying DCFS of the assigned payment error rate, was signed by a designee of FNS on June 28, 2018 and received by DCFS via email on June 28, 2018," and that the appeal "is filed in accordance with the language in the attached letter signed by Brandon Lipps, Administrator, Food and Nutrition Service."

In response, Respondent FNS filed a motion to dismiss ("First Motion to Dismiss") pursuant to 7 C.F.R. § 283.5(a) on August 7, 2018,

[1] Precedent indicates "Petitioner" and "Respondent" are the more proper designations of the respective parties in this type of proceeding, rather than "Appellant" and "Appellee." *See Dep't of Public Health & Soc. Serv., Guam*, 75 Agric. Dec. 163, 163 n.l (U.S.D.A. 2016) (stating that the "terms 'Appellant' and 'Appellee' refer to appeals of initial decisions and orders by USDA Administrative Law Judges to the Judicial Officer for the Secretary of the United States Department of Agriculture.").

contending, at 2, that Petitioner DCFS's appeal was time barred because it was filed sixteen days after the "10-day deadline had passed"[2] in accordance with Section 16(c)(8)(D)(i)[3] of the Food and Nutrition Act of 2008 ("FNA"), as amended (7 U.S.C. §§ 2011-2036) and 7 C.F.R. § 283.25(a).

Petitioner DCFS filed a Memorandum in Opposition to Appellee's Motion to Dismiss ("First Response") on August 30, 2018, in which it conceded, at 1-2, that DCFS received Respondent FNS's letter on June 28, 2018 by email but, although the FNS letter stated the assigned error rate and that the method of error rate determination was appealable, the letter did not provide a claim or liability amount, did not cite to the authority on which the state has the right to appeal, and did not provide the procedure to appeal. In the First Response, at 2, Petitioner DCFS contended that Respondent FNS's First Motion to Dismiss was improper because "no regulation exists that provides for the procedural measures for an appeal of the assignment of an error rate (1) for less than $50,000 (2) not in excess of the tolerance level, and (3) with no assessment of a liability or claim amount; thus 7 C.F.R. 283.5(a) has been improperly applied because no delays have been established setting the parameters for the proper filing of an appeal in this instance." Petitioner also contended, at 6, that neither Section 16(c)(8)(D)(i) of the FNA (7 U.S.C. § 2025(c)(8)(D)(i)) nor 7 C.F.R. § 283.25 apply to the current appeal; that Respondent FNS itself failed to adhere to 7 C.F.R. § 283.25(a) because the June 28, 2018 FNS Letter was delivered via email rather than certified mail or personal service; and that, because DCFS is still in the process of disputing the FNS findings from the FY 2017 QC Integrity review, "[t]here exist[s] an inherent issue with the process and issuance of the payment error rates as such letters, claims, or bills of collection should be issued after the period of time has run to dispute the findings on which they are based."

On October 26, 2018, I held a telephone conference with the parties to discuss the status of the case and to better understand why, as it came to my attention, Respondent FNS had taken conflicting stances regarding

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[2] Citing *Idaho Dep't of Health & Welfare, Statewide Self Reliance Programs*, 66 Agric. Dec. 408 (U.S.D.A. 2007); *Walker*, 65 Agric. Dec. 932 (U.S.D.A. 2006); and *In re: Hereford, Texas, Factory*, 65 Agric. Dec. 294 (U.S.D.A. 2006).

[3] 7 U.S.C. § 2025(c)(8)(D)(i). Also citing 7 C.F.R. § 283.25(a).

USDA administrative law judge ("ALJ") jurisdiction over an appeal by a State of its "assigned error rate." Specifically, in this Docket No. 18-0063, as previously mentioned, FNS filed its First Motion to Dismiss on August 7, 2018, arguing that DCFS's July 25, 2018 Notice of Appeal was untimely under Section 16(c)(8)(D)(i) of FNA (7 U.S.C. § 2025(c)(8)(D)(i)) and 7 C.F.R. § 283.25(a); however, in a similar docket, Docket No. 18-0060 ("*Vermont*"), concerning a Notice of Appeal filed by the State of Vermont, Department for Children and Families, FNS filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, taking the position that states had no right of appeal where no payment liability amount was established. Similarly, in Docket No. 18-0059, concerning Petitioner Florida Department of Children and Families, based on Petitioner's withdrawal of its appeal, FNS communicated the position that states have no right of appeal where no payment liability amount has been established. In my Summary of October 26, 2018 Telephone Conference, at 3, I noted that "[t]o grant FNS's Motion to Dismiss in this docket would be to rule that, contrary to FNS's contentions elsewhere, states that receive a QC error rate determination with no associated liability amount had a right to appeal under 7 C.F.R. 275.23(b)(2)(ii) and 7 C.F.R pt. 283, albeit a right subject to a ten-day deadline." Therefore, it was agreed by both parties that they would confer regarding possible resolution of this matter and provide a status update.

The parties filed a Joint Status Report on November 6, 2018, requesting additional time to confer, which was granted on November 7, 2018. The parties filed a second Joint Status Report on November 26, 2018, requesting additional time to confer, which was granted on November 29, 2018. On February 26, 2019 I issued a *Sua Sponte* Order Setting Revised Status Report Filing due to the furlough of federal employees from December 22, 2018 through January 28, 2019. Accordingly, the parties filed a third Joint Status Report on March 21, 2019, stating at 1-2 that "[t]he parties do not anticipate that further discussions will prove fruitful" and that "DCFS has recommended that the Respondent request leave of this administrative court to file the appropriate amended or supplemental pleading to correct its argument and put this case in the proper posture so that the Court may rule." Respondent FNS filed a Motion for Leave to File Amended Motion to Dismiss on March 25, 2019, which was granted on April 1, 2019.

Respondent FNS filed an Amended Motion to Dismiss ("Second Motion to Dismiss") on April 12, 2019. In summary, Respondent FNS moved to dismiss for lack of subject matter jurisdiction, contending, at 8-9, that because "not only did Respondent not establish a liability amount for Petitioner, but Respondent made clear to the Petitioner that its assigned payment error rate for FY 2017 would not count as the first year of the two consecutive years trigger" pursuant to the FNA, specifically 7 U.S.C. § 2025(c)(7)(B), "the Secretary lacks subject matter jurisdiction to hear this appeal."

Petitioner DCFS filed an Amended Memorandum in Opposition to Petitioner's Amended Motion to Dismiss ("Second Response") on May 7, 2019, incorporating "its original Motion in Opposition filed on August 28, 2019 by incorporating and amending the same" and further contends a "lack of due process afforded state agencies wherein no amount of liability is established." Second Response at 1. In particular, Petitioner DCFS contends, at 5-11, that 1) Respondent FNS improperly applied 7 C.F.R. § 283.5(a); 2) sections 16(c)(8)(D)(i) of the FNA (7 U.S.C. § 2025(c)(8)(D)(i)) nor 7 C.F.R. § 283.25(a) apply to Louisiana's Appeal of the QC error rate finding; and 3) the regulations do not provide an appellate process for the appeal of the payment error rate for a viable means of appeal for Louisiana. Petitioner DCFS requests therein, at 12, "that its appeal be accepted as timely and the Respondent's Amended Motion to Dismiss be denied."

Based on careful review of the statutes and regulations governing administrative and judicial review of quality control payment error rates under the SNAP, as well as the undisputed facts before me, I find that subject matter jurisdiction for USDA ALJ of 1) determination of the payment error rate of a state agency, 2) whether the payment error rate exceeds 105 percent of the national performance measure for payment error rates (i.e. whether the payment error rate is "excessive"), and 3) the assessment of an error rate by FNS assigning a payment error rate to a state under 7 C.F.R. § 275.23(b)(2)(ii), ***is not triggered*** unless and until a claim or liability amount for the fiscal year has been established in accordance with 7 U.S.C. § 2025(c)(1)(C). Here, although a payment error rate was assigned to Petitioner DCFS, no excessive payment error rate for the FY 2017 was assigned, the FY 2017 assigned payment error rate was

not considered a "first-year" of the two consecutive years trigger,[4] and, as a result, necessarily no liability amount was established against Petitioner DCFS for FY 2017. In these circumstances, as Respondent FNS contends, the applicable statutes and regulations are clear and express that I have no authority to review the FNS actions. FNS's earlier misstatements of DCFS's rights to appeal FNS's determinations cannot create review authority in me where none has been established by the applicable statutes and regulations, and would, in fact, be contrary to the applicable statutes and regulations. Petitioner DCFS's contention that there is a lack of due process in the instant matter is *ultra vires* to my legal authority to rule upon such contention. DCFS presents a constitutional challenge to a statutory and regulatory scheme that I am bound by unless and until that scheme is overturned by a forum that has authority to overturn that scheme. DCFS's Notice of Appeal is therefore DISMISSED, as discussed herein.

Background of Supplemental Nutrition Assistance Program and Quality Control Measures

The instant matter falls under the Food and Nutrition Act of 2008 ("FNA") (7 U.S.C. §§ 2011 *et seq*.) and involves the Respondent FNS's, administration of the Supplemental Nutrition Assistance Program ("SNAP"). SNAP is a federal aid program that provides nutrition benefits with the mission "[t]o alleviate . . . hunger and malnutrition" among Americans by allowing "low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. § 2011. The FNA authorizes the Secretary of Agriculture to pay each State[5] fifty percent (50%) of all administrative costs associated with

[4] *See* 7 U.S.C. § 2025(c)(1)(C).

[5] Throughout the FNA and the regulations promulgated thereunder, "State," "State Agency," and "State or territory" are used interchangeably. Hereafter, references to "State" will be deemed to include "State Agency" and "territory" or "territories." *See* 7 U.S.C. § 2012(r)-(s).

the administration of the program, while the federal government funds one-hundred percent (100%) of the cost of the SNAP benefits.[6]

In administering the SNAP, the Secretary, through FNS, is charged with carrying out a quality control ("QC") system that "enhances payment accuracy and improves administration by establishing fiscal incentives that require State agencies with high payment error rates to share in the cost of payment error."[7] The SNAP QC system entails FNS review of data reported by the State, and/or data compiled by FNS where State reporting is found to be insufficient, in order to make determinations as to the accuracy of State eligibility and benefit determinations, and where improper payments (underpayment or overpayment)[8] to households occurred. The SNAP QC system also establishes a process for the establishment and payment of a "liability amount" for a State with high payment error rates to share in the cost of those payment errors.[9]

The review process begins when FNS conducts an annual validation review of the State's monthly collection of sample cases in which the State identified payment errors.[10] After identifying cases in which FNS disagrees with the State's conclusions about specific cases, FNS is to share

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[6] 7 U.S.C. § 2025(a).

[7] 7 U.S.C. § 2025(c)(1)(A)(i).

[8] Improper payments can occur in three ways: an over- or under-payment to an eligible recipient, a payment made to a recipient incorrectly determined to be eligible, and a payment that is insufficiently (including not at all) documented. *See* 7 U.S.C. § 2025(c)(2)(B).

[9] *See Quality Control Error Rates*, USDA.GOV, https://www.fns.usda.gov/snap/quality-control (last visited May 8, 2019).

[10] 7 C.F.R. § 275.2.

the results of its review with the State and provide it an opportunity to contest FNS's findings.[11]

States may request binding arbitration of such an FNS quality control validation review if the State contests FNS findings.[12]

Thereafter, FNS is to determine the State's payment error rates based on "(1) Reports submitted to FNS by the State; (2) FNS reviews of State agency operations; (3) State performance reporting systems and corrective action efforts; and (4) Other available information such as Federal audits and investigations, civil rights reviews, administrative cost data, complaints, and any pending litigation."[13] FNS will typically "validate each State agency's estimated payment error rate by re-reviewing the State agency's active case sample and ensuring that its sampling, estimation, and data management procedures are correct" according to the regulatory formula.[14]

However, where FNS determines that a State has provided inadequate or inaccurate data, or has a deficient QC data management system, and where FNS cannot correct the State's deficiency, FNS may assign the State a payment error rate based on "the best information available."[15]

A State is deemed to have an "excessive payment error rate" for the first full fiscal year ("FFY") in which FNS determines that a 95 percent (95%) statistical probability exists that the State's payment error rate exceeds 105 percent (105%) of the national performance measure ("NPM"). When FNS assigns a State an excessive payment error rate for a first FFY, no liability amount is established. Rather the State is put on notice that if its performance error rate exceeds the NPM in the subsequent FFY, FNS will establish a liability against the state for the subsequent

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[11] 7 C.F.R. §§ 275.3(c), 275.14(b).

[12] 7 C.F.R. § 275.3(c)(4).

[13] 7 C.F.R. § 275.23(a).

[14] *See* 7 C.F.R. § 275.23(b)(2).

[15] 7 C.F.R. § 275.23(b)(2)(ii).

FFY.[16] A liability amount is to be established when, for the second or subsequent FFY, FNS determines there is an excessive payment error rate.[17] FNS does not assess a monetary liability amount for an FFY unless an excessive payment error rate has been determined for two subsequent fiscal years. In the current situation, FNS assigned Louisiana a payment error rate for FFY 2017 but found that the assigned payment error rate did not meet the criteria of an "excessive payment error rate," which, as previously noted, requires a finding that the error rate is 105 percent (105%) of the NPM within a 95 percent (95%) statistical probability. Thus, under the FNA and implementing regulations, FNS did not and could not establish a liability amount against Louisiana DCFS for FFY 2017. Moreover, its determination that there was no excess payment error rate for FFY 2017 precludes the assignment of a liability amount for FFY 2018, even if an excessive payment error rate was later found for 2018.

Applicable Statutory Provisions

The FNA, and the regulations promulgated by the Secretary thereunder, provide the following authority for administrative and judicial review of State appeals regarding financial claim or liability amounts assessed against a State:

> **(7) Administrative and judicial review**
>
> **(A) In general**
>
> Except as provided in subparagraphs (B) and (C), **if the Secretary asserts a financial claim against or establishes a liability amount with respect to a State agency under paragraph** (1), **the State may seek administrative and judicial review** of the action pursuant to section 2023 of this title.
>
> **(B) Determination of payment error rate**

[16] 7 U.S.C. § 2025(c)(1)(C).

[17] 7 U.S.C. §§ 2025(c)(1)(C)-(D).

> With respect to any fiscal year, a determination of the payment error rate of a State agency or a determination whether the payment error rate exceeds 105 percent of the national performance measure for payment error rates **shall be subject to administrative or judicial review only if the Secretary establishes a liability amount with respect to the fiscal year under paragraph (1)(C).**
>
> **(C) Authority of Secretary with respect to liability amount**
>
> An action by the Secretary under subparagraph (D) or (F)(iii) of paragraph (1) **shall *not* be subject to administrative or judicial review.**

7 U.S.C. § 2025(c)(7) (emphasis added).

> *Right to appeal payment error rate liability.* Determination of a State agency's **payment error rate** or whether that payment error rate exceeds 105 percent of the national performance measure **shall be subject to administrative or judicial review *only if* a liability amount is established *for that fiscal year***. Procedures for good cause appeals of excessive payment error rates are addressed in paragraph (f) of this section. The established national performance measure is not subject to administrative or judicial appeal, **nor is any prior fiscal year payment error rate subject to appeal as part of the appeal of a later fiscal year's liability amount**. However, **State agencies may address matters related to good cause in an immediately prior fiscal year that impacted the fiscal year for which a liability amount has been established. The State agency will need to address how year 2 was impacted by the event(s) in the prior year.**

7 C.F.R. § 275.23(d)(3) (emphasis added).

> If FNS determines that a State agency has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system, FNS will correct the State agency's payment and negative case error rates based upon a correction to that aspect of the State agency's QC system which is deficient. **If FNS cannot accurately correct the State agency's deficiency, FNS will assign the State agency a payment error rate** or negative case error rate **based upon the best information available**. After consultation with the State agency, the assigned payment error rate will then be used in the liability determination. After consultation with the State agency, the assigned negative case error rate will be the official State negative case error rate for any purpose. **State agencies shall have the right to appeal assessment of an error rate in this situation in accordance with the procedures of Part 283 of this chapter.**

7 C.F.R. § 275.23(b)(2)(ii) (emphasis added).

> *Good cause.* When a State agency with otherwise effective administration exceeds the tolerance level for payment errors as described in this section, **the State agency may seek relief from liability claims that would otherwise be levied** under this section on the basis that the State agency had good cause for not achieving the payment error rate tolerance. **State agencies desiring such relief must file an appeal with the Department's Administrative Law Judge (ALJ)** in accordance with the procedures established **under part 283** of this chapter.

7 C.F.R. § 275.23(f) (emphasis added).

The scope of the rules of practice for proceedings concerning "Appeals of Quality Control ("QC") Claims," 7 C.F.R. part 283, is:

> **Scope and applicability.**

> The rules of practice in this part, shall be applicable to appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year ("FY") 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c).

7 C.F.R. § 283.2.

The FNA also provides the following standard of review:

> (8) The Secretary may not limit the authority of such judges presiding over determinations regarding claims made pursuant to section 2025(c) of this title.

7 U.S.C. § 2023(a)(8).

> (H) In considering a claim or liability amount under this paragraph, the administrative law judge shall consider all grounds for denying the claim or liability amount, in whole or in part, including the contention of a State agency that the claim or liability amount should be waived, in whole or in part, for good cause.

7 U.S.C. § 2025(c)(8)(H).

The FNA provides a "two-year rule" for establishing a liability amount for States whose payment error rate has exceeded the NPM:

> With respect to fiscal year 2004 and any fiscal year thereafter **for which the Secretary determines that, for the second or subsequent consecutive fiscal year**, a 95 percent statistical probability exists that the payment error rate of a State agency exceeds 105 percent of the national performance measure for payment error rates announced under paragraph (6), **the Secretary shall establish an amount for which the State agency may be liable** (referred to in this paragraph as the "liability amount").

7 U.S.C. § 2025(c)(1)(C) (emphasis added).

Discussion

Petitioner DCFS's Notice of Appeal stated, at 1, that "DCFS is appealing the assignment of the 6.56 percent payment error rate as calculated by" Respondent Food and Nutrition Service ("FNS") under the Supplemental Nutrition Assistance Program ("SNAP"). Petitioner DCFS stated that the "period covered by the assigned payment error rate is October 2016 – September 2017," that the FNS letter "notifying DCFS of the assigned payment error rate, was signed by a designee of FNS on June 28, 2018 and received by DCFS via email on June 28, 2018," and that the appeal "is filed in accordance with the language in the attached letter signed by Brandon Lipps, Administrator, Food and Nutrition Service." *Id.* The "attached letter" (hereinafter referred to as the "June 28, 2018 FNS Letter") is two pages and the pages are not numbered as part of the Notice of Appeal.

The June 28, 2018 FNS Letter, attached to Petitioner DCFS's Notice of Appeal, stated in pertinent part, at 1-2 (emphasis added):

> Louisiana was notified on June 12, 2018, that the Food and Nutrition Service (FNS) would assign a payment error rate to the State for FY 2017. The integrity review of Louisiana's QC system by FNS, conducted January 29, 2018, through February 2, 2018, cited findings of non-compliance with SNAP rules in the State's QC system during the FY 2017 review period that precluded FNS from verifying Louisiana's reported error rate data as required by 7 CFR 275.23(a). Section 16(c)(4) of the Act provides the Secretary of Agriculture, through FNS, the statutory authority to assign an error rate when the State fails to meet QC reporting requirements established by the Secretary.
>
> Louisiana's assigned QC error rates for FY 2017 are:
>
> Overpayment Rate 5.51 percent
> Underpayment Rate 1.04 percent

> Payment Error Rate 6.56 percent
>
> . . . .
>
> Under the Act, a 2-year liability system is in place. Under this system, a liability amount shall be established when, for the second or subsequent consecutive FY, the Food, Nutrition, and Consumer Services determines that there is a 95 percent statistical probability that a State's payment error rate exceeds 105 percent of the national performance measure for payment error rates. **Louisiana's assigned payment error rate falls within the tolerance level for QC related liability assessments and FY 2017 will not count as a first year for your State agency.**
>
> **FNS' assignment of a FY 2017 error rate may be administratively appealed. Such an appeal is limited to the issue of whether a rational basis exists for the methodology used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate**.

Respondent FNS's Second Motion to Dismiss, at 7, explains that the language in the June 28, 2018 FNS Letter, which states that the "FY 2017 error can be administratively appealed," was "an incorrect statement of applicable law" and that "FNS was advised to include this boilerplate language by a USDA attorney who has since retired." *See id.*, n. 6. Respondent FNS contends, *id.* at 12, that although FNS "concedes that the letter of June 28, 2018, contained a statement erroneously advising all states receiving notices of assigned payment error rates . . . that they could file an appeal limited to the issue of whether a rational basis exists for the methodology used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate" the statement in the June 28, 2018 FNS Letter was "contrary to the statute and regulation on administrative appeals of quality control claims" and the "statement does not—cannot—waive the statutory and regulatory authority."

In the Motion to Dismiss, Respondent FNS contends that 1) there is no statutory authority for this appeal, 2) there is no regulatory authority for

this appeal, and 3) there can be no waiver of, nor consent to, subject matter jurisdiction.

In response, Petitioner DCFS incorporates its August 30, 2018 First Response, and reiterates the following contentions:1) FNS improperly applied 7 C.F.R. § 283.5; 2) neither Section 16(c)(8)(D)(i) of the FNA nor 7 C.F.R. § 283.25(a) apply to the current appeal of the QC error rate finding; and 3) the regulations do not provide the due process legally required because they fail to provide an appellate process for the appeal of the FNS assigned payment error rate.

Legal Standard of Review

Respondent FNS's Second Motion to Dismiss contends that the Secretary, and in particular the administrative law judge presiding over this case, lacks subject matter jurisdiction to review the payment error rate assigned by FNS under the FNA.[18] By analogy to the district courts, "[t]he party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008).[19] "In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).[20] "The moving party should prevail only if the material

[18] 7 U.S.C. § 2025(c)(7)(B).

[19] Citing *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994); *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

[20] Citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Trentacosta v. Frontier Pac. Aircraft Indus*., 813 F.2d 1553, 1558 (9th Cir. 1987).

jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*[21]

USDA Administrative Law Judge Jurisdiction Under the FNA

USDA administrative law judges ("ALJs") provide fora of limited jurisdiction. This jurisdiction is limited to that provided by statute and regulation.[22] Congress expressly provided statutorily for administrative and judicial review of financial claims, liability amounts, determination of State payment error rates, and determination of whether a State's payment error rate is excessive in the FNA,[23] but expressly restricted administrative or judicial review of financial claims, liability amounts, determination of State payment error rates, and determination of whether a State's payment error rate is excessive to instances where the Secretary has established a claim or liability amount "with respect to the fiscal year" pursuant to 7 U.S.C. § 2025(c)(1)(C).[24] The Secretary of Agriculture delegates authority to ALJs pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(b)(3), to hold hearings and perform related duties in proceedings under the FNA.[25] An ALJ's jurisdiction is expressly limited to adjudicatory authority conferred by Congress.[26]

Respondent FNS contends, Motion to Dismiss at 10, that the FNA mandates an unambiguous "statutory prerequisite for filing administrative

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[21] Citing *Trentacosta*, 813 F.2d at 1558.

[22] 5 U.S.C. §§ 554(a); 556(b)(3).

[23] 7 U.S.C. § 2025(c)(7).

[24] 7 U.S.C. § 2025(c)(7)(B).

[25] *See* 7 C.F.R. §§ 2.27(a)(1), 275.23(d)(3), 275.23(b)(2)(ii), 275.23(f), 283.2 (limiting the scope and applicability of pt. 283 to "appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year ("FY") 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c).").

[26] 5 U.S.C. §§ 554(a); 556(b)(3). *See also* 5 U.S.C. § 706(2)(C) (a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be- . . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *Corey Lea, Corey Lea Inc., Start Your Dream Inc., &*

and judicial appeals—a liability amount" and that the evidence, specifically the June 28, 2018 FNS Letter, demonstrates that Petitioner DCFS "has met neither the preliminary nor subsequent causes for review: 1) it has not had even one year, much less two consecutive years, of a payment error rate above 105 percent of the national performance measure, and 2) FSA has not established a liability amount for it." I agree with Respondent FNS that the FNA unambiguously requires FNS to have established a claim or liability amount against a State before FNS's

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Cowtown Found., Inc., 70 Agric. Dec. 384, 390 (U.S.D.A. 2011) ("Petitioners refer to the APA as the authorizing statute for OALJ's jurisdiction, but fail to state with any specificity how the APA vests OALJ with statutory or regulatory jurisdiction. The APA provides a framework for agencies to follow to assure due process in adjudicatory proceedings, but the statute allows broad latitude to agencies to establish their own procedures within that framework. See, 5 U.S.C. § 554. The right to a hearing under the APA exists only so long as another statute provides for such right. 5 U.S.C. § 551 et seq. USDA has promulgated regulations governing adjudications before OALJ where prevailing statues require a hearing on the record. Petitioners' request for a hearing does not involve any of those statutes, which are enumerated at 7 C.F.R. § 1.131. Absent specific statutory authority, the APA does not vest OALJ with jurisdiction to hold a hearing in Petitioners' complaints."); *Burlington N. R.R. Co.-Order for Just Comp.-Nat'l R.R. Passenger Corp. (Amtrak)*, 7 I.C.C.2d 74, 77 (I.C.C. 1990) ("The Commission's general powers to issue declaratory orders to eliminate controversy among parties under the APA and its inherent authority to issue declarations concerning matters within its regulatory jurisdiction cannot, as suggested by petitioner, be resorted to override an express Congressional withholding of jurisdiction to resolve the controversy at issue."); *Califano v. Sanders*, 430 U.S. 99, 107 (1977), (Where Respondent contended that Section 10 of the APA (5 U.S.C. §§ 701-706) conferred judicial jurisdiction, the Supreme Court held it was the statute (28 U.S.C. § 1331(a)) and not the APA that confers subject matter jurisdiction, stating at 107 "Congress' explicit entry into the jurisdictional area counsels against our reading the APA as an implied jurisdictional grant designed solely to fill such an interstitial gap" and concluding that "the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.").

determination of an error rate or FNS's determination of an excessive error rate can be administratively or judicially reviewed.[27]

In the Second Motion to Dismiss, Respondent FNS did not acknowledge nor provide an explanation for its change of position and legal analysis regarding the FNA and the regulations promulgated thereunder as to USDA ALJ jurisdiction to review the instant appeal. However, although not stated directly in Respondent FNS's Second Motion to Dismiss, it is inherent, based on the record, that Petitioner FNS has changed its legal opinion and, by amending its first Motion to Dismiss, has abandoned the argument that Petitioner's appeal should be dismissed for failure to timely file a Notice of Appeal. *See* Summary of October 26, 2018 Telephone Conference; Joint Status Report filed March 21, 2019; and Respondent's Motion for Leave to File Amended Motion to Dismiss filed March 25, 2019 (where Respondent FNS acknowledged at 2-3 "that it has in fact taken conflicting stances in the three related dockets" but that "the parties agreed that, 'to promote judicial consistency comparable with the similarly situated cases' discussed above, the Respondent would file a Motion requesting leave of this court to file an amended pleading, i.e., an amended Motion to Dismiss, and that Petitioner would have no objection to Respondent so doing.").

By incorporating the First Response, the majority of Petitioner DCFS's Second Response consists of contentions with regard to the First Motion to Dismiss, which has been supplanted, instead of the Second Motion to Dismiss. Because, as stated above, Respondent FNS has amended and replaced the First Motion to Dismiss with the Second Motion to Dismiss, I will only lightly address Petitioner DCFS's contentions regarding the First Motion to Dismiss.

By contending in its Second Response, at 5-7, that the FNA and regulations, particularly Section 16(c)(8)(D)(i) of the FNA[28] and 7 C.F.R. part 283, do not apply to Petitioner's appeal, Petitioner DCFS apparently agrees with Respondent's contentions that neither the FNA nor the regulations promulgated thereunder provide subject matter jurisdiction for

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[27] 7 U.S.C. § 2025(c)(7)(B); 7 C.F.R. § 275.23(d)(3).

[28] 7 U.S.C. § 2025(c)(8)(D)(i).

this appeal. First, as to the First Motion to Dismiss, Petitioner DCFS contends that "FNS filed their Motion to Dismiss pursuant to 7 C.F.R. 283.5(a) . . . . [i]n their pleading, FNS clearly emphasizes 'the appeal petition was not filed in accordance with [7 C.F.R.] § 283.4 . . . The prong opted as the basis of the motion to dismiss emphasized by FNS clearly does not apply here in that Louisiana was not issued a bill of collection for a claim of $50,000 or more for a QC error rate in excess of the tolerance level."[29] Then, as to the Second Motion to Dismiss, Petitioner DCFS contends that "Respondent amended its Motion to Dismiss negating a bases for an argument that the filing of their motion pursuant to §283.5(a) based on 7 C.F.R. 283.4 was erroneous and was not substantiated by clear and convincing proof of any of these factors to validate grounds for dismissal; but, the amended motion is still brought forth pursuant to 7 C.F.R. § 283.5." *Id*. at 6.

I agree with Petitioner DCFS that FNS's statement that it "submits this Amended Motion to Dismiss pursuant to 7 CFR §§283.5 and 283.18" is *non sequitur* to the basis of Respondent FNS's argument—that the case should be dismissed for lack of subject matter jurisdiction as there is no authority for this appeal in either the FNA nor the regulations promulgated thereunder. However, Petitioner DCFS neither provided any authority nor reasoning for the argument that FNS's Second Motion to Dismiss was "not substantiated by clear and convincing proof of any of these factors to validate grounds for dismissal" nor provided authority for such legal standard of proof. As earlier noted, the standard is that it is "the party asserting jurisdiction that bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction."[30] Given that the facts are uncontested that the FNS did not

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[29] Petitioner DCFS's reference to "page 1 of their [FNS's] pleadings", Second Response at 5 is referring to the First Motion to Dismiss page 1. The Second Motion to Dismiss, page 1, does not reference 7 C.F.R. § 283.4 nor have any bolded text, but states that Respondent FNS "respectfully submits this Amended Motion to Dismiss pursuant to 7 C.F.R. §§ 283.5 and 283.18."

[30] *Dynamic Random Access Memory.*, 546 F.3d 984. *See supra* note 19.

establish a liability amount, it is clear as a matter of law that I have no jurisdiction to consider the DCFS notice of appeal.

Second, as to the First Motion to Dismiss, Petitioner DCFS contends that FNA section 16(c)(8)(D)(i)[31] is inapplicable to this appeal because the June 28, 2018 "assesses no liability amount" and "DCFS contends that the [June 28, 2018 FNS] letter itself does note establish a claim because it does not assert a right or sum due by the agency and therefor the letter is not a notice of claim." Second Response at 6. Respondent FNS, in its Second Motion to dismiss, clearly changes FNS's stance from its First Motion to Dismiss, and is in agreement with DCFS in that the FNA and regulations regarding the appeal of QC error rates are not applicable because "1) [DCFS] has not had even one year, much less two years, of payment error rate above 105 percent of the national performance measure, and 2) FSA has not established a liability amount for it." Second Motion to Dismiss at 10.

Lastly, Petitioner DCFS contends, Second Response at 10, that "the methodology utilized by FNS warrants review and what better jurisdiction to bring forth an accurate evaluation and assessment." Petitioner DCFS states, at 11, that "OALJ is charged with conducting adjudicatory hearings subject to the Administrative Procedures Act (APA), 5 U.S. § 551 *et seq*. [*sic*] . . .[t]his adjudication is the due process allotted the state agencies" and contends that "§ 551(7) is clear and the lacking of such process is one that the U.S. Department of Agriculture must cure." Petitioner DCFS's contention is without merit. As further set out below, only Congress may statutorily confer jurisdiction; an agency, and a USDA ALJ, cannot have jurisdiction to review a matter without the statutory authority to do so.[32] The APA does not independently create ALJ jurisdiction to adjudicate a matter.[33]

A USDA ALJ's subject matter jurisdiction arises under statutory authority for administrative hearings and is derived with set procedure for such hearings from regulations promulgated by the Secretary

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[31] 7 U.S.C. § 2025(c)(8)(D)(i).

[32] 5 U.S.C. § 554(a).

[33] *See supra* note 26.

thereunder.[34] Congress provides statutory authority to the Secretary to hear administrative appeals under the FNA.[35] The Secretary, as previously mentioned, has delegated authority to ALJs pursuant to the APA[36] to hold hearings and perform related duties in proceedings under the FNA.[37]

The "rules of practice" promulgated by the Secretary under the FNA for "appeals of Quality Control (QC) Claims," 7 C.F.R. pt. 283, are limited to addressing "appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year ("FY") 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c)." Part 283 (7 C.F.R. pt. 283), is divided into two limited types of appeals: "Subpart B – Appeals of QC Claims of $50,000 or More"[38] and "Subpart C – Summary Procedure for Appeals of QC Claims of Less Than $50,000."[39]

It is noteworthy that the "usual" procedural rules, the "Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary" ("Standard Rules of Practice"), 7 C.F.R. §§ 1.130-.151, do not apply to any hearings under the FNA.[40]

The regulations are express that USDA ALJ jurisdiction to preside over appeals of assigned error rates in "situations," such as the present matter, where "FNS determines that a State agency has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system" and where "FNS cannot correct the State agency's deficiency," resulting in FNS assigning "the State agency a payment error rate or negative case error rate based upon the best information available" must

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[34] *See* 5 U.S.C. §§ 556(b)(3), 554(a), 706(2)(C).

[35] *See* 7 U.S.C. § 2025(c)(7).

[36] 5 U.S.C. § 556(b)(3).

[37] *See* 7 C.F.R. §§ 2.27(a)(1), 275.23(d)(3), 275.23(b)(2)(ii), 275.23(f), pt. 283.

[38] 7 C.F.R. § 283.4-.23.

[39] 7 C.F.R. § 283.24-.32.

[40] *See* 7 C.F.R. § 1.131.

be conducted "in accordance with the procedures of Part 283." The scope of Part 283[41] consists of "sections 14(a) and 16(c)" of the FNA, 7 U.S.C. § 2023(a) and 2025(c). Therefore, as both parties agree,[42] Part 283 is necessarily limited to appeals where a claim or liability amount is assessed.

The statute and regulations provide that once a claim or liability amount has been established for an FFY, "the administrative law judge shall consider all grounds for denying the claim or liability amount, in whole or in part, including the contention of a State agency that the claim or liability amount should be waived, in whole or in part, for good cause."[43] Therefore, the USDA Secretary's decision that a State has failed to meet established reporting requirements, as well as the methodology used to calculate a State's assigned payment error rate, may be reviewed pursuant to 7 C.F.R. § 275.23(b)(2)(ii) as long as a liability amount has been established for the FFY.[44]

I recognize that this finding does not address administrative review of an assigned payment error rate that may negatively affect a State's ability to qualify for a "high performance bonus."[45] But subject matter jurisdiction for ALJ review cannot be presumed where Congress has not otherwise provided such by statute. I do note, however, that States have

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[41] 7 C.F.R. § 283.2.

[42] *See* Respondent's Second Motion to Dismiss at 10 and Petitioner's Second Response at 5.

[43] 7 U.S.C. § 2025(c)(8)(H). "Good cause" contentions are defined at 7 U.S.C. § 2025(c)(9) and 7 C.F.R. § 275.23(f).

[44] 7 U.S.C. § 2025(7).

[45] *See* Petitioner's Second Response at 11. For context, *see also* 7 U.S.C. § 2025(d); 7 C.F.R. § 275.24. As an additional note, review of the Secretaries determinations "whether, and in what amount, to award a performance bonus" is not subject to administrative or judicial review. 7 U.S.C. § 2025(d)(4).

the opportunity to seek administrative review within FNS, or arbitration, of QC validation reviews.[46]

Waiver and Consent

Respondent FNS further contends, Second Motion to Dismiss at 11-12, that there can be no waiver of, or consent to, subject matter jurisdiction. Respondent FNS concedes, *id.* at 11, that the June 28, 2018 FNS Letter "contained a statement erroneously advising all States receiving notices of assigned payment error rates . . . that they could file an appeal limited to the issue of whether a rational basis exists for the methodology used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate." Respondent FNS contends, however, that the erroneous statement in the June 28, 2018 FNS Letter "does not—cannot—waive the statutory and regulatory authority."[47]

There is no current dispute and no question that FNS passed an erroneous statement of the law on to Petitioner DCFS on two occasions. *See* Second Response at 4 and 8. However, Respondent FNS is correct that such erroneous advice does not and cannot create nor confer subject matter jurisdiction.[48]

Due Process Claim

While Petitioner DCFS and Respondent FNS seem to agree that neither the FNA nor the regulations promulgated thereunder apply to the instant appeal, Petitioner DCFS raises a constitutional question contending that

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[46] 7 C.F.R. §§ 275.3(c), 275.14(b).

[47] Citing *Simon v. Wal-Mart Stores, Inc*., 193 F.3d 848, 850 (5th Cir. 1999) ("A party may neither consent to nor waive federal subject matter jurisdiction."); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court.").

[48] *See supra* note 26. *See also Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

"the statutory law lacks sufficient due process and mandate to allow state agencies in the position of Louisiana a right to appeal." Second Response at 3.

In particular, Petitioner DCFS contends that the QC Integrity Review process is unfair because "in its haste to issue assigned payment error rates by the June 30th deadline mandated under Sec. 16(c)(8)(C), state agencies are still within their allowed 30-day timeframe in which to dispute the findings of the QC Integrity review whose report must be completed by May 31st of the review year. Sec. 16(c)(8)(B). FNS issues its audit findings, allows a period in which to dispute those findings, but issues its error rates based on those findings before reviewing and responding to the contested findings." Second Response at 7. Therefore, Petitioner argues, *id.,* "[t]here exists an inherent issue with the process and issuance of the payment error rates as such letters, claims, or bills of collection should be issued after the period of time has run to dispute the findings on which they are based."

I acknowledge Petitioner DCFS's constitutional argument that the current QC review process lacks due process and here note that this issue has been timely raised and is preserved for appeal. However, although it is well-settled that constitutional issues can and should be raised during administrative proceedings,[49] this constitutional issue is outside the scope of my authority to consider. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."); *Robinson v. United States*,

[49] *See Horne v. Dep't of Agric.*, 569 U.S. 513, 528 (2013) (stating "[a]llowing 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."); *Lesser*, 52 Agric. Dec. 155, 167-68 (U.S.D.A. 1993) (stating "Although an agency cannot declare a statute unconstitutional, constitutional issues can (and should) be raised before the ALJ.").

718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional.").

CONCLUSIONS OF LAW

1. The Secretary lacks subject matter jurisdiction for review of DCFS' notice of appeal. 7 U.S.C. § 2025(c)(7).

2. There is no subject matter jurisdiction for administrative review of the FNS's decision that a State has failed to meet established reporting requirements, as well as review of the methodology used to calculate a State's assigned payment error rate, where a claim or liability amount has not been established. 7 U.S.C. § 2025(c)(7); 7 C.F.R. §§ 275.23(d)(3), 275.23(b)(2)(ii), part 283.

ORDER

WHEREFORE, because there is no liability amount established for the fiscal year 2017 against Petitioner Louisiana DCFS, I find that I have no jurisdiction to hear DCFS's appeal and, therefore, Docket No. 18-0063 is **DISMISSED**.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondent.

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

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: JACK GRISHAM HEFFINGTON, an individual.
Docket No. 17-0188.
Decision and Order.
Filed February 27, 2019.

HPA.

Lauren Axley, Esq., for APHIS.
Respondent Jack Grisham Heffington, *pro se*.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

Decision Summary

1. Three times during August 2014, Jack Grisham Heffington, Respondent, also known as Jack G. Heffington ("Mr. Heffington"), showed a horse named "I'm Infamous" at horse shows in Tennessee. Previously, Mr. Heffington and APHIS had agreed to a $1,000.00 civil penalty and a period of disqualification from showing horses, in the Consent Decision and Order in HPA Docket No. 12-0199, issued on January 14, 2014, under which Mr. Heffington ***could have*** completed his period of disqualification on July 31, 2014, but ***only if*** before July 31, 2014, he had paid his $1,000.00 civil penalty.

2. Mr. Heffington failed to end his period of disqualification as soon as he could have. Mr. Heffington failed to comply with 15 U.S.C. § 1825(c) when he began to show a horse named "I'm Infamous" during August 2014 while disqualified. Mr. Heffington did not deliberately disobey the disqualification order to which he had agreed, but he and he alone is responsible for his oversight in failing to pay the $1,000.00 civil penalty he owed under the 12-0199 Consent Decision, before he showed the horse. Mr. Heffington should have known he was disobeying the disqualification order, and he disobeyed the disqualification order three times.

3. The maximum penalty for the three instances of disobeying the disqualification order during August 2014 is $4,300.00 plus $4,300.00 plus $4,300.00; for a total of $12,900.00 in civil penalties, under sections 1825(b) and (c) of the Horse Protection Act (15 U.S.C. § 1825(b) and (c)); and 7 C.F.R. § 3.91(b)(2)(ix). I determine that Mr. Heffington shall deliver to USDA APHIS by August 15 (Thur) 2019, payment of the following civil penalties under sections 1825(b) and (c) of the Horse Protection Act (15 U.S.C. § 1825(b) and (c)); and 7 C.F.R. § 3.91(b)(2)(ix), which I determine to be adequate, proportionate, reasonable and just: $1,000.00 plus $1,000.00, plus $1,000.00, for a total of $3,000.00 in civil penalties.

Parties and Allegations

4. The Complainant is the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant").

5. APHIS is represented in this case, HPA Docket No. **17-0188**, by Ms. Lauren C. Axley, Esq.; was previously represented by Ms. Sharlene Deskins, Esq.; and prior to that was represented by Ms. Colleen A. Carroll, Esq., each with the Office of the General Counsel, United States Department of Agriculture.

6. The Respondent is Jack Grisham Heffington, an individual (frequently herein "Mr. Heffington" or "Respondent Heffington" or "Respondent").

7. The Respondent Jack Grisham Heffington represents himself; as a lawyer he is known as Jack G. Heffington, Esq.

8. APHIS alleged in the Complaint filed in Docket No. **17-0188** on January 31, 2017, that Respondent Jack Grisham Heffington violated the Horse Protection Act ("HPA" or "Act"), as amended (15 U.S.C. § 1821 *et seq*.), specifically 15 U.S.C. § 1825(c), when he, Respondent Heffington, knowingly failed to obey the order of disqualification issued in Docket No. 12-0199.

9. Respondent Heffington in his Answer filed February 27, 2017, denied that he knowingly failed to obey an order of disqualification.

Overview

10. Before me are APHIS's Motion for Summary Judgment filed February 28, 2018 with accompanying and subsequent filings; and Mr. Heffington's Response filed March 19, 2018 with accompanying and subsequent filings. In addition to that voluminous documentation, painstakingly gathered by each side and very helpful, I examine two prior cases involving Mr. Heffington: Docket No. 12-0199, and Docket No. 14-0053. As I evaluate the written record before me, which I conclude is sufficient to decide this case without an oral hearing, I next state a Time Line, which will be incorporated in my Findings of Fact.

Time Line

11. This Time Line will be incorporated in the Findings of Fact.

2013, December 1 -	Disqualification under Docket No. 12-0199 BEGAN. (The parties agreed to the disqualification beginning date, which was prior to issuance of the Consent Decision.)
2014, January 14 -	Consent Decision was issued in Docket No. 12-0199.
2014, January 14 -	Consent Decision in Docket No. 12-0199 was sent to Mr. Heffington by certified mail [but subsequently, no proof of service was filed].
2014, August 2 -	Mr. Heffington showed a horse named I'm Infamous in a horse show in Wartrace, Tennessee.
2014, August 21 -	Mr. Heffington showed a horse named I'm Infamous in a horse show in Shelbyville, Tennessee.
2014, August 27 -	Mr. Heffington showed a horse named I'm Infamous in a horse show in Shelbyville, Tennessee.

on or about 2014, November 25 -	Mr. Heffington paid his civil penalty ($1,000.00) under 12-0199. His check was dated 11-25-14. CX-10.
on or about 2014, November 26 -	Last Day of Disqualification under 12-0199 (giving Mr. Heffington the earliest possible day).
2014, December 2 -	Mr. Heffington's $1,000.00 check was processed by the U.S. Treasury.
on or about 2014, November 26 -	Disqualification under Docket No. 14-0053 BEGAN. (The parties agreed to a seven-month disqualification, to begin on the first day after Mr. Heffington fulfilled his obligations under 12-0199, which day was prior to issuance of the Consent Decision.)
2014 December 5 -	Consent Decision was issued in Docket No. 14-0053.
2014 December 5 -	Consent Decision in Docket No. 14-0053 was sent to Mr. Heffington by regular mail.
on or about 2015, May 11 -	Mr. Heffington paid his civil penalty ($1,100.00) under 14-0053. His check was dated 5-11-15. CX-10.
on or about 2015, June 26 -	Last Day of Disqualification under 14-0053.
2018, May 17 -	Mr. Heffington was served with Consent Decision issued in Docket No. 12-0199.
2018, May 18 -	Effective date of the Order in the Consent Decision issued in Docket No. 12-0199.

Background

12. In his Answer (at 1), Respondent Heffington admitted that he was subject to two Consent Decision and Orders in the matters of *Heffington*, HPA Docket No. 12-0199, and *Heffington*, HPA Docket No. 14-0053, each including a civil penalty and an uninterrupted period of disqualification from "showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction"; but he denied that he knowingly failed to obey the order of disqualification in *Heffington*, HPA Docket No. 12-0199, on the three separate occasions alleged in the Complaint. In his Answer (at 2), Respondent Heffington demanded a hearing, and he demanded dismissal.

13. APHIS filed a Motion for Summary Judgment on February 28, 2018. In this Motion, APHIS argues that a hearing is not needed as no dispute of material fact remains. APHIS states, at 6-8, that 1) "[t]here is no factual dispute that Respondent Jack Heffington was disqualified from showing horses during the month of August, 2014," and 2) "[t]here is no credible dispute that respondent showed I'm Infamous on three occasions in August, 2014."

14. Respondent Heffington filed his "Response to Complainant's Motion for Summary Judgment" ("Response to the Motion for SJ") on March 19, 2018. In his Response to the Motion for SJ, at 1-3, Respondent Heffington argues that 1) APHIS's Motion for Summary Judgment is "a motion to dismiss on the pleadings which is not allowed under The Rules of Practice," and 2) that there is a genuine issue of material fact in that Respondent contends he did not "knowingly" disobey the HPA Docket No. 12-0199 Consent Decision and Order.

15. On May 8, 2018, I issued a Ruling Deferring Action on APHIS's Motion for Summary Judgment ("Ruling Deferring Action") which noted that, in considering APHIS's Motion for Summary Judgment, it was necessary to examine two prior cases involving Mr. Heffington, Docket Nos. 12-0199 and 14-0053. Because the 12-0199 Consent Decision and Order issued on January 14, 2014 was sent via certified mail, but the record did not contain proof of delivery, I deferred action on APHIS's Motion for

Summary Judgment until proof was obtained that Respondent Heffington had been served a copy of the 12-0199 Consent Decision.[1]

16. On October 3, 2018 I issued an order to "File Calculations by 31 October (Wed) 2018", asking both parties to file their calculations of when the period(s) of disqualification under Docket Nos. 12-0199 and 14-0053 begin and end, and to also provide their interpretations on the impact of the Consent Decision order language: "shall become effective on the first day after service of this decision on the respondent."

17. Respondent's Response to Judge was filed on October 30, 2018 ("Respondent's October 2018 Response") and APHIS's Filing Regarding the Disqualification Periods in Dockets 12-0199 and 14-0053 was filed on October 30, 2018 ("APHIS's October 2018 Response").

Discussion

Determination of Disqualification Period under 12-0199

18. It is not disputed that Respondent Heffington was subject to the Consent Decision and Order in HPA Docket No. 12-0199, nor is it disputed that the disqualification period imposed by the 12-0199 Decision started on December 1, 2013 and lasted through payment of the imposed civil penalty. Respondent's Answer at para. 2.

19. In APHIS's October 2018 Response, at 2-3, APHIS states that "(t)he dates of Respondent's disqualification period are highly relevant to APHIS's Motion for Summary Judgment and case" and argues that "the effective date clause in the 12-0199 Consent Decision has no bearing on the dates of the period of disqualification."

20. The 12-0199 Decision includes language that the order "shall become effective on the first day after service of this decision on the respondent."[2]

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[1] The December 5, 2014 Consent Decision and Order in Docket No. 14-0053 was sent by regular mail and presumably received. My focus in this case, Docket No. 17-0188, is almost entirely on the disqualification period resulting from the Consent Decision and Order in Docket No. 12-0199.

[2] Consent Decision and Order, *Heffington*, HPA Docket No. 12-0199 at ¶ 5. *See*

As I suggested in the May 8, 2018 Ruling Deferring Action, para. 4, the Hearing Clerk re-mailed the 12-0199 Consent Decision and Order via certified mail on May 9, 2018. I conclude that the re-mailed 12-0199 Consent Decision and Order was received by Mr. Heffington on May 17, 2018; and that the effective date of the 12-0199 Decision order is May 18, 2018. Upon careful study, I agree with APHIS that the effective date of the Decision order does NOT change the disqualification period in the 12-0199 Decision order, which states in pertinent part:

> 2. Respondent Jack G. Heffington is disqualified for an uninterrupted period of 8 months beginning on December 1, 2013, from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.
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> 3. By signing this consent, respondent Jack G. Heffington certifies, that as of December 1, 2013, he has not shown, exhibited, or entered any horse, directly or indirectly through any agent, employee, or other device, nor has he judged, managed or otherwise participated in any horse show, horse exhibition, or horse sale or auction. Accordingly, Respondent's disqualification period that began on December 1, 2013, continues up to and including July 31, 2014.
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> 4. If Respondent fails to pay the assessed civil penalty by July 31, 2014, his disqualification shall remain in

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also 7 C.F.R. § 1.138 (stating that "[s]uch decision . . . shall become final upon issuance to become effective in accordance with the terms of the decision.").

> effect until the first day after APHIS receives payment of the civil penalty.

21. In his Response to the Motion for SJ, Respondent Heffington explains (paras. 6-7) that he paid the civil penalty imposed by the 12-0199 Decision order on November 25, 2014 upon realization that no previous payment was received by APHIS. The date of the payment is corroborated by copies of the check, *see* CX-10, and the Declaration of Jennifer Elias, APHIS Financial Management Division, Account Receivable Team, Financial Management Analyst, para. 4, which states that "check number 1053 in the amount of $1,000.00, dated November 25, 2014. Check number 1053 was made in payment of HPA case number 12-0199. The ECP indicates that check number 1053 was processed by the bank (U.S. Treasury) on December 2, 2014."

22. Based on the parties' responses regarding the disqualification period, it does not appear that there is any dispute regarding the beginning and the ending of the disqualification period under the Consent Decision and Order in Docket No. 12-0199. I agree with the analysis in APHIS's Response that modification of consent decision terms would undermine the parties' agreement, which could discourage parties from reaching such agreements, and the terms of a consent decision should not be modified unless "'extreme circumstances' [exist] related 'to the assent of the parties to the agreement that was subsequently entered as a Consent Decision'".[3] No extreme circumstances related to the assent of the 12-0199 Decision and Order exist here. Mr. Heffington does not argue that the effective date changes the disqualification period. I conclude that the disqualification period to which Respondent Heffington was subject under the Consent Decision and Order in HPA Docket No. 12-0199 started on December 1, 2013 and ended on November 26, 2014.

Impact of the Effective Date of the Decision Order in 12-0199

23. The parties disagree regarding the impact of the effective date of the Decision Order in 12-0199. Mr. Heffington argues that he cannot have

[3] APHIS's Response at 6 (citing *Reid Haggan*, 35 Agric. Dec. 1812, 1817-19 (U.S.D.A. 1976) (additional citations omitted)).

violated the Order in August 2014 if the effective date of the Order is May 18, 2018.

24. In Respondent's October 2018 Response, para. 1, Mr. Heffington states:

> 1. It appears to the Respondent that the main issue raised by the ALJ is as the ALJ states what impact does the order have when it states that it "shall become effective on the first day after service".
>
> In what remains of my simple legal mind it means what the ORDER says and that is; "it is effective on the first day after service". Service was effectuated on May 17, 2018, so therefore it became effective on May 18, 2018, and had a beginning date at that time and has no effect until that time.

25. Respondent Heffington goes on to state that "[d]etermining the effective date of 12-0199 answers any query the ALJ has as to the beginning and ending date of any disqualification." *Id.* at para. 2. Respondent Heffington also states that, as all civil penalties in both previous dockets have been paid this matter should be dismissed. *Id.* at para. 3.

26. APHIS argues that the effective date of the Order has no practical implications under the circumstances here, because it does not change the period of disqualification. I agree with APHIS that the period of disqualification was clearly described by agreement of the parties which specified dates and events that did not depend on when a judge would issue the Consent Decision and Order; and did not depend on when the Hearing Clerk's mailings of copies of the Consent Decision and Order would be delivered to the parties.

27. This is the language at the end of the Consent Decision and Order in 12-0199. What is its purpose?

> 5. This order shall have the same effect as if entered after a full hearing and shall become effective on the first day after service of this decision on the respondent.

Here, the prior paragraphs of the 12-0199 Consent Decision and Order contained everything that anyone needed to know, so I reluctantly conclude that the paragraph 5 language was superfluous.

28. Consent Decision and Order formats increasingly omit language that creates uncertainty, using instead language that is clear within the four corners of the document, for example:

> The provisions of this order shall be final and effective on December 1, 2018. This order may be executed in counterparts. Copies of this decision shall be served upon the parties.

29. The Order was within the 12-0199 Consent Decision and Order, which Mr. Heffington had signed, agreeing to its requirements. Mr. Heffington did not need the Hearing Clerk to send him a copy of the Consent Decision to know what was required of him by the Consent Decision. Mr. Heffington failed to meet the requirement of paying the $1,000.00 to end the period of disqualification prior to showing the horse at horse shows. Mr. Heffington's failure was an oversight, a mistake. Mr. Heffington did not deliberately disobey. Nevertheless, he "knowingly failed to obey" because he should have known he had failed to pay the $1,000.00 civil penalty.

Decision and Order on the Written Record

30. The parties' detailed and voluminous submissions in this case **17-0188** go beyond summary judgment, which is why I have chosen to issue a Decision and Order on the Written Record. I have accepted as true the assertions in both parties' submissions, and there is no need to hear testimony, no need for an oral hearing.

31. Respondent Heffington argues in his Response to the Motion for SJ (at 1) that APHIS's Motion for Summary Judgment is "a motion to dismiss on the pleadings which is not allowed under The Rules of Practice." The

Rules of Practice state that "[a]ny motion will be entertained other than a motion to dismiss on the pleading." 7 C.F.R. § 1.143(b)(1). That provision is not applicable here, but would perhaps have been applicable if Mr. Heffington had failed to answer APHIS's Complaint and had instead attempted a motion to dismiss (not a good idea). The Rules of Practice make clear that only an Answer will do.

32. It is well accepted that a hearing is futile and summary judgment appropriate where review of the pleadings and filings on the record reveal that no issue of material fact exists. See *Knaust*, 73 Agric. Dec. 92, 98-9 (U.S.D.A. 2014).[4]

Here, APHIS has not moved to dismiss the proceedings but has moved for summary judgment based on both the pleadings and other filings. *See* CX-1 - 10, Declaration of Jennifer Elias, and Declaration of Rebecca Janicek. It is appropriate to entertain such a motion under 7 C.F.R. § 1.143(b)(1). *See Knaust*, *supra,* at 98-9.

No Factual Dispute of Substance

33. Hearings are futile and summary judgment is appropriate in proceedings in which there is no factual dispute of substance.[5]

34. Respondent Heffington argues in his Response to the Motion for SJ (at 1-3) that, in the event I consider the Motion for Summary Judgment, there exists a genuine issue of material fact in that he contends he did not "knowingly" disobey the 12-0199 Decision Order. I disagree with Mr.

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[4] Citing *Pine Lake Enters., Inc.*, 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); *Bauck*, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. 2010); *Animals of Mont., Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric*., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice)).

[5] *Agri-Sales, Inc.*, 73 Agric. Dec. 612, 625 (U.S.D.A. 2014), in which the USDA Judicial Officer affirms a Decision made without an oral hearing (citing, among others, *Animals of Montana, Inc*., 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Bauck*, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009); and *Veg-Mix, Inc. v. U.S. Dep't of Agric*., 832 F.2d 601, 607 (D.C. Cir. 1987).

Heffington that he has raised a sufficient genuine issue of material fact that would merit an oral hearing.

As support for his contention, Respondent Heffington states that he

> in fact believed that the order had been complied with until Nov. 2014, when he was informed by the APHIS attorney, Brian T. Hill, representing the USDA in case Docket No. 14-0053 that the civil penalty had not been paid in case No. 12-0199. . . . Respondent checked to see if the payment had cleared his bank and upon not being able to find proof that the check had cleared: he issued another check immediately.

Id. at para. 6.

35. Respondent Heffington goes on to explain that he

> entered the horse to show after July 31, 2014, which was the disqualification end period. If there had been any intent to violate the order, the horse could have been entered any time prior to July 31, 2014. . . .
>
> The USDA informs horse show management if a person is on disqualification list and therefore is prohibited from showing. Horse show management strictly enforces this prohibition.
>
> The Respondent did not appear on any disqualification list when the horse was entered. If he had appeared on the USDA disqualification list he would have been informed at that time and would have known before Nov. 2014 that the civil penalty had not been paid. [Citation Omitted].

Id. at para. 8.

36. Respondent Heffington explains that, at the time of the alleged violations of the disqualification period, he was suffering health problems

and dementia while caring for an ill, elderly mother, leading to stressful circumstances contributing to his belief that the civil penalty had been paid. *Id.* at para. 9.

37. I accept as true Mr. Heffington's assertions that he was suffering health problems and dementia while caring for an ill, elderly mother, leading to stressful circumstances, and also accept as true the Affidavits of Mr. Heffington and his daughter Jacquelyn Way corroborating such assertions. I find, however, that knowingly failing to obey an order of disqualification can be and was committed under such circumstances. Knowingly failing as used in section 1825(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) means knew or should have known. Mr. Heffington's assertions go to mitigation, that is, what the appropriate remedy should be; but those assertions do not outweigh the powerful evidence that Mr. Heffington had control over how soon his period of disqualification would end after July 31, 2014; and Mr. Heffington had control over whether he would show the horse named "I'm Infamous" during August 2014 at horse shows in Tennessee.

38. Section 1825(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) states in pertinent part "[a]ny person who **knowingly fails to obey** an order of disqualification shall be subject to a civil penalty . . ." (emphasis added). The term "knowingly" is defined by Black's Law Dictionary as "1. [h]aving or showing awareness or understanding; well-informed". [6] As pointed out in APHIS's Motion for Summary Judgment (at 9), Respondent, having personally signed the Consent Decision and Order in Docket No. 12-0199, attesting to knowledge of its conditions, "knew that he was subject to an order disqualifying him." Respondent Heffington knew of the order of disqualification and the terms therein.

39. APHIS contends (*id.* at 10) that Respondent Heffington "knew that he did not pay the civil penalty until November 25, 2014." It is not necessary to hold a hearing on the issue of what did Mr. Heffington know and when did he know it. I accept as true that Mr. Heffington did not know he had not paid at the times he showed the horse "I'm Infamous" on three occasions in August 2014. Nevertheless, Mr. Heffington should have known that he had not paid at the times he showed the horse "I'm

[6] BLACK'S LAW DICTIONARY 950 (9th ed. 2009).

Infamous" on three occasions in August 2014. Mr. Heffington's failures to obey remain proved, and the mitigating factors that Mr. Heffington has proved change the amount of civil penalties.

40. Mr. Heffington knew that he was subject to a disqualification order within the meaning of the Horse Protection Act that "began on December 1, 2013, continu[ing] up to and including July 31, 2014" and "[i]f Respondent fail[ed] to pay the assessed civil penalty by July 31, 2014, his disqualification [would] remain in effect until the first day after APHIS receives payment of the civil penalty."[7]

41. The responsibility to ensure payment of the civil penalty was on Mr. Heffington. Respondent Heffington argued that he was not listed on any disqualification list when showing the horse on each occasion in August 2014.[8] It was not the responsibility of the horse show management, and it was not the responsibility of the USDA, to prevent Mr. Heffington from showing the horse on each occasion in August 2014. Had Respondent Heffington taken care timely to confirm payment of his civil penalty, all this extra burden on horse show management and the USDA could have been avoided.

42. Respondent Heffington did not take the action of ensuring his payment and the cessation of his disqualification prior to showing the horse "I'm Infamous" on three occasions in August 2014, though he did take such action when informed of the non-payment by Mr. Hill in November 2014. I am sympathetic to Respondent Heffington under stressful circumstances, especially during the 8 months from December 1, 2013 through July 31, 2014. Those stressful circumstances did not dissolve Mr. Heffington's knowledge of the disqualification order and did not absolve him of his carelessness in failing to assure his civil penalty payment prior to showing the horse in a horse show.

Civil Penalties

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[7] Consent Decision and Order, *Heffington*, HPA Docket No. 12-0199 at ¶ 5.

[8] As corroborated by the Affidavit of Ms. Rachel Reed, Secretary/Treasurer of Sound Horses-Honest Judging-Objective Inspection-Winning Fairly (S.H.O.W.).

43. The maximum civil penalty of $4,300.00 per offense[9] would ordinarily be the civil penalty amount that I would choose, but not here. While Respondent Heffington is responsible for his carelessness in failing to assure his civil penalty payment prior to showing a horse in a show, the circumstances leading to his error make the maximum penalty inappropriate.

44. Respondent Heffington's assertions that he thought he had paid, likely made a mistake due to dementia and other stressful circumstances, and that he paid as soon as he was notified that his payment was not received by APHIS, are not enough to negate his knowing violations of the disqualification order, but can be taken into consideration when determining the civil penalty in accordance with section 1825(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1), including "as justice may require." Under the unique circumstances here, I find that $1,000.00 per failure is adequate, proportionate, reasonable and just.

45. On December 5, 2014, the Hearing Clerk sent the Consent Decision issued on December 5, 2014 in Docket No. 14-0053 to the parties. Mr. Heffington's copy of the Consent Decision was sent by regular mail (ordinary mail), which he presumably received (the mailing was not returned to the Hearing Clerk as undeliverable). The Consent Decision in 14-0053 required payment of a $1,100 civil penalty but set no deadline for the payment. Mr. Heffington's $1,100 payment was processed by the U.S. Treasury on May 15, 2015. Declaration of Jennifer Elias, filed February 28, 2018.

Findings of Fact

46. The Time Line above is hereby incorporated into these Findings of Fact.

[9] 7 C.F.R. § 3.91(b)(2)(ix) provided that the maximum civil penalty for failure to obey Horse Protection Act disqualification under 15 U.S.C. § 1825(c) during 2014 was $4,300.00; and now provides that the maximum civil penalty for failure to obey Horse Protection Act disqualification under 15 U.S.C. § 1825(c) is $10,969.00.

47. Respondent Jack Grisham Heffington ("Mr. Heffington") is an individual with a business mailing address in Shelbyville, Tennessee, who at all times mentioned herein was a "person" and an "exhibitor" within the meaning of the Horse Protection Act.

48. On January 14, 2014, Administrative Law Judge Jill S. Clifton issued a Consent Decision and Order in *In re: Jack G. Heffington*, HPA Docket No. 12-0199. The order in that case states:

> 1. Respondent Jack G. Heffington is assessed a civil penalty of $1,000, which shall be received by July 31, 2014. The civil penalty shall be paid by certified check, payable to the "Treasurer of the United States". The certified check shall include the docket number of these proceedings, namely HPA Docket No. 12-0199. The certified check shall be mailed to: USDA/APHIS, P.O. Box 979043, St. Louis, Missouri, 63197-9000.
>
> 2. Respondent Jack G. Heffington is disqualified for an uninterrupted period of 8 months beginning on December 1, 2013, from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warmup or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.
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> 3. By signing this consent, respondent Jack G. Heffington certifies, that as of December 1, 2013, he has not shown, exhibited, or entered any horse, directly or indirectly through any agent, employee, or other device, nor has he judged, managed or otherwise participated in any horse show, horse exhibition, or horse sale or auction.

> Accordingly, Respondent's disqualification period that began on December 1, 2013, continues up to and including July 31, 2014.
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> 4. If Respondent fails to pay the assessed civil penalty by July 31, 2014, his disqualification shall remain in effect until the first day after APHIS receives payment of the civil penalty.
>
> 5. This order shall have the same effect as if entered after a full hearing and shall become effective on the first day after service of this decision on the respondent.
>
> Copies of this decision shall be served upon the parties.

Heffington, HPA Docket No. 12-0199 (Consent Decision and Order, Jan. 14, 2014).

49. Mr. Heffington dated his check November 25, 2014 to pay the $1,000.00 civil penalty assessed in *Heffington*, HPA Docket No. 12-0199; the check was processed by the U.S. Treasury on December 2, 2014. Declaration of Jennifer Elias; CX-10.

50. For this Decision, November 26, 2014 is the last day of Mr. Heffington's disqualification under 12-0199. Using November 26, 2014 gives Mr. Heffington the earliest possible date for his disqualification to end. [Under 12-0199, disqualification continued until the first day after APHIS received payment of the civil penalty.]

51. On August 2, 2014, Mr. Heffington knowingly failed to obey the order of disqualification issued in *Heffington*, HPA Docket No. 12-0199, by showing a horse known as "I'm Infamous" in class 12 in a horse show in Wartrace, Tennessee.

52. On August 21, 2014, Mr. Heffington knowingly failed to obey the order of disqualification issued in *Heffington*, HPA Docket No. 12-0199, by showing a horse known as "I'm Infamous" in class 23 in a horse show in Shelbyville, Tennessee.

53. On August 27, 2014, Mr. Heffington knowingly failed to obey the order of disqualification issued in *Heffington*, HPA Docket No. 12-0199, by showing a horse known as "I'm Infamous" in class 134 in a horse show in Shelbyville, Tennessee.

54. Under Docket No. 12-0199, Respondent Mr. Heffington paid the $1,000.00 civil penalty on or about November 25, 2014. If Mr. Heffington had paid that $1,000.00 during the 8 months of his disqualification under Docket No. 12-0199, before he again showed horses, he would have avoided this case and the demand for $12,900.00.
55. In this case (Docket No. **17-0188**), APHIS asks for an order requiring Respondent Mr. Heffington to pay $4,300.00 plus $4,300.00 plus $4,300.00; for a total of $12,900.00 in civil penalties.

56. The $12,900.00 maximum in civil penalties is disproportionate for Mr. Heffington's oversight, particularly in light of Mr. Heffington's major medical issues and dementia and burden of his sick and debilitated 94 year old mother.

57. The assertions and evidence contained in the written record before me are accepted as true. An oral hearing is not necessary and would not change the law.

58. Mr. Heffington, from December 1, 2013, through June 26, 2015, was under consecutive periods of Horse Protection Act disqualification calculated in accordance with the agreements by Mr. Heffington and APHIS in two Consent Decisions.

Conclusions

59. The Secretary of Agriculture has jurisdiction over the subject matter and the parties.

60. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty . . ." Section 1825(c) of the Horse Protection Act (15 U.S.C. § 1825(c)).

61. "Knowingly", within the meaning of section 1825(c) of the Horse Protection Act (15 U.S.C. § 1825(c)), means the person knew, or should have known.

62. Mr. Heffington had agreed to an order of disqualification in the Consent Decision and Order he signed in Docket No. 12-0199. Mr. Heffington knew or should have known what was required of him by the Consent Decision.

63. Mr. Heffington failed to meet the requirement of paying the $1,000.00 civil penalty to end the period of disqualification prior to showing the horse at horse shows. Mr. Heffington's failure was an oversight, a mistake. Mr. Heffington did not deliberately disobey. Nevertheless, he "knowingly failed to obey" because he should have known he had failed to pay the $1,000.00 civil penalty.

64. While under an order of disqualification, the Respondent Jack Grisham Heffington ("Mr. Heffington") knowingly failed to obey an order of disqualification, in violation of section 1825(c) of the Horse Protection Act (15 U.S.C. § 1825(c)), three times during August 2014.

65. Mr. Heffington is responsible for his failing to assure that his civil penalty payment had been made, prior to showing a horse in a horse show.
66. While under a period of disqualification, which began on December 1, 2013, and which would last at least 8 months but would remain in effect until the first day after APHIS received payment of the $1,000.00 civil penalty, Mr. Heffington knowingly failed to obey an order of disqualification by showing the horse named "I'm Infamous" on three occasions:

(a) August 2, 2014 in a horse show in Wartrace, Tennessee;

(b) August 21, 2014 in a horse show in Shelbyville, Tennessee; and

(c) August 27, 2014 in a horse show in Shelbyville, Tennessee.

67. Mr. Heffington's evidence includes (a) the Affidavit of Rachel Reed, the Secretary-Treasurer of S.H.O.W. (Sound Horses-Honest Judging-Objective Inspection-Winning Fairly) filed March 20, 2018; the Affidavit

of Mr. Heffington's daughter Jacquelyn Way filed March 20, 2018, and Mr. Heffington's own Affidavit filed on March 20, 2018, each of which is accepted as true.

68. The evidence presented by Mr. Heffington through these three Affidavits shows that his assertions are true, that he was suffering major medical issues and dementia and had the burden of a sick and debilitated 94 year old mother during the time in question; and that he was dealing with two USDA cases, Case No. 14-0053 and Case No. 12-0199 at the same time; and that these factors contributed to his belief that the civil penalty had been paid.

69. Neither S.H.O.W. nor APHIS stopped Mr. Heffington from showing the horse named "I'm Infamous" on three occasions in August 2014, because Jack Heffington's name did not appear on the USDA Horse Protection Act Federal Disqualification and Civil Penalty List that was dated July 2014. Affidavit of Rachel Reed, the Secretary-Treasurer of S.H.O.W. (Sound Horses-Honest Judging-Objective Inspection-Winning Fairly) filed March 20, 2018.

70. Mr. Heffington's evidence goes to mitigation, that is, what the appropriate remedy should be; but Mr. Heffington's evidence does not outweigh the powerful evidence that Mr. Heffington had control over how soon his period of disqualification would end after July 31, 2014; and that Mr. Heffington had control over whether he would show the horse named "I'm Infamous" during August 2014 at horse shows in Tennessee.

71. APHIS's evidence is the Declaration of Rebecca Janicek, plus the Declaration of Jennifer Elias, plus CX-1 through CX-10, each filed February 28, 2018, each of which is accepted as true.

72. The written record before me is sufficient to decide this case without an oral hearing.

73. The language in paragraph 5 of the Order, in the 12-0199 Consent Decision and Order, which states this order "shall become effective on the first day after service of this decision on the respondent" is superfluous. The prior paragraphs of the 12-0199 Consent Decision and Order contained everything that anyone needed to know. Mr. Heffington did

not need to be served with a copy of the 12-0199 Consent Decision and Order by certified mail by the Hearing Clerk to know his obligations under the 12-0199 Consent Decision and Order.

74. The maximum civil penalty for failure to obey Horse Protection Act disqualification under 15 U.S.C. § 1825(c) during 2014 was $4,300.00. 7 C.F.R. § 3.91(b)(2)(ix). [That amount has increased; the maximum civil penalty for failure to obey Horse Protection Act disqualification under 15 U.S.C. § 1825(c) is now $10,969.00. 7 C.F.R. § 3.91(b)(2)(ix).]

75. Ordinarily, the civil penalty of $4,300.00 (the maximum civil penalty at the time for each failure to obey an order of disqualification) would be appropriate. *See Timothy Wayne Holley, d/b/a Tim Holley Stables*, 66 Agric. Dec. 481, 482 (U.S.D.A. 2007), *available at* https://oalj.oha.usda.gov/sites/default/files/070409_HPA_06-0005.pdf, where Mr. Holley was assessed $115,500.00 for 35 violations of 15 U.S.C. § 1825(c), the maximum civil penalty at that time having been $3,300.00 for each failure to obey an order of disqualification.

76. Under the unique circumstances here, considering the factors to be taken into account as enumerated in 15 U.S.C. § 1825(b), $1,000.00 for each of Mr. Heffington's failures to obey is adequate, proportionate, reasonable and just. It is not necessary to crush Mr. Heffington.

77. Mr. Heffington should be required to deliver to USDA APHIS by August 15 (Thur) 2019, payment of the following civil penalties under sections 1825(b) and (c) of the Horse Protection Act (15 U.S.C. § 1825(b) and (c)); and 7 C.F.R. § 3.91(b)(2)(ix), $1,000.00 plus $1,000.00, plus $1,000.00, for a total of $3,000.00 in civil penalties.

ORDER

78. Jack Grisham Heffington, Respondent, is assessed **civil penalties totaling $3,000.00** for his three violations of 15 U.S.C. § 1825(c), which shall be **paid by check(s) delivered to USDA APHIS by August 15 (Thur) 2019.**

79. Mr. Heffington's payment(s) totaling $3,000.00 shall be made **payable to the order of USDA APHIS**, with " **HPA 17-0188** "marked on the check(s).

80. The payment(s) totaling $3,000.00 shall be sent to and received by

USDA APHIS
PO Box 979043
St. Louis, MO
63197-9000

81. If this Decision and Order is appealed to the Judicial Officer, the August 15 (Thur) 2019 deadline for receipt of Mr. Heffington's payment by USDA APHIS will not apply, but will instead be determined by further proceedings. See next paragraph for when this Decision and Order becomes final.

Finality

82. 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 Appendix A).

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

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MISCELLANEOUS ORDERS & DISMISSALS

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. Substantive 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: https://oalj.oha.usda.gov/current.

ALL ACTS

In re: EACH CASE PENDING BEFORE THE USDA OFFICE OF ADMINISTRATIVE LAW JUDGES.
All Dockets Pending Before USDA OALJ.
Blanket Order Extending Filing Deadlines Occurring During Furlough in All Cases Pending Before USDA Administrative Law Judges.
Filed January 11, 2019.

In re: EACH CASE PENDING BEFORE THE USDA OFFICE OF ADMINISTRATIVE LAW JUDGES.
All Dockets Pending Before USDA OALJ.
Blanket Order Amending to February 11, 2019 Filing Deadlines Occurring During the Furlough Period in All Cases Pending Before USDA Administrative Law Judges.
Filed January 29, 2019.

ANIMAL WELFARE ACT

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Miscellaneous Order.
Filed February 22, 2019.

AWA – Appointments Clause – *Lucia v. SEC* – Hearing, new – Rehearing, motion for – Remand – Written record, integrity of.

Colleen A. Carroll, Esq., for Complainant.
Larry Thorson, Esq., for Respondents.
Initial Decision and Order by Channing D. Strother, Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING MOTION FOR REHEARING AND REMANDING TO THE CHIEF JUDGE FOR FURTHER PROCEEDINGS

I. Summary of Relevant Procedural History

On July 30, 2015, Complainant, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), filed a complaint alleging that Cricket Hollow Zoo, Inc., Pamela J. Sellner, Thomas J. Sellner, and Pamela J. Sellner Tom J. Sellner ("Sellner Partnership") (collectively, "Respondents") violated the Animal Welfare Act[1] and the Regulations[2] on multiple occasions between 2013 and 2015. The allegations were generally based on evidence derived from twelve inspections of respondents' facilities, animals, and records that APHIS conducted, or attempted to conduct, on twelve occasions between 2013 and 2015.

On August 20, 2015, Respondents filed an answer admitting the jurisdictional allegations and admitting and denying other of the material allegations of the Complaint. An oral hearing was held before Administrative Law Judge ("ALJ" or "Judge") Channing D. Strother on January 24 through January 27, 2017, in Davenport, Iowa.

On November 30, 2017, Judge Strother filed an initial decision and order ("IDO"), in which he found that APHIS had established a number of the violations alleged in the Complaint.[3] The Judge concluded that "[t]he violations are in such frequency and numbers that a fine is insufficient.

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[1] 7 U.S.C. §§ 2131 *et seq.*

[2] 9 C.F.R. §§ 1.1 *et seq.*

[3] IDO at 1 (". . . [APHIS], although it did not prove every alleged violation, demonstrated in the record the zoo had numerous violations over time, requiring repeated visits by APHIS inspection personnel.").

Revocation of the license is necessary."[4] Consequently, he assessed a joint and several civil penalty of $10,000, ordered AWA license 42-C-0082 revoked, and ordered Respondents to cease and desist from further violations.[5]

On December 29, 2017, Respondents filed a petition for appeal ("Appeal"), in which they challenged some, but not all, of the Judge's findings. Respondents' petition for appeal did not mention the Appointments Clause or otherwise challenge the authority of Judge Strother. On February 9, 2018, Complainant filed a response to the petition for appeal.

On July 17, 2018, Respondents filed the instant two-page "motion for rehearing." The stated basis for the motion is that "[t]he United States Supreme Court issued a Decision on June 21, 2018, in the case of *Lucia et al. v. Securities and Exchange Commission*," 585 U.S. ___, 138 S. Ct. 2044 (2018)[.]"[6] Respondents assert that they are entitled to a new hearing before another administrative law judge, and they "are raising this matter in a timely manner . . . because this matter is still on review before the Judicial Officer."[7]

On August 10, 2018, Complainant filed its response in opposition to Respondents' motion for hearing, raising several meritorious points including, among others, that Respondents have waived their Appointments Clause argument by failing to raise it before the Administrative Law Judge.

For the reasons discussed more fully herein below, Respondents' motion for hearing is GRANTED, and this proceeding is REMANDED back to the Chief ALJ for further proceedings consistent with *Lucia*.

II. USDA Administrative Law Judge Channing D. Strother Was

[4] *Id.* at 2.

[5] *Id.* at 180.

[6] Motion at 1.

[7] Motion at 2 (citing *Lucia*, 138 S. Ct. 2044 (2018); *Ryder v. United States*, 515 U.S. 177, 182 (1995)).

Properly Appointed at the Time His Decision and Order Was Issued But Not at the Time of the Hearing.

In a ceremony on July 24, 2017, the Secretary of the United States Department of Agriculture, Sonny Perdue ("Secretary Perdue"), personally ratified the prior appointments of Chief ALJ Bobbie J. McCartney (retired from that position on 1/20/2018), ALJ Jill S. Clifton, and ALJ Channing D. Strother and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that he "conducted a thorough review of the qualifications of this Department's administrative law judges," and "affirm[ing] that in a ceremony conducted on July 24, 2017, [he] ratified the agency's prior written appointments of the [USDA ALJs] before administering their oath of office . . ."

On June 21, 2018, almost one year later, the U.S. Supreme Court held that the Securities and Exchange Commission's ALJs are inferior officers of the United States under U.S. Const. art. II, § 2, cl. 2. and *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018) ("*Lucia*") and therefore must be appointed consistent with the Appointments Clause. The actions of the Secretary of Agriculture in reviewing the qualifications of his ALJs, personally ratifying their appointments, and personally administering their renewed Oaths of Office go well beyond a simple recitation of ratification, are clearly consistent with the Supreme Court's ruling in *Lucia* and are therefore entitled to full deference. Accordingly, certainly as of July 24, 2017, the USDA's ALJs, as inferior officers of the United States subject to the Appointments Clause, were duly appointed by a "head of the department" as required by the U.S. Constitution, art. 2, § 2, cl. 2, and the Supreme Court's ruling in *Lucia*.

ALJ Strother issued his Decision and Order in this matter on November 30, 2017, well after the July 24, 2017 actions of the Secretary of Agriculture addressing the Appointments Clause requirements. However, the Decision and Order is, and of course must be, based on the record evidence adduced during the oral hearing held before Judge Strother on January 24 through January 27, 2017 in Davenport, Iowa. As of the dates of the hearing, Judge Strother's authority to conduct the hearing had not yet been addressed in the manner required by the Supreme Court's ruling in *Lucia*.

III. Respondents Are Entitled to a New Hearing Consistent with the Supreme Court's Ruling in *Lucia*.

The following language from the Supreme Court's decision in *Lucia* provides specific language as to the remedy:

> This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id.*, at 183, 188. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

Lucia, 138 S. Ct. at 2055.

Consistent with the Supreme Court's ruling, Respondent will be granted a new hearing by "… another ALJ (or the Commission itself)." *Id.*

Complainant's contention that Respondents have waived their Appointments Clause argument by failing to raise it before the Administrative Law Judge is understandable. It is well settled that arguments raised for the first time on appeal are untimely under both the Rules of Practice[8] and case law.[9] Here, Respondents did not raise their constitutional argument as an assignment of error in their petition for appeal, filed December 29, 2017, but rather some six months later while the case was pending on appeal before the Judicial Officer. However, for reasons of equity given the flux of the law on this issue prior to the

[8] *See* 7 C.F.R. §§ 1.130-1.151.

[9] *See, e.g.*, *Burnette Foods, Inc.*, 74 Agric. Dec. 413, 424 (U.S.D.A. 2015); *Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (U.S.D.A. 1998).

Supreme Court's ruling in *Lucia*, Respondents' Appointments Clause challenge will be deemed timely raised for purposes of this proceeding.

IV. The Hearing Process on Remand Must Respect the Integrity of the Written Record.

The Supreme Court did not specify the type of hearing required to remedy an Appointments clause violation, thereby leaving it to judges' discretion to determine how to comply with its ruling and how to conduct new hearings. Judge Strother's November 30, 2017 Initial Decision and Order is hereby ***Vacated,*** and this proceeding is ***Remanded*** to the Chief Judge for further proceedings consistent with *Lucia,* including a new hearing by another ALJ.

Testimony taken at USDA hearings is taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. In the hearing held before Judge Strother on January 24 through January 27, 2017, in Davenport, Iowa, neither side was prevented from calling and fully examining all witnesses, from presenting all relevant documentary and other forms of evidence, and fully developing a true and accurate record. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as part of that written record. However, the written record which has already been made by the parties in this proceeding shall be reviewed ***de novo*** to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any ***new*** testimony or other evidence as may be supported by a showing of good cause.

This process addresses any argument that Judge Strother's prior opinions, orders, and rulings may have been tainted from the Appointments Clause violation by removing any influence of Judge Strother on the record while respecting the integrity of the record regarding the raw evidence already produced and testimony already taken at the hearing.

ORDER

For the reasons set forth herein above, Judge Strother's November 30, 2017 Initial Decision and Order is hereby ***Vacated,*** and this proceeding is ***Remanded*** to the Chief Judge for further proceedings consistent with *Lucia,* including a new hearing by another ALJ and a ***de novo*** review of the written record which has already been made by the parties in this proceeding to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any ***new*** testimony or other evidence as may be supported by a showing of good cause.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in all of the dockets identified herein above.

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HORSE PROTECTION ACT

In re: SHAWN FULTON, an individual; and AMELIA HASELDEN, an individual.
Docket Nos. 17-0124, 17-0127.
Miscellaneous Order.
Filed February 15, 2019.

HPA – Appointments Clause – *Lucia v. SEC* – Remand.

Colleen A. Carroll, Esq., for APHIS.
Karin Cagle, Esq., and Steven Mezrano, Esq., for Respondents.
Initial Decision and Order entered by Bobbie J. McCartney, Chief Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER REMANDING TO THE CHIEF JUDGE FOR FURTHER ACTION AS TO AMELIA HASELDEN (DOCKET NO. 17-0127) AND SHAWN FULTON (DOCKET NO. 17-0124)

Respondents, Amelia Haselden and Shawn Fulton, timely petitioned the United States Court of Appeals For the District of Columbia ("the DC Circuit Court" or "the Court") for review of United States Department of Agriculture ("USDA" or "Agency") Orders issued by the Judicial

Officer on October 13, 2017 as to Amelia Haselden and October 26, 2017 as to Shawn Fulton affirming an Administrative Law Judge's ("ALJ") entry of default judgment for failure to file a timely answer to a complaint for violations of the Horse Protection Act.

In a decision entered on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 ("*Lucia")*, the Supreme Court held that the Securities and Exchange "Commission's ALJs are 'Officers of the United States', subject to the Appointments Clause." *Id.* at 2055. Because the petitioner in that case timely challenged the constitutional validity of the ALJ officer adjudicating his case, the Supreme Court held that he was entitled to a new hearing before a properly appointed ALJ who had not previously presided over his case. *Id.*

USDA has conceded that its ALJs are also Officers of the United States who must be appointed consistent with the Appointments Clause. USDA has also acknowledged that the subject ALJ may not have been properly appointed as required by *Lucia* at the time of the entry of the default decisions.

Accordingly, USDA did not oppose Amelia Haselden and Shawn Fulton's petition to the DC Circuit Court requesting that the Court vacate the subject Agency Orders and remand to the Agency for further proceedings. (*Amelia Haselden v. USDA*, Case No. 17-1235; *Shawn Fulton v. USDA*, Case No. 17-1247).[1]

Based on the foregoing, on January 16, 2019, the DC Circuit Court granted the unopposed petition and directed that the Judicial Officer's October 13, 2017 Order as to Amelia Haselden, and the Judicial Officer's October 26, 2017 Order as to Shawn Fulton be set aside and that these two cases be remanded for further proceedings "…consistent with the parties' proposed consent decisions."
[2] The Court also ordered that consolidation of these two cases (DC

[1] *Haselden v. USDA* and *Fulton v. USDA* (HPA cases on Appeal: Amelia Haselden Docket No. 17-0127 and Shawn Fulton Docket No. 17-0124).

[2] Petitioner's unopposed Motion provided in pertinent part as follows: "On September 14, 2018, this Court granted the parties' joint motion to hold the consolidated cases in abeyance pending settlement proceedings in the Haselden

Circuit Case Nos. 17-1235 and 17-1247) be terminated with other pending cases in as much as the remaining consolidated cases were returned to the Court's active docket (DC Circuit Case Nos. 17-1246, 17-1249, and 17-1250).

ORDER

In accordance with the DC Circuit Court's January 16, 2019 Order, the consolidation of the subject dockets (Shawn Fulton, HPA Docket No. 17-0124 and Amelia Haselden, HPA Docket No. 17-0127) are terminated as to the HPA docket numbers referenced herein above and as to the remaining active DC Circuit Case Nos. 17-1246, 17-1249, and 17-1250; further, the Judicial Officer's October 13, 2017 Order as to Amelia Haselden, and the Judicial Officer's October 26, 2017 Order as to Shawn Fulton are hereby **VACATED** and these two dockets are **REMANDED** to the Chief ALJ for further proceedings consistent with the DC Circuit Court's Order.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in all the dockets identified herein above.

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In re: PHILIP TRIMBLE.
Docket No. 15-0097.
Remand Order.
Filed February 19, 2019.

HPA – Appointments Clause – Hearing, new – Hearing process, modification of – *Lucia v. SEC* – Remand.

Thomas N. Bolick, Esq., and Lauren C. Axley, Esq., for APHIS.
Jan Rochester, Esq., for Respondent.
Initial Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

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and Fulton cases. The Court directed a status report be filed no later than November 14, 2018. During this time, the parties executed documents that will finalize a disposition of the administrative proceeding after an order is entered by this Court vacating the agency's orders and remanding the two cases to the USDA for further proceedings."

ORDER REMANDING TO THE CHIEF JUDGE FOR FURTHER PROCEEDINGS

On November 29, 2018, I issued an "Order Granting Respondent's Petition For Appeal To Judicial Officer For a New Hearing" ("Order"), which vacated Administrative Law Judge ("ALJ") Strother's Decision and Order dated June 8, 2018 and granted Respondent's request for a new hearing. I ordered the parties, within twenty days of the date of the Order, "to submit proposals for the conduct of further proceedings consistent with the Supreme Court's *Lucia* decision, the USDA Rules of Practice and Procedure, and with the guidelines set forth [in the Order]." Proposals were due on December 19, 2018. On December 10, 2018, Respondent filed a Motion to Modify Judicial Officer's Order Granting Respondent's Petition to Appeal to the Judicial Officer for a New Hearing ("Motion to Modify"). On December 19, 2018, Complainant filed a motion for a two-day extension of time to respond, which I granted, and filed its response on December 21, 2018.

In his Motion to Modify, Respondent objects to the Order in several ways, including the process for a new hearing provided for in the Order, as well as my proposal to hold the new hearing myself in my capacity as the duly appointed Judicial Officer of the Secretary of Agriculture. For the reasons discussed more fully below, my November 29, 2018 Order is modified to grant Respondent's request to have this case remanded to the Chief Judge for further proceedings. The Order is affirmed as to all other rulings, including the process for a new hearing provided for in the Order.

1. The Secretary of Agriculture has properly appointed his ALJs as required by *Lucia*.

In *Lucia*, the Supreme Court held that the appropriate remedy "for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official. . . . To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing" to which Lucia is entitled. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018). Respondent continues to assert that none of the USDA ALJs have been properly appointed as required by *Lucia*, but this argument has been considered and rejected for the reasons discussed more fully in my

November 29, 2018 Order. Accordingly, my ruling that as of July 24, 2017, the USDA's ALJs, as inferior officers of the United States subject to the Appointments Clause, were duly appointed by a "head of the department" as required by U.S. Constitution, art. II, § 2, cl. 2, and the Supreme Court's ruling in *Lucia* is affirmed.[1]

2. The hearing process on remand is consistent with *Lucia*.

The Supreme Court did not specify the type of hearing required to remedy an Appointments clause violation, thereby leaving it to judges' discretion to determine how to comply with its ruling and how to conduct new hearings. The process outlined in my November 29, 2018 Order is consistent with *Lucia* and is affirmed. ALJ Strother's Decision and Order dated June 8, 2018 has been vacated, and the written record which has already been made by the parties in this proceeding shall be reviewed *de novo* to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any new testimony or other evidence.

Testimony taken at USDA hearings is taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits that have already been admitted into evidence as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any new evidence not previously submitted in the prior proceeding.

As Complainant points out, this process addresses any argument that Judge Strother's prior opinions, orders, and rulings may have been tainted

[1] As explained in my November 29, 2018 Order, the actions of the Secretary of Agriculture in reviewing the qualifications of his ALJs, personally ratifying their appointments, and personally administering their renewed Oaths of Office go well beyond a simple recitation of ratification and are clearly consistent with the Supreme Court's ruling in *Lucia*.

from the Appointments Clause violation by removing any influence of Judge Strother on the record. Doing so does not in any way undermine the integrity of the record regarding the raw evidence produced and testimony taken at the hearing. In the hearing before Judge Strother, neither side was prevented from calling and fully examining all witnesses, from presenting all relevant documentary and other forms of evidence, or from fully developing a true and accurate record.

3. Respondent's Motion does not support modification of the hearing process on remand.

My November 29, 2018 Order permitted the parties an opportunity to show good cause for the submission of any new evidence not previously submitted in the proceeding during the three-day hearing in March 2017.[2] Complainant's Response averred that Complainant has reviewed the record and believes that the witnesses were fully examined and cross-examined, that all of the issues were fully fleshed out at the hearing, that the record was fully developed and complete, and that there is no need for any new evidence or testimony. Respondent elected not to file a response on the merits of this issue but rather filed a motion to modify the Order, which argues: (1) that the Rules of Practice do not authorize limiting a hearing to new evidence; [3] (2) that "limiting Respondent to only submitting new evidence not previously submitted does not satisfy *Lucia*";[4] and (3) that it is impossible "to make credibility assessments of witness from a cold written transcript." [5] These arguments are not persuasive for the following reasons.

Firstly, my November 29, 2018 Order does not limit the hearing to new evidence because in addition to considering the need for new evidence, the newly assigned ALJ will be conducting a *de novo* review of the existing written record, and the parties will be allowed to rely on the written record. This process is not specifically contemplated by the Rules of Practice for the simple reason that the Rules of Practice did not anticipate *Lucia*. This

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[2] Order at 6.

[3] Respondent's Motion ¶ 8.

[4] *Id.*

[5] *Id.* at ¶ 12.

process, which preserves the integrity of the existing written record while providing the parties an opportunity to address *Lucia*, concerns moving aligns with the Rules of Practice because the Rules of Practice consider the need for some level of efficiency in agency proceedings by requiring the exclusion of unduly repetitious evidence. 7 C.F.R. § l.141(h)(iv).

Allowing Respondent to resubmit evidence and recall witnesses to testify without good cause shown would be unduly repetitious and contrary to 7 C.F.R. § l.141(h)(iv) and would provide Respondent with a procedural advantage not contemplated by *Lucia* to the extent that witnesses may no longer be available or may not have the same level of independent recollection of the facts and circumstances due to the passage of time.

Secondly, Respondent does not explain why the written record is inadequate, incomplete, or otherwise unreliable. My November 29, 2018 Order invited the parties to demonstrate how Judge Strother's rulings may have constrained the record, but as of the filing of this proposal, Respondent has not demonstrated that. Respondent has neither suggested that he has any new evidence to submit nor shown good cause for the submission of such evidence.

Thirdly, Respondent has suggested that an entirely new hearing is necessary to allow the new judge to make a credibility assessment. Respondent's Motion ¶ 12. As a general rule the trier of fact is best situated to assess credibility; however, credibility assessments can be made on the record. *See Lion Raisins, Inc.*, Docket No. 01-0001, 2010 WL 2020178, at *8 (U.S.D.A. May 12, 2010) (the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility); *Saulsbury Enterprises*, 58 Agric. Dec. 19, 38 (U.S.D.A. 1999) ("Where the JO disagrees with the credibility determinations of the ALJ, his disagreement is based on inferences drawn from documents and testimony in the record. . . . These are derivative inferences drawn from not discredited testimony."). In addition, as Complainant's Response points out, arguments can be made regarding credibility based on the record; both parties in this case did so in their post-hearing briefs. *See, e.g.*, Complainant's PHB, June 2, 2017, at 15-18; Respondent's PHB, June 1, 2017, at 131-32.

Respondent has not shown good cause why an entirely new hearing is necessary in this instance, nor has the Respondent pointed to any specific evidence or testimony that he believes is necessary to supplement the written record. The process outlined in my November 29, 2018 Order is consistent with *Lucia* and is affirmed. ALJ Strother's Decision and Order dated June 8, 2018 has been vacated, and the written record which has already been made by the parties in this proceeding shall be reviewed *de novo* by a newly appointed ALJ to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any new testimony or other evidence.

4. This case will be remanded to the Chief Judge for further proceedings.

In Respondent's Motion, he argues that the USDA's Rules of Practice and Procedure do not authorize a Judicial Officer to perform the duties of an Administrative Law Judge. Respondent's Motion ¶ 6. The Judicial Officer has been lawfully delegated the authority to act as the final deciding officer in various USDA adjudicatory proceedings (7 C.F.R. § 2.35) and therefore acts as the Secretary. However, in light of Respondent's objection to the Judicial Officer serving as the presiding officer over the new hearing and the point raised by the Complainant that doing so may adversely affect the Respondent's ability to appeal pursuant to 7 C.F.R. § 1.145, Respondent's request to have the proceedings remanded to the Chief Judge for assignment to a newly appointed ALJ in accordance with *Lucia* is granted.

ORDER

For the reasons discussed above, my November 29, 2018 Order is modified to grant Respondent's request to have this case remanded to the Chief Judge for further proceedings. Respondent's Motion to Modify is denied as to all other arguments, and my November 29, 2018 Order is affirmed as to all other rulings, including the process for a new hearing on remand provided for in the Order.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in all of the dockets identified herein above.

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In re: KENNY COMPTON, an individual; and RICK COMPTON, a individual.
Docket Nos. 17-0041, 17-0042.
Order Denying Respondents' Motions for Summary Judgment and/or to Dismiss and/or to Vacate; to Disqualify Administrative Law Judge and Judicial Officer; and to Stay.
Filed February 25, 2019.

In re: ROCKY ROY MCCOY.
Docket No. 16-0026.
Miscellaneous Order.
Filed March 12, 2019.

HPA – Stay order, motion to lift.

Buren W. Kidd, Esq., for APHIS.
David F. Broderick, Esq., and R. Taylor Broderick, Esq., for Respondent.
Initial Ruling entered by Jill S. Clifton, Administrative Law Judge.
Order issued by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING COMPLAINANT'S MOTION TO LIFT STAY ORDER

On March 12, 2019, Complainant, the Administrator of the Animal and Plant Health Inspection Service, filed a motion to lift the Stay Order issued by the Judicial Officer in the above-captioned matter on July 26, 2016. The Motion was based on section 1.143 of the Rules of Practice (7 C.F.R. § 1.143(b)), on all the pleadings and papers on file in this docket, and on the following asserted material facts:

1. On June 2, 2016, the Judicial Officer issued a decision and order in this case.

2. On July 21, 2016, Respondent Rocky Roy McCoy filed a petition for review of the Judicial Officer's decision in the United States Court of Appeals for the Sixth Circuit. *McCoy v. U.S. Dep't of Agric.*, No. 16-3842 (6th Cir. 2017).

3. On July 26, 2016, the Judicial Officer issued an order staying the June 2, 2016 Order pending the outcome of proceedings for judicial review.

4. On August 21, 2017, the Court of Appeals denied Respondent McCoy's petition for review.

Motion at 1.

A copy of the Court of Appeals decision was attached to Complainant's Motion. Respondent Rocky Roy McCoy did not seek further review of the decision of the Court of Appeals, and the time for doing so has expired.

Complainant's Motion to Lift the Stay Order is supported by good cause; accordingly, the Judicial Officer's July 26, 2016 Stay Order is hereby lifted.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

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In re: DANNY BURKS, an individual; Hayden Burks, an individual;[1] and Sonny McCarter, an individual.[2]
Docket Nos. 17-0027, 17-0028, 17-0029.
Miscellaneous Order.
Filed May 7, 2019.

HPA – Stay order, motion to lift.

Colleen A. Carroll, Esq., for APHIS.
L. Thomas Austin, Esq., for Respondent Danny Burks.
Initial Decision and Order entered by Bobbie J. McCartney, Chief Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING COMPLAINANT'S

[1] On December 19, 2017, a Consent Decision and Order was filed in HPA Docket No. 17-0029, which resolved this case as to Respondent Sonny McCarter.

[2] On March 31, 2017, a Consent Decision and Order was filed in HPA Docket No. 17-0028, which resolved this case as to Respondent Hayden Burks.

MOTION TO LIFT STAY ORDER AS TO DANNY BURKS

On April 12, 2019, Complainant, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), filed a motion to lift the Stay Order ("Motion") issued by the Judicial Officer in the above-captioned matter on October 2, 2017. The Motion was based on section 1.143 of the Rules of Practice (7 C.F.R. § 1.143(b)), on all the pleadings and papers on file in this docket, and on the following asserted material facts:

1. On May 30, 2017, the Chief Administrative Law Judge issued a default decision and order ("Initial Decision and Order") in this case.

2. On July 19, 2017, the Judicial Officer issued a decision and order affirming the Initial Decision and Order.

3. On July 31, 2017, Respondent Danny Burks filed a petition for reconsideration. On August 22, 2017, the Judicial Officer denied the petition for reconsideration.

4. On September 21, 2017, Respondent Danny Burks filed a petition for review of the Judicial Officer's decision in the United States Court of Appeals for the Sixth Circuit. *Burks v. U.S. Dep't of Agric.*, No. 17-4003 (6th Cir. 2017). On the same date, Respondent Danny Burks filed a request that the Judicial Officer issue a stay order.

5. On October 2, 2017, the Judicial Officer issued an order staying the July 19, 2017 Order pending the outcome of proceedings for judicial review. The Judicial Officer stated that "[t]his Stay Order as to Danny Burks shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction." Stay Order at 2.

6. On May 30, 2018, the Court of Appeals denied Respondent Danny Burks's petition for review. On July 23, 2018, the Court of Appeals issued its mandate.

Motion at 1-2.

Copies of the Court of Appeals order and mandate were attached to Complainant's Motion. Respondent Danny Burks did not seek further review of the decision of the Court of Appeals, and the time for doing so has expired. Further, Respondent Danny Burks has not filed a response to Complainant's Motion.[3]

Complainant's Motion to Lift Stay Order is supported by good cause; accordingly, the Judicial Officer's October 2, 2017 Stay Order as to Danny Burks is hereby LIFTED.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

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FEDERAL MEAT INSPECTION ACT / POULTRY PRODUCTS INSPECTION ACT

In re: BRIDGE FOODS, INC.
Docket No. 19-J-0065.
Order Dismissing Complaint.
Filed April 30, 2019.

FOOD AND NUTRITION ACT

In re: STATE OF VERMONT, DEPARTMENT FOR CHILDREN AND FAMILIES.
Docket No. 18-0060.
Decision and Order Dismissing Case.
Filed June 18, 2019.

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[3] Pursuant to the Rules of Practice, "[w]ithin 20 days after service of any written motion or request . . . an opposing party may file a response to the motion or request." 7 C.F.R. § 1.143(d). The Hearing Clerk's records reflect that Respondents' counsel was served with the Motion on April 16, 2019; therefore, Respondent had until May 6, 2019 to file a response thereto. Respondent has not filed a response.

In re: LOUISIANA DEPARTMENT OF CHILDREN AND FAMILY SERVICES.
Docket No. 18-0063.
Decision and Order Dismissing Case.
Filed June 18, 2019.

PLANT PROTECTION ACT

In re: JOHN C. DEMOTT.
Docket No. 15-0105.
Order Dismissing Complaint.
Filed May 6, 2019.

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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: https://oalj.oha.usda.gov/current].

ANIMAL WELFARE ACT

In re: LISA R. WHITEAKER, an individual d/b/a MONKEYPRO.
Docket No. 18-0072.
Default Decision and Order.
Filed February 27, 2019.

COMMERCIAL TRANSPORTATION OF EQUINE FOR SLAUGHTER ACT / ANIMAL HEALTH PROTECTION ACT

In re: GARY LEON BIGELOW.
Docket No. 19-0014.
Default Decision and Order.
Filed June 5, 2019.

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CONSENT DECISIONS

ANIMAL WELFARE ACT

Henry Hampton, an individual d/b/a The Farm at Walnut Creek and Lazy 5 Ranch; The Farm at Walnut Creek, Inc., an Ohio domestic corporation; and Lazy 5 Ranch, Inc., a North Carolina domestic corporation.
Docket Nos. 18-0076, 18-0077, 18-0078.
Consent Decision and Order.
Filed March 4, 2019.

William Meadows, d/b/a Tiger Safari, Inc.
Docket No. 19-J-0062.
Consent Decision and Order.
Filed March 22, 2019.

Stephanie Taunton, an individual d/b/a Bow Wow Productions and Hesperia Zoo.
Docket No. 14-0157.
Consent Decision and Order.
Filed April 22, 2019.

FEDERAL CROP INSURANCE ACT

Steve Lane.
Docket No. 15-0043.
Consent Decision and Order.
Filed April 15, 2019.

FEDERAL MEAT INSPECTION ACT

Harmon Brothers Meat, Inc.
Docket No. 19-0015.
Consent Decision and Order.
Filed February 7, 2019.

CONSENT DECISIONS

Mark Meats, Inc.
Docket No. 19-J-0063.
Consent Decision and Order.
Filed March 15, 2019.

Southeastern Provision LLC; James M. Brantley; Pamela K. Brantley; and Kelsey Brantley.
Docket Nos. 19-J-0066, 19-J-0067, 19-J-0068, 19-J-0069.
Consent Decision and Order.
Filed April 2, 2019.

HORSE PROTECTION ACT

Herbert Derickson, an individual.
Docket Nos. 14-0199 & 17-0163.
Consent Decision and Order.
Filed January 28, 2019.

Ewin Cowley, an individual.
Docket No. 17-0071.
Consent Decision and Order.
Filed January 28, 2019.

Bruce Vaughn, an individual.
Docket No. 17-0045.
Consent Decision and Order.
Filed February 5, 2019.

Sharon Peebles, an individual.
Docket No. 17-0049.
Consent Decision and Order.
Filed February 5, 2019.

J.W. Peebles, a/k/a Dick Peebles.
Docket Nos. 16-0028 & 17-0048.
Consent Decision and Order.
Filed February 6, 2019.

Brandye Craig Mills, an individual.
Docket No. 17-0190.
Consent Decision and Order.
Filed February 6, 2019.

Amy Blackburn, an individual.
Docket No. 17-0093.
Consent Decision and Order.
Filed February 8, 2019.

Keith Blackburn, an individual.
Docket No. 17-0094.
Consent Decision and Order.
Filed February 8, 2019.

Al Morgan, an individual.
Docket No. 17-0095.
Consent Decision and Order.
Filed February 8, 2019.

Larry Edwards.
Docket Nos. 14-0002, 14-0010, & 14-0014.
Consent Decision and Order.
Filed February 14, 2019.

Carl Edwards & Sons Stables, Inc.
Docket Nos. 14-0004, 14-0009, 14-0012, & 14-0016.
Consent Decision and Order.
Filed February 14, 2019.

Paige Edwards.
Docket No. 14-0011.
Consent Decision and Order.
Filed February 14, 2019.

Gary Edwards.
Docket Nos. 14-0007, 14-0015, & 17-0178.
Consent Decision and Order.
Filed February 21, 2019.

CONSENT DECISIONS

Beverly Townes Sherman, an individual.
Docket No. 17-0115.
Consent Decision and Order.
Filed February 21, 2019.

Patricia Kelly Sherman, an individual.
Docket No. 17-0116.
Consent Decision and Order.
Filed February 21, 2019.

Amelia Haselden, an individual.
Docket No. 17-0127.
Consent Decision and Order.
Filed February 21, 2019.

Larry Edwards, an individual.
Docket No. 17-0179.
Consent Decision and Order.
Filed February 21, 2019.

King Moore, an individual, a/k/a Slim Moore.
Docket No. 17-0184.
Consent Decision and Order.
Filed February 21, 2019.

Kelly Peevy, an individual.
Docket No. 17-0025.
Consent Decision and Order.
Filed February 28, 2019.

Shawn Fulton, an individual.
Docket No. 17-0124.
Consent Decision and Order.
Filed February 28, 2019.

Kenny Compton, an individual.
Docket No. 17-0041.
Consent Decision and Order.
Filed March 1, 2019.

Ricky Compton, an individual.
Docket No. 17-0042.
Consent Decision and Order.
Filed March 1, 2019.

Jamey Thompson, an individual.
Docket No. 17-0087.
Consent Decision and Order.
Filed March 1, 2019.

Russell J. Thompson, an individual.
Docket No. 17-088.
Consent Decision and Order.
Filed March 1, 2019.

Larry George, an individual.
Docket No. 17-0111.
Consent Decision and Order.
Filed March 1, 2019.

Bill Cantrell Stables, Inc., an Alabama corporation.
Docket No. 17-0107.
Consent Decision and Order.
Filed March 21, 2019.

Bill Cantrell, an individual.
Docket No. 17-0108.
Consent Decision and Order.
Filed March 21, 2019 *(amended April 20, 2020)*.

Larry Harrell, an individual.
Docket No. 17-0110.
Consent Decision and Order.
Filed March 21, 2019.

CONSENT DECISIONS

Wayne Putnam, an individual.
Docket No. 17-0193.
Consent Decision and Order.
Filed March 21, 2019.

Scott Beaty, a/k/a Michael Scott Beaty, an individual.
Docket No. 17-0069.
Consent Decision and Order.
Filed March 25, 2019.

Darius Newsome, an individual.
Docket No. 17-0084.
Consent Decision and Order.
Filed April 1, 2019.

Timothy Lee Smith, an individual.
Docket No. 14-0057 & 17-0194.
Consent Decision and Order.
Filed April 9, 2019.

Philip Trimble, an individual.
Docket No. 15-0097.
Consent Decision and Order.
Filed April 10, 2019.

Michael Wright, an individual.
Docket No. 17-0157.
Consent Decision and Order.
Filed April 16, 2019.

Dale Watts, an individual.
Docket No. 17-0090.
Consent Decision and Order.
Filed April 16, 2019.

Joshua D. Watts, an individual.
Docket No. 17-0091.
Consent Decision and Order.
Filed April 16, 2019.

Floyd Ray Jones, an individual.
Docket No. 17-0059.
Consent Decision and Order.
Filed April 19, 2019.

Derek Monahan, an individual d/b/a Derek Monahan Stables.
Docket No. 17-0149.
Consent Decision and Order.
Filed April 23, 2019.

Ronal Young, an individual.
Docket No. 17-0158.
Consent Decision and Order.
Filed April 25, 2019.

Ray Jones Trucking, Inc., a Kentucky corporation.
Docket No. 17-0135.
Consent Decision and Order.
Filed May 15, 2019.

Jimmy Reece, an individual.
Docket No. 17-0136.
Consent Decision and Order.
Filed May 15, 2019.

Chad Way, an individual.
Docket No. 17-0137.
Consent Decision and Order.
Filed May 15, 2019.

CONSENT DECISIONS

Cliff Wilson, an individual.
Docket No. 17-0104.
Consent Decision and Order.
Filed June 18, 2019.

Brad Beard, an individual, a/k/a William Bradley Beard.
Docket No. 17-0096.
Consent Decision and Order.
Filed June 24, 2019.

ORGANIC FOODS PRODUCTION ACT

Fusion Organic, S.P.R. de R.L. de C.V., d/b/a Fusion Organic of Jalisco, Mexico.
Docket No. 19-0008.
Consent Decision and Order.
Filed April 8, 2019.

Amos K. Stoltzfus, d/b/a Healthy Harvest.
Docket No. 19-0016.
Consent Decision and Order.
Filed May 9, 2019.

PLANT PROTECTION ACT

Redland Nursery, Inc.
Docket No. 15-0104.
Consent Decision and Order.
Filed June 28, 2019.

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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

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2019

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

--

MISCELLANEOUS ORDERS & DISMISSALS

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DEFAULT DECISIONS

--

CONSENT DECISIONS

--

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

In re: RAYMOND FRANK CHRISTIE, a/k/a RAY CHRISTIE, d/b/a CHRISTIE LIVESTOCK.
Docket No. 18-0020.
Decision and Order.
Filed March 18, 2019.

P&S – Answer, failure to file timely – Decision without hearing – Default – Objections – Rules of Practice – Service.

Thomas Bolick, Esq., for AMS.
Respondent Raymond Frank Christie, *pro se*.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge, for Channing D. Strother, Chief Administrative Law Judge.
Final Decision and Order by Bobbie J. McCartney, Judicial Officer.

DECISION AND ORDER AFFIRMING ALJ'S CORRECTED DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Summary of Relevant Procedural History

The relevant procedural history of this case is somewhat complex but has been fully set forth in Complainant's Response to Respondent's Appeal of Corrected Decision and Order Without Hearing by Reason of Default ("Complainant's Response") filed in the above-referenced proceeding on October 12, 2018 and is therefore adopted herein below. Complainant's Response was filed in response to the letter dated September 28, 2018 that respondent Raymond Frank Christie, a/k/a Ray Christie, d/b/a Christie Livestock ("Respondent"), filed to appeal the Corrected Decision and Order Without Hearing by Reason of Default ("Corrected Decision and Order") that Administrative Law Judge ("ALJ") Jill S. Clifton ("Judge Clifton") issued in the above-captioned matter on behalf of then-Acting Chief ALJ Channing D. Strother ("Chief Judge Strother")[1] on August 30, 2018.

[1] Channing D. Strother was appointed to the position of Chief Administrative Law Judge by the Secretary of Agriculture on October 17, 2018.

Complainant, the Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service, United States Department of Agriculture, states in Complainant's Response as follows:[2]

1. On March 9, 2018, Complainant filed an administrative complaint alleging that Respondent willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181 *et seq.*) ("Act"), and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. §§ 201.1 *et seq.*). Specifically, the Complaint alleged that Respondent had committed multiple violations of sections 312(a) and 409 (7 U.S.C. §§ 213(a) and 228b) of the Act. Section 312(a) of the Act is a prohibition against unfair, unjustly discriminatory, or deceptive practices by dealers and market agencies who are subject to the Act.[3] Violations of this section may result in the Secretary of Agriculture imposing a cease and desist order and a civil penalty of not more than $11,000 per violation after notice and full hearing, pursuant to section 312(b) of the Act (7 U.S.C. § 213(b)).[4]

2. On March 12, 2018, the USDA Hearing Clerk mailed copies of the Complaint and copies of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) ("Rules of Practice") to Respondent at Respondent's mailing address in Arcata, California. The

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[2] Complainant's Response at 1-7.

[3] *See* 7 U.S.C. § 213(a).

[4] The Packers and Stockyards Act provides that the Secretary of Agriculture may assess a maximum civil penalty of $10,000 for each violation of 7 U.S.C. § 192(a). 7 U.S.C. § 193(b). However, that maximum been increased several times 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. When Respondent violated the Act in this case, the maximum civil penalty for each violation of 7 U.S.C. § 192(a) was $11,000. *See* 7 C.F.R. § 3.91(b)(6)(i) (2010) ($11,000 maximum civil penalty for violations occurring after May 7, 2010); *cf.* 7 C.F.R. § 3.91(b)(6)(i) (2017) ($27,500 maximum civil penalty for violations occurring after December 5, 2017); 7 C.F.R. § 3.91(b)(1)(lvi) (2018) ($28,061 maximum civil penalty for violations occurring after March 14, 2018).

documents were sent to Respondent by certified mail, return receipt requested,[5] and by regular mail.

3. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the Complaint and in the Hearing Clerk's letter accompanying the Complaint that: (1) an answer should be filed with the Hearing Clerk within twenty days after service of the Complaint and (2) failure to file an answer within twenty days after service of the Complaint would constitute an admission of the allegations in the Complaint and a waiver of hearing. Pursuant to sections 1.136 and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136 and 1.139), the Hearing Clerk's letter further informed Respondent that his answer should admit or deny each allegation set forth in the Complaint and that filing an answer that did not deny the material allegations of the Complaint would constitute both an admission of those allegations and a waiver of his right to a hearing.[6]

United States Postal Service ("USPS") online tracking indicates that the Complaint was delivered to Respondent's address on March 17, 2018. Thus, Respondent's answer was due no later than April 6, 2018, twenty days after service of the Complaint.[7] Respondent did not file an answer by April 6, 2018, and no answer has been filed as of this date.

4. On April 23, 2018, counsel for Complainant filed a motion for Decision Without Hearing by Reason of Default ("Motion") and proposed Decision Without Hearing by Reason of Default ("Proposed Default Decision") because Respondent had not filed an answer to the Complaint. The Motion correctly stated that Respondent had violated section 312(a) of the Act (7 U.S.C. § 213(a)), but the Proposed Default Decision inadvertently stated that Respondent had violated section 202(a) of the Act (7 U.S.C. § 192(a)) instead of section 312(a) and that Respondent should cease and desist from committing further violations of section 202(a) instead of section 312(a). The Proposed Default Decision also inadvertently stated that Respondent should be assessed a civil penalty of $13,600 in accordance with section 203(b) of the Act (7 U.S.C. § 193(b)) instead of section 312(b) of the Act.

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[5] USPS Tracking No. 7015 3010 0001 5187 3552.

[6] 7 C.F.R. §§ 1.136(b),(c); 7 C.F.R. § 1.139.

[7] 7 C.F.R. § 1.136(a).

Section 202(a) of the Act is a prohibition against unfair, unjustly discriminatory, or deceptive practices by packers who are subject to the Act,[8] and violations of this section likewise may result in the Secretary of Agriculture imposing a cease and desist order and a civil penalty of not more than $11,000 per violation after notice and full hearing,[9] pursuant to sections 203(a) and (b) of the Act (7 U.S.C. §§ 193(a) and (b)).[10]

On April 23, 2018, the Hearing Clerk mailed copies of the Motion and Proposed Default Decision to Respondent at Respondent's mailing address in Arcata, California. These documents were sent to Respondent by certified mail.[11] Pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Respondent was informed in the Hearing Clerk's letter accompanying the Motion and Proposed Default Decision that he could file meritorious objections to the Motion and Proposed Default Decision with the Hearing Clerk within twenty days after service of those documents.

USPS online tracking indicates that the Motion and Proposed Default Decision were delivered to Respondent's address on April 30, 2018. Respondent's meritorious objections, if any, were due no later than May 21, 2018, twenty days[12] after service of the Motion and Proposed Default Decision.[13] Respondent did not file objections, meritorious or otherwise, by May 21, 2018.

5. On May 22, 2018, Chief Judge Strother issued a Decision and Order Without Hearing by Reason of Default ("Initial Default Decision") that was based on the Proposed Default Decision and thus contained the

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[8] *See* 7 U.S.C. § 192(a).

[9] The notice and full hearing required by section 203(b) of the Act is provided under section 203(a) of the Act (7 U.S.C. § 193(a)).

[10] *See supra* note 4.

[11] USPS Tracking No. 7015 3010 0001 5187 3590.

[12] The twentieth day after April 30, 2018 was May 20, 2018, a Sunday. Pursuant to section 1.147(h) of the Rules of Practice (7 C.F.R. § 1.147(h)), Respondent's meritorious objections were due on or before Monday, May 21, 2018.

[13] 7 C.F.R. § 1.139.

inadvertent errors described in paragraph 3 above. On the same day, the Hearing Clerk mailed a copy of the Initial Default Decision to Respondent at Respondent's mailing address in Arcata, California. This document was sent to Respondent by certified mail.[14] Pursuant to section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), Respondent was informed in the Hearing Clerk's letter accompanying the Initial Default Decision that he could appeal the Initial Default Decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk within thirty days after service thereof. The letter further informed Respondent that, in accordance with section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Initial Default Decision would become final and effective thirty-five days after the date of service if he or Complainant failed to file an appeal petition with the Hearing Clerk within the time prescribed by section 1.145(a) of the Rules of Practice.

Despite that the Initial Default Decision was mailed to Respondent's address in Arcata, California, USPS online tracking indicates that it was delivered to an unspecified recipient in Eureka, California on May 29, 2018. Complainant subsequently had one of its agents execute personal service of the Initial Default Decision and the accompanying Hearing Clerk's letter upon Respondent on July 11, 2018.[15] Respondent's appeal petition, if any, was due no later than August 10, 2018.[16] Respondent did not file an appeal petition by August 10, 2018, and Complainant did not file an appeal petition; therefore, the Initial Default Decision became effective on August 15, 2018, thirty-five days after it was personally

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[14] USPS Tracking No. 7012 3460 0003 3833 6515.

[15] *See* Complainant's Response, Exhibit I ("Certificate of Service"); *see also* 7 C.F.R. § 1.147(c)(3) ("Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of . . . [d]elivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]").

[16] *See* 7 C.F.R. § 1.145(a) ("Within 30 days after receiving service of the Judge's decision . . . a party who disagrees with the decision . . . may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk."). The thirtieth day after personal service was August 10, 2018.

served on Respondent.[17]

6. On or about August 15, 2018, Complainant belatedly discovered the inadvertent errors that were in the Proposed Default Decision and thus carried over into the Initial Default Decision. On August 27, 2018, counsel for Complainant filed a Request for Technical Correction of Decision and Order Without Hearing by Reason of Default ("Correction Request"). The Correction Request stated in pertinent part:

> Given that (1) the complaint and motion for Decision Without Hearing by Reason of Default cited the correct statutory provisions violated by respondent; (2) sections 312(a) and 202(a) of the Act prohibit the same kind of conduct by different entities that are subject to the Act; (3) sections 312(b) and 203(b) of the Act prescribe the same procedures for determining whether the conduct prohibited by sections 312(a) and 202(a) of the Act has occurred; (4) sections 312(b) and 203(b) of the Act prescribe the same remedies for the conduct prohibited by sections 312(a) and 202(a) of the Act; and (5) respondent was afforded the notice and opportunity for a full hearing in this proceeding pursuant to section 312(b) of the Act but failed to file an answer to the complaint, to file objections to the proposed decision, and to appeal the final decision, respondent was not denied any of his procedural rights in this proceeding or prejudiced in any way by the inadvertent errors in either the proposed decision or the final decision.

Correction Request at 2. It then requested the issuance of a corrected Decision and Order Without Hearing by Reason of Default that changed the Initial Default Decision's references to section 202(a) of the Act (7 U.S.C. § 192(a)) to section 312(a) of the Act (7 U.S.C. § 213(a)) and its reference to section 203(b) of the Act (7 U.S.C. § 193(b)) to section 312(b)

[17] *See* 7 C.F.R. § 1.139 (providing that a default decision "shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145").

of the Act ((7 U.S.C. § 213(b)).

7. On August 30, 2018, Judge Clifton, acting on behalf of Chief Judge Strother, issued an Order Reopening Case and Vacating Decision Issued May 22, 2018 ("Order Reopening Case and Vacating Decision"). On the same day, Judge Clifton also issued a Corrected Decision and Order Without Hearing by Reason of Default ("Corrected Default Decision") that reflected the changes proposed in Complainant's Correction Request. On August 31, 2018, the Hearing Clerk sent a copy of the documents to Respondent at Respondent's mailing address in Arcata, California. These documents were sent to Respondent via certified mail.[18] Pursuant to section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), Respondent was informed in the Hearing Clerk's letter accompanying the Corrected Default Decision that he could appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk within thirty days after service of the Corrected Default Decision. The letter further informed Respondent that, in accordance with section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Corrected Default Decision would become final and effective thirty-five days after the date of service if he or Complainant failed to file an appeal petition with the Hearing Clerk within the time prescribed by section 1.145(a) of the Rules of Practice.

Due to the problems that occurred during the attempt to serve the Initial Default Decision by certified mail, Complainant again had one of its agents execute personal service of the Order Reopening Case and Vacating Decision, the Corrected Default Decision, and the accompanying Hearing Clerk's letter on Respondent on September 12, 2018.[19] Respondent's appeal petition, if any, was due no later than October 12, 2018, thirty days after service of the Corrected Default Decision.[20]

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[18] USPS Tracking No. 7012 3460 0003 3833 6867.

[19] *See* Complainant's Response, Exhibit II. USPS online tracking indicates that the Corrected Default Decision that had been sent to Respondent could not be delivered to Respondent on September 29, 2018 and was returned to the sender marked as unclaimed.

[20] *See* 7 C.F.R. § 1.145(a) ("Within 30 days after receiving service of the Judge's decision . . . a party who disagrees with the decision . . . may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk."). The thirtieth day after personal service was October 12, 2018.

8. In a letter dated and filed on September 28, 2018, Respondent notified the Hearing Clerk that he was appealing the Corrected Default Decision. Per section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), Respondent's "Notice of Appeal" was timely filed. Apart from its heading, however, the letter merely provided:

> Dear Disciplinary Person Hearing Officer.
>
> This letter is to serve as my formal Notice of Appeal in this Default matter. Please accept and file this letter on my behalf to protect my appeal rights. I will provide more documents if needed.
>
> I am acting as my own attorney in this matter to try to save costs and expenses to be able to resolve this matter without the need of trial.
>
> I will continue to represent myself in this matter in the future.
>
> Thank you.
>
> Very truly:
> RAYMOND CHRISTIE

Respondent's Notice of Appeal at 1.

Conclusion and Order

For the reasons discussed more fully herein below, Respondent's appeal of the Corrected Default Decision is **denied**. As noted above, Respondent was properly served with the Complaint, Motion and Proposed Default Decision, Initial Default Decision, and Corrected Default Decision. Further, each document was accompanied by a Hearing Clerk's letter that apprised Respondent of his deadlines for filing the appropriate response thereto. Despite being properly served and so apprised, Respondent did not file an answer to the Complaint or meritorious objections to the Motion and Proposed Default Decision.

Respondent did not file an appeal petition until he had been served with the Corrected Default Decision.

Complainant acknowledges that Respondent's September 28, 2018 letter appealing the Corrected Default Decision was timely filed per section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)); however, Complainant correctly points out that this action simply preserved Respondent's appeal rights to the Judicial Officer and did not change the underlying fact that Respondent failed to timely file an answer to the Complaint.[21] Respondent's first and only filing in this matter was received 175 days after his answer was due.[22] The Department's case law is very clear that a default decision and order is proper when an answer is not timely filed.[23]

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[21] *See* Complainant's Response at 7.

[22] United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on March 17, 2018. Respondent had twenty days from the date of service to file a response. 7 C.F.R. § 1.136(a). Weekends and federal holidays shall not be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's answer was due on or before April 6, 2018.

[23] *See, e.g.*, *Zedric*, 46 Agric. Dec. 948, 956 (U.S.D.A. 1987) ("The Department gives fair warning to all respondents as to the consequences of failure to file an answer within the required 20 days. If good cause is shown as to the need for an extension of time, a motion filed before the expiration of the 20-day time period would generally be granted. But in view of the increasingly heavy workload of this Department, the budget constraints on hiring additional personnel, and the importance of having administrative disciplinary cases decided promptly to effectuate the congressional purpose of the remedial statutes administered by this Department, it is necessary to take a hard-nosed approach as to answers filed late, following the letter of the rules of practice."); *Coblentz*, 61 Agric. Dec. 330, 342-44 (U.S.D.A. 2002) (default decision properly issued where response to complaint was filed seven months and eight days after answer was due and respondent is deemed, by his failure to file a timely answer, to have admitted violations of Packers and Stockyards Act), *aff'd sub nom. Coblentz v. U.S. Dep't of Agric.*, 89 F. App'x 484 (6th Cir. 2003); *Bejarano*, 46 Agric. Dec. 925, 929-31 (U.S.D.A. 1987) (default order proper where timely answer not filed); *A.W. Schmidt & Son, Inc.*, 46 Agric. Dec. 586, 593-94 (U.S.D.A. 1987) (default order proper where timely answer not filed); *Carter*, 46 Agric. Dec. 207, 213(U.S.D.A. 1987) (default

Having failed to timely file an answer that denied and/or raised defenses to some or all of the allegations set forth in the administrative Complaint, and having also failed to file meritorious objections to Complainant's Proposed Default Decision, Respondent is now precluded by the Rules of Practice and the Department's case law from doing so on appeal. Respondent's offer to "provide more documents if needed,"[24] raised for the first time on appeal, will not be considered because Respondent failed to preserve his right to enter documents into evidence by filing either an answer to the Complaint or meritorious objections to the Proposed Default Decision. Further, Judge Clifton's Order Reopening Case and Vacating Decision Issued May 22, 2018 did not re-open this matter for the purpose of taking and considering new evidence.

For the foregoing reasons, Respondent's appeal is **DENIED**, and Judge Clifton's August 30, 2018 Corrected Decision and Order Without Hearing by Reason of Default is **AFFIRMED**. No change or modification of the Judge's Corrected Decision and Order is warranted; therefore, it is hereby adopted as the final order in this proceeding pursuant to the provisions of section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)) for all purposes, including judicial review.[25]

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order proper where timely answer not filed); *McDaniel*, 45 Agric. Dec. 2255, 2260-61 (U.S.D.A. 1986) (default order proper where timely answer not filed); *Nw. Orient Airlines*, 45 Agric. Dec. 2190, 2194-95 (U.S.D.A. 1986) (default order proper where timely answer not filed); *Schwartz*, 45 Agric. Dec. 1473 (U.S.D.A. 1986) (default order proper where timely answer not filed); *Cuttone*, 44 Agric. Dec. 1573, 1576 (U.S.D.A. 1985) (default order proper where timely answer not filed), *aff'd per curiam*, 804 F.2d. 153 (D.C. Cir. 1986) (unpublished). *See also McCoy v. U.S. Dep't of Agric.*, No. 16-3482, slip op. at 4-5 (6th Cir. Aug. 21, 2017) (Order Den. Pet. for Review) (holding that the Judicial Officer properly granted default decision where respondent's answer was filed late due to delay in retaining counsel); *Morrow v. Dep't of Agric.*, No. 94-3793, 65 F.3d 168 (Table), 1995 WL 523336, at **2-3 (6th Cir. Sept. 5, 1995) (holding that default judgment was properly issued where respondent conceded that his answer was filed three days late and the Rules of Practice did not violate respondent's constitutional right to due process).

[24] Respondent's Notice of Appeal at 1.

[25] Respondent has the right to seek judicial review in the appropriate United States Court of Appeals, in accordance with 28 U.S.C. §§ 2341–2350. Respondent must

WHEREFORE, Respondent Raymond Frank Christie, a/k/a Ray Christie, d/b/a Christie Livestock, his agents and employees, directly or through any corporate or other device, shall cease and desist from failing to provide 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 sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b).

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is hereby assessed a civil penalty in the amount of thirteen-thousand and six-hundred dollars ($13,600.00). Respondent shall send a certified check or money order, payable to the U.S. Department of Agriculture, to USDA GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0035, within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that the payment is in reference to P&S Docket No. 18-0020.

RIGHT TO JUDICIAL REVIEW

Raymond Frank Christie 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. Christie must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order. The date of entry of the Order is March __, 2019.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in each of the dockets identified herein above, with courtesy copies provided via email where available.

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seek judicial review within sixty days after entry of the Order in this Decision and Order.

MISCELLANEOUS ORDERS & DISMISSALS

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. Substantive 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: https://oalj.oha.usda.gov/current.

PACKERS AND STOCKYARDS ACT

In re: EACH CASE PENDING BEFORE THE USDA OFFICE OF ADMINISTRATIVE LAW JUDGES.
All Dockets Pending Before USDA OALJ.
Blanket Order Extending Filing Deadlines Occurring During Furlough in All Cases Pending Before USDA Administrative Law Judges.
Filed January 11, 2019.

In re: EACH CASE PENDING BEFORE THE USDA OFFICE OF ADMINISTRATIVE LAW JUDGES.
All Dockets Pending Before USDA OALJ.
Blanket Order Amending to February 11, 2019 Filing Deadlines Occurring During the Furlough Period in All Cases Pending Before USDA Administrative Law Judges.
Filed January 29, 2019.

In re: DEBORAH NICHOLAS, an individual.
Docket No. 18-0062.
Order Dismissing Complaint as to Respondent Deborah Nicholas.
Filed January 31, 2019.

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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: https://oalj.oha.usda.gov/current].

PACKERS AND STOCKYARDS ACT

TONY BOTT, an individual.
Docket No. 18-0075.
Default Decision and Order.
Filed April 17, 2019.

TOMMY BRADLEY WELCH, d/b/a TBW CATTLE.
Docket No. 19-J-0054.
Default Decision and Order.
Filed June 25, 2019.

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CONSENT DECISIONS

PACKERS AND STOCKYARDS ACT

S & S Buying, Inc.; and Troy Siebels.
Docket Nos. 18-0054, 18-0044.
Consent Decision and Order.
Filed January 28, 2019.

Warren Hudspeth, d/b/a 56 Cattle Co.
Docket No. 18-0025.
Consent Decision and Order.
Filed February 15, 2019.

John P. McGraw.
Docket No. 19-0001.
Consent Decision and Order.
Filed February 27, 2019.

L2 Cattle Corporation, Inc.; and Ronnie Lewis.
Docket Nos. 19-J-0052, 19-J-0053.
Consent Decision and Order.
Filed February 28, 2019.

Glean Plunkett; and Fort Payne Stockyard, Inc.
Docket Nos. 19-J-0056, 19-J-0057.
Consent Decision and Order.
Filed March 7, 2019.

R & W Farms, LLC; Wanda Thompson; and Rickey G. Thompson.
Docket Nos. 19-0010, 19-0011, 19-0012.
Consent Decision and Order.
Filed April 26, 2019.

Cargill Meat Solutions Corporation.
Docket No. 19-J-0089.
Consent Decision and Order.
Filed May 16, 2019.

Allen Thompson Jr. and Chuck Thompson, a Missouri partnership.
Docket Nos. 19-0005 & 19-0006.
Consent Decision and Order.
Filed May 17, 2019.

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AGRICULTURE DECISIONS

Volume 78

Book One

Part Three (PACA Decisions)

Pages 180–247

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

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2019

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

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MISCELLANEOUS ORDERS & DISMISSALS

--

DEFAULT DECISIONS

--

CONSENT DECISIONS

--

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: JONATHAN DYER; DREW JOHNSON, a/k/a DREW R. JOHNSON; and MICHAEL S. RAWLINGS.
Docket Nos. 14-0166, 14-0168, 14-0169.
Decision and Order.
Filed February 7, 2019.

PACA-APP – Alter ego – Appointments Clause – Hearing, new – *Lucia v. SEC* – Owner – Remand – Responsibly connected.

Stephen P. McCarron, Esq., for Petitioners.
Charles L. Kendall, Esq., for AMS.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Decision and Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER AFFIRMING IN PART AND REVERSING IN PART INITIAL DECISION AND ORDER IN DOCKET NOS. 14-0166, 14-0168, AND 14-0169

Summary of Procedural History and Preliminary Findings

This is a "responsibly connected" proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. § 499(a) *et seq.)* (PACA), which is conducted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.)* (Rules or Rules of Practice).

On June 28, 2013, a disciplinary complaint (Complaint) was filed against Adams Produce Company LLC (Adams), for failing to make full payment promptly in the amount of $10,735,186.81 to 51 produce sellers for 9,314 lots of perishable agricultural commodities that the company purchased, received, and accepted during the period of August 8, 2011 through May 18, 2012. As of the filing of the Complaint, $1,928,417.72 remained unpaid.

On November 22, 2013, a Default Decision and Order was entered against Adams, finding that Adams willfully, repeatedly and flagrantly

violated section 2(4) of the PACA, by failing to make full payment promptly as alleged in the Complaint. The Default Decision and Order became final and effective on January 8, 2014.

Petitioners Jonathan Dyer, Steven C. Finberg, Drew Johnson, and Michael S. Rawlings, each filed a petition for review of the determination of the Director of the PACA Division, Specialty Crops Program, Agricultural Marketing Service (Respondent) determining that each Petitioner was "responsibly connected" with Adams, as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), during the period of time Adams violated section 2 of the PACA. These four "responsibly connected" cases were consolidated for hearing in accordance with 7 C.F.R. § 1.137 of the Rules of Practice by direction of Rulings and Preliminary Instructions filed on September 4, 2014. The hearings in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, DC, before the Administrative law Judge (ALJ) Jill S. Clifton (Judge Clifton).[1] Although the four petitions for review of the Director's responsibly connected determinations were consolidated for hearing, Judge Clifton indicated in her Initial Decision that she would issue a separate decision regarding Steven Finberg's responsibly connected status.

On May 19, 2017 Judge Clifton issued a Decision and Order (Initial Decision or ID) in Dockets 14-0166, 14-0168, and 14-0169, finding that Petitioners Dyer, Johnson, and Rawlings were not "responsibly connected" with Adams during the period that Adams violated section 2(4) of the PACA.

On June 21, 2017, Respondent timely filed an appeal of Judge Clifton's Initial Decision seeking to establish that Petitioners Dyer, Johnson and Rawlings have each failed to rebut the presumption that they were "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA and requesting that the determination by the Director of the PACA Division that Petitioners were "responsibly connected" with Adams during the period of its repeated and flagrant

[1] The parties' Updated Stipulation as to Proceedings filed on June 11, 2015 provided, among other things: All evidence in the consolidated hearing will be available to be considered in each case.

violations of the PACA be affirmed. Specifically, Respondent requests that the Judicial Officer reverse the ALJ's holdings in the Initial Decision that: 1) Petitioners Dyer, Johnson, and Rawlings were not owners of Adams when Adams violated the PACA; and 2) Adams was the *alter ego* of Scott Grinstead when Adams violated the PACA. Also, Respondent asserts that if the Judicial Officer agrees that one or both of these conclusions are in error, the determinations by the Director of the PACA Division that Petitioners Dyer, Johnson, and Rawlings were each "responsibly connected" with Adams during the period that Adams willfully, repeatedly and flagrantly violated section 2(4) of the PACA, should be affirmed.

On July 25, 2017, Judge Clifton issued her Decision and Order on Docket 14-0167, affirming the determination of the Agency and finding that Petitioner Finberg was "responsibly connected" to Adams, within the meaning of the PACA, pursuant to 7 C.F.R. §499a(b)(9).

On August 21, 2017, Petitioner Finberg timely filed an appeal to the Judicial Officer asserting that he was not "actively involved" in the activities resulting in the violations, that Adams was the *alter ego* of Mr. Grinstead, and, therefore, that he had successfully rebutted the presumption that he was "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA.

On December 28, 2017, the Judicial Officer remanded the instant proceeding to Judge Clifton in order to put to rest any Appointments Clause claim that may arise in this proceeding in light of the Solicitor General's position in *Lucia v. SEC* (*Raymond J. Lucia, et al. v. S.E.C.*, 138 S. Ct. 2044 (2018)) (*Lucia*)[2]. On February 1, 2018, the Judicial Officer denied the Petitioners' request for reconsideration of the Remand Order.

On November 30, 2018, Judge Clifton issued her Notice of Completion

[2] At the time *Lucia v. SEC,* 138 S. Ct. 2044 (2018) was pending before the Supreme Court of the United States. The Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2.

of Judge's Tasks on Remand (Notice) concluding that Docket Nos. 14-0166, 14-0167, 14-0168 & 14-0169 were ready for return to the Judicial Officer based on the following findings:

1) That Petitioners Jonathan Dyer, Drew Johnson, and Michael S. Rawlings have consistently declined to request relief pursuant to the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). (Petitioners' Response filed October 31, 2018, by Stephen P. McCarron, Esq.)

2) That Petitioner Steven C. Finberg has respectfully requested a new hearing conducted under the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), before a different administrative law judge, who did not previously participate in the matter. (Petitioners' Response filed October 31, 2018, by Stephen P. McCarron, Esq.); and,

3) That Respondent did not initiate a challenge to Judge Clifton's authority pursuant to the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 (2018); further, AMS indicated that if the parties were to waive any challenge to the issue of Judge Clifton's authority to enter a Decision and Order in these cases, Respondent prefers that the cases continue to resolution before the Judicial Officer but that absent such waiver, the cases may need to be set for a new hearing, potentially before a different administrative law judge. (Respondent's Response filed October 10, 2018, by Charles L. Kendall, Esq.).

During the course of my February 1, 2019 phone conference with Mr. McCarron on behalf of the Petitioners and Mr. Kendall on behalf of Respondent, the parties reaffirmed their respective positions as reflected by these findings.

REMAND ORDER

Based on the foregoing, it is my determination that Docket Nos. **14-0166**, **14-0167**, **14-0168** & **14-0169** are properly before the Judicial Officer in accordance with Judge Clifton's November 30, 2018 Notice. However, in light of the fact that Petitioner Finberg has requested that a new hearing be conducted in accordance with *Lucia,* while the other three petitioners have declined to request such relief, the dockets have become procedurally distinguishable. Accordingly, Docket Nos. **14-0166**, **14-0168** & **14-0169** pertaining to Petitioners Jonathan Dyer, Drew Johnson, and Michael S. Rawlings will remain consolidated and will remain in appeal status before the Judicial Officer, while Docket No. **14-0167** pertaining to Petitioner Steven C. Finberg will be Remanded for further proceedings to be conducted in accordance with *Lucia.*

In a ceremony on July 24, 2017, the Secretary of the United States Department of Agriculture, Sonny Perdue (Secretary Perdue), personally ratified the prior appointments of Chief ALJ Bobbie J. McCartney (retired from that position on 1/20/2018), ALJ Jill S. Clifton, and ALJ Channing D. Strother and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that he "conducted a thorough review of the qualifications of this Department's administrative law judges," and "affirm[ing] that in a ceremony conducted on July 24, 2017, [he] ratified the agency's prior written appointments of the [USDA ALJs] before administering their oath of office …"

On June 21, 2018, almost one year later, the U.S. Supreme Court held that the Securities and Exchange Commission's ALJs are inferior officers of the United States, U.S. Const. Art. II, §2, cl. 2., *Raymond J. Lucia, et al. v. S.E.C.*, 138 S. Ct. 2044 (2018) (*Lucia*) and therefore must be appointed consistent with the Appointments Clause. The actions of the Secretary of Agriculture in reviewing the qualifications of his ALJs, personally ratifying their appointments, and personally administering their renewed Oaths of Office, go well beyond a simple recitation of ratification, are clearly consistent with the Supreme Court's ruling in *Lucia* and are therefore entitled to full deference. Accordingly, certainly as of July 24, 2017, the USDA's ALJs, as inferior officers of the United States subject to

the Appointments Clause, were duly appointed by a "head of the department" as required by U.S. Constitution, Art. 2, §2, cl. 2 and the Supreme Court's ruling in *Lucia*.

Because the hearing conducted by Judge Clifton in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, DC, and the ensuing Decision and Orders issued on July 25, 2017 pertaining to Petitioner Finberg, predate the July 24, 2017 and December 5, 2017 actions of the Secretary of Agriculture addressing the Appointments Clause requirements; Petitioner Finberg's request for a hearing before an ALJ other than Judge Clifton is **GRANTED** and the proceedings in Docket No. 14-0167 are hereby **REMANDED** for further proceedings to be conducted in accordance with *Lucia.*

The parties are advised that the newly appointed ALJ shall exercise the full powers conferred by the USDA Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in this matter. Rather, the Decision and Order issued on July 25, 2017 by Judge Clifton in Docket No. 14-0167 is hereby **VACATED** and the written record which has already been made by the parties in this proceeding shall be reviewed ***de novo*** to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any ***new*** testimony or other evidence.

Testimony taken at USDA hearings are taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any ***new*** evidence not previously submitted in the prior proceeding.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in all of the dockets identified herein above.

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In re: OLYMPIC WHOLESALE PRODUCE, INC.
Docket No. 18-0009.
Decision and Order.
Filed February 13, 2019.

PACA – *De minimis* amount – Failure to pay – Flagrant violations – Full payment promptly, failure to make – License, revocation of – Motion to vacate – Produce debt – Prompt payment – Repeated violations – Sanctions – Trust claim, withdrawal of – Willful violations – Written record, decision on.

Christopher P. Young, Esq., for AMS.
Stephen P. McCarron, Esq., for Respondent.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Decision and Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER DENYING RESPONDENT'S MOTION TO VACATE DECISION AN ORDER ON THE WRITTEN RECORD AND AFFIRMING DECISION AND ORDER

Summary of Background

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq*.) ("PACA"), wherein Administrative Law Judge ("ALJ") Jill Clifton issued an August 28, 2018 Decision and Order on the Written Record ("Decision and Order") finding, *inter alia*, that Respondent, during the period December 2016 through May 2017, on or about the dates and in the transactions set forth in Appendix A to the Complaint filed in this case, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to four (4) sellers for 108 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of $898,725.70. ALJ Clifton further denied Respondent's request for an oral hearing and ordered that the facts and circumstances of Respondent's PACA violations be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

On September 28, 2018, Respondent filed a Motion to Vacate Decision and Order on the Written Record, or in the Alternative, to Appeal to the

Judicial Officer Pursuant to 7 C.F.R. § 1.145 ("Motion to Vacate"),[1] apparently on the sole basis that on May 15, 2018, one of the unpaid produce sellers listed on Appendix A to the Complaint in the instant case filed a Voluntary Dismissal and Withdrawal of its Trust Claim in District Court (in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 17-cv-08381). Respondent asserts in its motion that because the produce seller New Era Produce, LLC ("New Era") withdrew its claim in District Court, New Era should be removed from the list of produce sellers that ALJ Clifton in the August 28, 2018 Decision and Order found were owed unpaid and past due produce debt by Respondent (New Era is owed $762,253.05 by Respondent). Respondent seeks to have the amount owed to New Era removed from consideration in an effort to argue that the remaining balance of $136,472.65 ($898,725.70 - $762,253.05 = $136,472.65), an amount which Respondent apparently does not dispute is a past due unpaid produce debt, is a *de minimis* amount and that therefore does not warrant a finding or sanctions against Respondent. Complainant's Response to Respondent's Motion to Vacate was filed on October 23, 2018.

For the reasons discussed more fully herein below, Respondent's Motion to Vacate is denied and the Decision and Order issued by ALJ Clifton on August 28, 2018 is affirmed.

Discussion

1. New Era's withdrawal of trust claim is not dispositive to Respondent's failure to pay.

Respondent provides, as an exhibit to its Motion to Vacate, the May 15, 2018 Voluntary Dismissal and Withdrawal of its Trust Claim filed by New Era in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 17-cv-08381. The Voluntary Dismissal consists of two lines stating only that New Era voluntarily withdrew its PACA trust claim and offers no substantive explanation for the dismissal of the trust claim. The fact that the claim was withdrawn and

[1] Complainant asserts that Respondent's filing does not meet the requirements of a petition for appeal (7 C.F.R. § 1.145); however, Respondent's filing will be deemed sufficient for purposes of this Order.

dismissed in District Court is not dispositive of whether Respondent failed to pay New Era in accordance with the provisions of the PACA.

The fact that a PACA produce seller has perfected its rights under the trust provisions of the PACA, or that a PACA trust claimant has withdrawn or waived its PACA trust rights under the PACA, in no way precludes the Secretary from enforcing the full and prompt payment provisions of the PACA under section 2(4) (7 U.S.C. § 499b(4)). *Baiardi Food Chain v. United States*, 482 F.3d 238, 242-44 (3rd Cir. 2007). Nor do these facts preclude disciplinary sanctions for a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *Id.* Complainant's position on this issue, set forth in its October 23, 2018 Response to Respondent's Motion, accurately summarizes the applicable law and is hereby adopted. Full payment promptly in accordance with the PACA means payment by a buyer within ten days after the day(s) on which produce is accepted, provided that parties may elect to use different payment terms, so long as those terms are reduced to writing prior to entering into the transaction. The burden of proof of such written agreement is on the party claiming existence of the agreement. 7 C.F.R. §§ 46.2 (aa)(5) and 46.2 (aa)(11); *see Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998). A PACA licensee always has a duty under section 2(4) of the PACA to make full payment promptly (*Scamcorp*, *Inc.*, 57 Agric. Dec. at 547-49); the PACA trust is an additional remedy under a separate section of the Act (7 U.S.C. § 499e(c)) against a buyer failing to make prompt payment. *Idahoan Fresh*, 157 F.3d 197, 199 (3d Cir. 1998); H.R. REP. NO. 98-543, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406. Prior to this amendment to the PACA, unpaid produce suppliers were unsecured creditors vulnerable to the buyers' practice of granting other creditors a security interest in their inventory and accounts receivable. *In re Lombardo Fruit & Produce Co.*, 12 F.3d 806, 808-09 (8th Cir. 1994).

Respondent, in its Motion to Vacate, in no way substantively addresses the debt owed to New Era or states that the debt has been (or will be) paid. Moreover, Respondent does not address the declaration of PACA Senior Marketing Specialist Jacob Garcia, who on July 10, 2018 (two months after New Era's Voluntary Dismissal and waiver of trust claims in District Court) communicated with Gregory Holzhausen, Managing Member of New Era and was told by Mr. Holzhausen that as of that date, the entire New Era debt of $762,253.05 as stated in the Complaint was still owed by

Respondent. Nor does Respondent in any way address Jacob Garcia's finding that as of July 10, 2018, Respondent had accumulated $123,567.00 in additional roll-over PACA produce debt to produce sellers. *See* Declaration of Jacob Garcia; Decision and Order on the Written Record at 8-9.

The amount owed to New Era, as stated in Appendix A to the Complaint, the Declaration of Jacob Garcia, and as found by ALJ Clifton in her August 28, 2018 Decision and Order, is supported by the record; therefore, it will not be subtracted from the total debt of $898,725.70 that ALJ Clifton found Respondent owed to produce sellers. That New Era withdrew and waived its PACA trust rights in the District Court forum does not eliminate Respondent's PACA prompt-payment violation as to New Era, nor does it bar a finding by the Secretary that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA when it failed to promptly pay New Era. *Baiardi Food Chain*, 482 F.3d at 241-44.

2. Respondent is incorrect as to what constitutes a *de minimis* amount.

Assuming *arguendo* that the New Era debt should be subtracted from the $898,725.70 total debt that ALJ Clifton found Respondent owed to produce sellers, the $136,472.65, which Respondent apparently does not dispute is a past-due unpaid produce debt owing to three produce sellers, is not a *de minimis* amount. *See, for example*, *D.W Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994) (a finding of PACA violation and sanction is appropriate whenever the total amount due and owing exceeds $5,000); *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984) (Ruling on Certified Question) (no hearing required unless "the amount presently due and unpaid would be *de minimis*, *e.g.*, less than $5,000"), *final decision*, 44 Agric. Dec. 870 (U.S.D.A. 1985). *See also Scamcorp, Inc.*, 57 Agric. Dec. at 551 n.7.

Respondent has made no assertion in the Answer, or in any subsequent filing, that full payment of the past due and unpaid New Era debt or *any* of the past due and unpaid produce debt owed to the other sellers listed in the Appendix to the Complaint in this case will be made or full compliance will be achieved pursuant to the parameters set by the *Scamcorp* case. *See*

id. at 548-49. Under the policy enunciated in the *Scamcorp* case (*see* ALJ Clifton's Decision and Order at 5-6), this is a no-pay case for which revocation of Respondent's license is warranted, or publication in lieu of revocation. *Id.* No genuine issue of fact exists in this case that would require a hearing.[2] Under these circumstances, a Decision and Order on the record and finding of PACA violation and sanction was appropriate. *Id.*; *see also H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 7 C.F.R. § 1.139.

3. Respondent's PACA Violations Were Repeated, Flagrant, and Willful.

The Secretary of Agriculture may revoke the license of a dealer who is found to have committed repeated, flagrant, and willful PACA violations.[3] As the Judicial Officer has explained:

> [O]ne of the primary remedial purposes of the PACA [is] the financial protection of sellers of perishable agricultural commodities. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the P ACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other P ACA licensees and even customers of perishable agricultural commodities who ultimately bear increased industry costs resulting from failures to pay. *These adverse repercussions can be avoided by limiting participation in the perishable agricultural*

[2] *See Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("Common sense suggests the futility of hearings when there is no factual dispute of substance.").

[3] *See* 7 U.S.C. § 499h(a); 5 U.S.C. § 588(c); *Norinsberg v. U.S. Dep't of Agric.*, 47 F.3d 1224, 1225 (D.C. Cir. 1995).

> *commodities industry to financially responsible persons, which is one of the primary goals of the PACA.*[4]

ALJ Clifton's finding that Respondent's violations in this case were repeated is fully supported by the record and is affirmed. Violations are "repeated" under PACA when they are committed multiple times, non-simultaneously.[5] As Respondent failed to pay four sellers promptly and in full for 108 lots of perishable agricultural commodities over a nearly six-month period, its violations were clearly repeated.

ALJ Clifton's finding that Respondent's PACA violations were flagrant is also supported by the record and is hereby affirmed. Flagrancy is determined by evaluating the number of violations, total money involved, and length of time during which the violations occurred.[6] The signed declaration by PACA employee Jacob Garcia provides that, as of July 10, 2018, Respondent owes a total of at least $889,233.70 to the four sellers named in Appendix A to the Complaint.[7] The declaration further states: "Since the completion of my compliance investigation there have been three additional informal complaints filed against Olympic Wholesale Produce, Inc., in the amount of $123,567.00. Olympic Wholesale Produce, Inc., has not responded to two complaints, and is not disputing the other."[8] By failing to pay that money – far more than a *de minimis* amount – to multiple sellers over a near six-month period and proceeding to accumulate an additional $123,567.00 in produce debt thereafter, Respondent has committed flagrant PACA violations.[9] Respondent submits no evidence to the contrary.

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[4] *Havana Potatoes of N.Y. Corp.*, 55 Agric. Dec. 1234, 1273-74 (U.S.D.A. 1996) (emphasis added).

[5] *See H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 592 (6th Cir. 2003); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

[6] *Five Star Food Distribs., Inc.,* 56 Agric. Dec. at 895; *Havana Potatoes,* 55 Agric. Dec. at 1270; *see Reese Sales Co. v. Hardin*, 458 F. 2d 183, 185 (9th Cir. 1972).

[7] *See* Mot. for Decision Without Hr'g Attach. at 1 ¶¶ 3-6.

[8] *Id.* at 1 ¶ 7.

[9] AMS is not required to prove – and ALJ Clifton was not required to find – the

Lastly, ALJ Clifton's finding that Respondent's violations were willful is fully supported by the record and is hereby affirmed.

> A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Willfulness is reflected by Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.[10]

Given the many transactions, substantial amount of debt, and continuation of violations over a six-month period in this case, ALJ Clifton correctly found that Respondent's violations were willful in that Respondent knew or should have known it did not have sufficient funds with which to comply with the prompt-payment provisions of PACA.[11]

ORDER

For the foregoing reasons, Respondent's Motion to Vacate is DENIED. The Decision and Order issued by Administrative Law Judge Jill Clifton on August 28, 2018 is AFFIRMED.

1. Olympic Wholesale Produce, Inc.'s Motion to Vacate Decision and Order on the Written Record is DENIED.

2. The finding that Olympic Wholesale Produce, Inc. committed willful, flagrant, and repeated violations of section 2(4) of PACA (7 U.S.C. § 499b(4)) is fully supported by the record and is AFFIRMED.

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exact number of unpaid produce sellers or the exact amount Respondent owes each seller. *See Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1835-36 (U.S.D.A. 2005*), petition for review denied,* 482 F.3d 238 (3d Cir. 2007); *see also Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1929-31 (U.S.D.A. 2005).

[10] *Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998).

[11] *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016).

3. Olympic Wholesale Produce, Inc.'s PACA license, No. 19740290, is revoked. In the alternative, in the event that Olympic Wholesale Produce, Inc. failed to renew its license, the facts and circumstances of Olympic Wholesale Produce Inc.'s PACA violations shall be published.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in all the dockets identified herein above.

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In re: HUXTABLE'S KITCHEN, INC.; and LEWIS MACLEOD.
Docket Nos. 18-0007, 18-0024.
Decision and Order.
Filed May 16, 2019.

PACA-APP – PACA-D – Admissions – Answer, failure to file – Attorney of record, service on – Bankruptcy – Complaint, service of – Default – Due process – Full payment promptly, failure to make – Responsibly connected – Schedule F – Service of process – Stay – Violations, publication of facts and circumstances regarding.

Shelton S. Smallwood, Esq., and Joyce McFadden, Esq., for AMS.
Jason C. Manfrey, Esq., for Respondent Huxtable's Kitchen, Inc.
John C. Gentile, Esq., and Jennifer R. Hoover, Esq., for Petitioner Lewis Macleod.
Lawyer.
Initial Order entered by Channing D. Strother, Chief Administrative Law Judge.
Decision and Order entered by Bobbie J. McCartney, Judicial Officer.

DECISION AND ORDER AFFIRMING IN PART AND REVERSING IN PART ALJ ORDER ON SUGGESTION OF BANKRUTPCY AND SEGREGATING DOCKETS FOR REMAND

Appeal Petition

This is a disciplinary proceeding initiated by Complainant, Specialty Crops Program, Agricultural Marketing Service ("Complainant" or "AMS"), against Huxtable's Kitchen, Inc. ("Respondent") on October 24, 2017 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) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice" or "Rules").

Complainant appeals the March 30, 2018 Order[1] issued by the Acting Chief Administrative Law Judge ("Chief Judge" or "ALJ") denying Complainant's Motion for Decision Without Hearing by Reason of Default ("Motion for Default") based on a finding that service of the Complaint on Respondent was not properly effected under the Rules of Practice.

Relevant Procedural History as to PACA-D Docket No. 18-0007

The record reflects that during all times relevant to the alleged violations Respondent Huxtable's Kitchen, Inc. was licensed and operating subject to the provisions of the PACA. License number 20120330 was issued to Respondent on October 6, 2011. This license was succeeded by license number 20160338, which was issued to Respondent on January 25, 2016. The license terminated on January 25, 2017, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), after Respondent failed to pay the required annual renewal fee.

Complainant filed a disciplinary complaint on October 24, 2017, 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 six sellers of the agreed purchase prices, or balances thereof, in the total amount of $551,829.47 for 174 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce. The Complaint alleged that the violations occurred in commerce during the period of October 2015 through May 2016, on or about the dates and in the transactions set forth in Appendix A and B to the Complaint, attached thereto and incorporated therein by reference, which were documents referenced from the filings in Respondent's

[1] The March 30, 2018 Order also found that the Complaint in this matter is not barred by the Bankruptcy Code's Section 362 automatic stay. *See* Order at 10. This finding, which was not appealed, is fully supported by statutory, regulatory, and judicial authority and is affirmed and adopted herein.

Voluntary Petition for Bankruptcy filed on June 4, 2016 under Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*) in the United States Bankruptcy Court, District of Delaware (designated Case No. 16-11538) ("Chapter 7 Bankruptcy").

Respondent admits in Schedule F of its Chapter 7 Bankruptcy filings that the six creditors listed in Appendix A to the Complaint were collectively owed undisputed unsecured produce debt in the amount of $535,954.79 for 174 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce. Accordingly, pursuant to section 1.141(h)(6) of the Rules of Practice,[2] Complainant respectfully requested that the ALJ take official notice of Respondent's Voluntary Bankruptcy Petition and Schedule F therein.

Based on these admissions, the Complaint also 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 the violations be published***. It is important to note that the relief requested by the Complaint does not seek reparations, restitution, or any sort of money judgment of the underlying debts.

The Complaint was attached to a detailed letter from the Hearing Clerk's Office explaining the nature of the proceedings, providing a citation to the applicable Rules of Practice, explaining that under the Rules of Practice a written answer to the Complaint signed by Respondent or his attorney of record must be filed within twenty days from the receipt of the letter and attached Complaint, providing information for the submission of filings to the Hearing Clerk's Office by means of email, providing the Hearing Clerk's Office email address, and providing a phone number for the Hearing Clerk Liaison Officer should Respondent wish to contact the Hearing Clerk's Office. The record reflects that the Hearing Clerk's letter and the Complaint were served on October 30, 2017 by means of the United States Postal Service ("USPS"), Certified Mail with Return Receipt Requested, to the last known principal place of business for Respondent's attorney of record, Jason R. Parish of Kirkland & Ellis, LLP, at 655

[2] 7 C.F.R. § 1.141(h)(6).

Fifteenth Street, NW, Washington, DC 20005.[3]

Complainant provided, as proof of service of the Complaint, a copy of the USPS Tracking Report[4] downloaded from the USPS official website.[5] The Tracking Report reflects that following several unsuccessful attempts, two because no authorized recipient was available, the Complaint was "delivered to an agent at 7:29am on October 30, 2017 in WASHINGTON, DC 20005."[6] The full address was not reflected on the Tracking Report but was spelled out in full on the Certified Mail Receipt associated with the USPS Tracking number.

Respondent failed to file an answer to the Complaint; therefore, pursuant to section 1.139 of the Rules of Practice,[7] on January 23, 2018, Complainant filed a Motion for Decision Without Hearing by Reason of Default ("Motion for Default"). The record reflects that Complainant's Motion for Default was served by the Hearing Clerk's Office via certified mail on January 24, 2018 to the same name and address and in the same manner as the Complaint.[8]

On February 2, 2018 the Hearing Clerk's Office received and filed a Notice of Appearance from Jason C. Manfrey, Esq. of Fox Rothschild LLP for Alfred T. Guiliano, the Chapter 7 Trustee for the estate of Respondent Huxtable's Kitchen, Inc.,[9] dated February 1, 2018. The Notice of Appearance directed that:

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[3] Mr. Parish identified himself as counsel for Huxtable's Kitchen, Inc. and even attended the investigation's exit interview on the company's behalf. *See* Complainant's "RESPONSE TO [ACTING] CHIEF ALJ'S ORDER OF FEB. 28, 2018" (hereinafter "Complainant's Response") at 2.

[4] USPS Certified Mail Tracking No. 7012 3460 0003 3833 6058.

[5] U.S. POSTAL SERV., https://www.usps.com/ (last visited May 14, 2019).

[6] Copies of the USPS Tracking Report and the corresponding USPS Certified Mail Receipt were attached to Complainant's Appeal Petition as "Attachment A."

[7] 7 C.F.R. § 1.139.

[8] USPS Certified Mail Tracking No. 7015 3010 0001 5187 3507.

[9] The "Suggestion of Bankruptcy" advised that, on June 24, 2016, Respondent

> All future communications, documents, notices, and copies of any pleadings, papers, and other materials relevant to this matter should be directed to and served upon the undersigned at the following address:
>
> > Fox Rothschild LLP, Attn: Jason C. Manfrey, Esq.
> > 2000 Market Street, 20th Floor
> > Philadelphia, PA 19103[.]

Notice of Appearance at 1.

While Mr. Manfrey did not file an answer to the Complaint with his Notice of Appearance, he did file a "Suggestion of Bankruptcy" asserting that: (1) Complainant "is precluded from prosecuting the above-entitled case at this time"[10] because Respondent filed for bankruptcy; and (2) Respondent was not properly served with the Complaint because:

> Kirkland & Ellis, LLP has never been counsel of record for the Trustee or Debtor Huxtable's Kitchen in its bankruptcy case. As the sole representative of Debtor Huxtable's Kitchen and the only party with the capacity to sue or be sued, proper service of the Complaint was not made on the Trustee or Respondent.

Suggestion of Bankruptcy at 3.

Mr. Manfrey concludes this filing with the contention that ". . . [because] Complainant had knowledge of Debtor Huxtable's Kitchen's filing of its chapter 7 bankruptcy case at the time Complainant filed the Complaint and initiated these proceedings, Complainant knowingly and

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filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, District of Delaware. The document also provided that "[o]n July 24, 2016, the Office of the United States Trustee appointed Alfred T. Giuliano as the Chapter 7 trustee for the estates of Huxtable's Kitchen, Inc. and the other Debtors." Suggestion of Bankruptcy at 1, 4.

[10] *Id.* at 4.

willfully violated the automatic stay under 11 U.S.C. § 362(a)."[11]

Mr. Manfrey does not challenge that service of the Complaint was properly effected on Kirkland & Ellis, LLP by USPS as a procedural matter; rather, he simply asserts that as counsel for the Trustee in the Chapter 7 Bankruptcy he should have been served with a copy of the Complaint rather than Kirkland & Ellis; therefore, Respondent was not properly served with the Complaint. Notably, Mr. Manfrey affirms that he had knowledge of the disciplinary proceeding against Debtor Huxtable's Kitchen as of January 31, 2018, yet he still declined to file an answer to the Complaint.

On February 28, 2018, the Acting Chief ALJ issued an order directing Complainant to address certain questions presented by the Suggestion of Bankruptcy. Complainant did so on March 20, 2018. As previously noted, the record reflects that Respondent made no further filings in this proceeding either before the ALJ or on appeal to the Judicial Officer.

On March 30, 2018 the Acting Chief ALJ issued an order that found that the Complaint in this matter is not barred by the Bankruptcy Code's Section 362 automatic stay. However, the ALJ denied Complainant's Motion for Default based on a finding that service of the Complaint on Respondent was not effected. The March 30, 2018 Order also consolidated this docket with the captioned docket *Lewis Macleod*, No. 18-0024, which involved a "potential" petition for review of the February 15, 2018 Director of the United States Department of Agriculture, Agricultural Marketing Service, PACA Division, determination that under PACA Mr. Macleod was responsibly connected to Huxtable's Kitchen, Inc., the Respondent in Docket No. 18-0007.

Discussion and Findings as to PACA-D Docket No. 18-0007

I. Assertions in Suggestion of Bankruptcy

The Suggestion of Bankruptcy makes two related sets of assertions: (1) the filing and continuation of this disciplinary proceeding against Debtor Huxtable's Kitchen violates the automatic stay afforded to

[11] *Id.*

Debtor Huxtable's Kitchen and its estate under 11 U.S.C. § 362(a)(1) ("Section 362"); and (2) service of the Complaint at the last known principal place of business of Respondent's named attorney of record, Jason R. Parish, Esq. of Kirkland & Ellis, LLC, was ineffective because Mr. Manfrey of Fox Rothschild LLP, as counsel for the Bankruptcy Trustee, is the sole representative of Huxtable's Kitchen, the only party with the capacity to sue or be sued, and therefore the only person upon whom service of the Complaint could be effected.

A. Bankruptcy Stay

The analysis and finding of the Acting Chief ALJ regarding the impact of the automatic stay provisions of the Bankruptcy Code on this regulatory disciplinary enforcement is well supported by the PACA statute, Regulations, and judicial precedent and is affirmed and adopted as provided herein below.

First, Mr. Manfrey's reference to 11 U.S.C. § 362(a) as a bar to the instant case is misplaced. Under the plain language of 11 U.S.C. § 362(b)(4), the automatic stay of paragraph (a) does not apply to:

> . . . the commencement or continuation of an action or proceeding by a governmental unit . . . , to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4).

The police and regulatory exception to the automatic stay has been applied to USDA actions to deny a PACA license[12] and to undertake and pursue an investigation for a debtor's failure to pay for livestock.[13] In other

[12] *In re Fresh Approach, Inc*., 49 Bankr. 494, 496 (Bankr. N.D. Tex. 1985).

[13] *In re Farmers & Ranchers Livestock Auction, Inc*., 46 B.R. 781, 784 (Bankr. E.D. Ark. 1984).

settings, courts have recognized the authority of governmental agencies to strip a debtor of its broadcasting license or refuse to allow the broadcaster to transfer or assign its license,[14] to suspend a debtor's license as a horse trainer based on demonstrated lack of financial responsibility,[15] and to revoke a debtor's mobile home dealer's license.[16]

The Complaint in this case was issued based on Respondent's failure to make full payment promptly to six sellers of the agreed purchase prices, or balances thereof, in the total amount of $551,829.47 for 174 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce during the period of October 2015 through May 2016 (on or about the dates and in the transactions set forth in Appendix A and B to the Complaint). As previously explained, this proceeding is a disciplinary enforcement action under the PACA and is a matter of Complainant AMS exercising police or regulatory power, not a matter of a government agency seeking collection of a debt. The Complaint seeks a finding that the Respondent's actions constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) as well as publication of the facts and circumstances thereof in accordance with the congressional intent of the PACA: to protect the agricultural industry from insolvent participants.[17]

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[14] *In re D.H. Overmyer Telecasting Co., Inc*., 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983).

[15] *In re Christmas*, 102 B.R. 447, 458-59 (Bankr. D. Md. 1989).

[16] *Matter of Edwards Mobile Home Sales, Inc*., 119 B.R. 857, 860-61 (Bankr. M.D. Fla. 1990).

[17] The exception can even apply where, unlike here, the governmental action seeks disgorgement of funds by the debtor. A cause of action by the New Jersey Bureau of Securities, seeking to compel disgorgement, on unjust enrichment theory, of proceeds of alleged Ponzi scheme from Chapter 7 debtor in her capacity as innocent recipient of such proceeds, was excepted from automatic stay as a cause of action that the government brought in exercise of its "police and regulatory power." *In re D'Angelo*, 409 B.R. 296, 297-99 (Bankr. D.N.J. 2009). The state sought disgorgement not to remedy any pecuniary loss it had suffered but to recapture funds lost by victims of securities fraud in manner that fostered public purpose behind New Jersey securities law, though the debtor was not alleged to be guilty of any wrongdoing. *See id.*

Second, the Secretary is expressly authorized by Bankruptcy Code § 525 to proceed under licensing provision of PACA. Section 525(a) of the Code states that:

> *Except as provided in the Perishable Agricultural Commodities Act, 1930* . . . a government unit may not deny revoke, suspend or refuse to renew a license . . . to a person that is or has been a debtor under this Title . . . solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable in the case under this title. . . .

11 U.S.C. § 525(a) (emphasis added).

Section 525(a) has been long and consistently held to except PACA proceedings such as the current one from a Section 362 stay.[18] As the Judicial Officer stated in *Ruma Fruit & Produce Co., Inc.*:[19]

> Congress, in 1978, specifically amended section 525 of the Bankruptcy Code, (11 U.S.C. § 525), in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984); *In re Fresh Approach, Inc*., 49 B.R. 494, 496-98 (N.D. Tex. 1985). In addition, it has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. *Marvin Tragash Co. v. United States Dep't of Agric*., 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967); *In re Fresh Approach, Inc*., . . ., 49 B.R. at 496.

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[18] *See* Complainant's Response at 4-5 (discussing and citing precedents interpreting 11 U.S.C. § 362(b)(4) as exempting PACA proceedings from a Section 362 stay). This proceeding is a matter of Complainant AMS exercising police or regulatory power, not a matter of a government agency seeking collection of a debt.

[19] 55 Agric. Dec. 642, 655 (U.S.D.A. 1996).

Ruma Fruit & Produce Co., Inc., 55 Agric. Dec. 642, 655 (U.S.D.A. 1996).

The "express authority in Code section 525 is a clearly defined exception inserted by Congress to the 'fresh start' otherwise available to a debtor in bankruptcy."[20] "To apply the automatic stay of section 362, or to enjoin the administrative proceedings under section 105, would unfortunately be inconsistent with section 525 of the Code and would trample the plain Congressional intent that the Secretary have the ability to protect the agricultural industry from insolvent participants."[21]

Accordingly, contrary to Respondent's contentions in the Suggestion in Bankruptcy, there is no violation of the Section 362 bankruptcy automatic stay by the initiation, continuation, and resolution of the PACA Complaint filed by Complainant in the instant proceeding. Indeed, in light of this clear statutory, regulatory, and judicial authority, Respondent's continued refusal to file an answer to the Complaint even after acknowledging receipt of the Complaint on January 31, 2018 is perplexing.

B. Service of Process

For the reasons discussed more fully herein below, service of the Complaint on Respondent was properly effected in accordance with the Rules of Practice applicable to this administrative disciplinary enforcement.

The Rules of Practice are very clear as to what constitutes effective service. In section 1.147(c), the Rules state:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> (c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person

[20] *In re Fresh Approach, Inc*., 49 Bankr. at 498.

[21] *Id.*

> to make that person a party respondent in a proceeding , proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the ***date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party,*** or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c) (emphasis added).

Respondent had an affirmative obligation, as a party licensed and operating under the provisions of the PACA, to apprise AMS of its contact information and failed to identify any person other than Mr. Parish of Kirkland & Ellis as its attorney of record, to provide change of address information, or to advise AMS of the Chapter 7 Bankruptcy. The PACA regulations specifically provide in pertinent part as follows:

> **§ 46.13 Address, ownership, changes in trade name, changes in number of branches, changes in members of partnership, and bankruptcy.**
>
> The licensee shall:
>
> (a) Promptly report to the Director in writing;
>
> (1) **Any change of address**; . . . . [and]

> (5) ***When the licensee, or if the licensee is a partnership, any partner is subject to proceedings under the bankruptcy laws***. . . .

7 C.F.R. § 46.13 (emphasis added). AMS is entitled to rely on the last know business address of Respondent or its attorney of record to effect service of the subject Complaint. The Complaint was delivered by certified mail to the last known principal place of business of the attorney of record, and the mailing was not returned to the Department by USPS. Accordingly, service was effected in accordance with section 1.147(c) of the Rules of Practice.[22]

Indeed, as previously noted, Mr. Manfrey did not challenge the fact that service of the Complaint was effected as to Kirkland & Ellis, LLP but asserts that Respondent was not properly served with the Complaint because "proper service of the Complaint was not made on the Trustee" as "the sole representative of Debtor Huxtable's Kitchen and the only party with the capacity to sue or be sued."[23] Mr. Manfrey provides no authority to support his contention that simply because he serves as counsel for the Bankruptcy Trustee he is the sole representative of Huxtable's Kitchen and therefore the only person who can be properly served with the subject disciplinary Complaint. Further, Mr. Manfrey seems to imply that when he was appointed as the Chapter 7 trustee for the estate of Huxtable's Kitchen, Inc. on July 24, 2016, he was somehow automatically substituted for Respondent's designated counsel of record. This position runs contrary to the above-referenced statutory, regulatory, and judicial authorities and is untenable given the complexity of the United States bankruptcy system and the sheer number of filings.[24]

In response to the ALJ's Order of February 28, 2016, Complainant

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[22] 7 U.S.C. § 1.147(c).

[23] Suggestion of Bankruptcy at 3.

[24] In the twelve-year span from October 1, 2005 to September 30, 2017, about 12.8 million consumer bankruptcy petitions were filed in the federal courts with the number of filings continuing to grow. *Just the Facts: Consumer Bankruptcy Filings, 2006-2017*, USCOURTS.GOV (published Mar. 7, 2018), https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017 (last visited May 14, 2019).

provided, as proof of service of the Complaint, a copy of the USPS Tracking Report[25] downloaded from the USPS official webpage. The Tracking Report reflects that following several unsuccessful attempts, two because no authorized recipient was available, the Complaint was "delivered to an agent at 7:29am on October 30, 2017 in WASHINGTON, DC 20005."[26] The full address was not reflected on the Tracking Report but was spelled out in full on the Certified Mail Receipt associated with the USPS Tracking number. Accordingly, the Complaint was served by means of USPS, Certified Mail with Return Receipt, to the last known principal place of business for Respondent's attorney of record, Jason R. Parish, Kirkland & Ellis, LLP at 655 Fifteenth Street, NW, Washington, DC 20005 in accordance with the provisions of the Rules of Practice.[27]

The March 30, 2018 Order may be read to imply that remailing of the Complaint by regular mail was required to effectuate service.[28] The additional step of remailing by ordinary mail to the same address is only necessary to effectuate service in cases where the original mailing was returned to the Department with either "unclaimed" or "refused" stamped on it by USPS.[29] Here, the Complaint was not returned but rather delivered

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[25] USPS Certified Mail Tracking No. 7012 3460 0003 3833 6058.

[26] Copies of the USPS Tracking Report and the corresponding USPS Certified Mail Receipt were attached to Complainant's Appeal Petition as "Attachment A."

[27] *See* 7 C.F.R. § 1.147(c)(1) ("Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or an agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]").

[28] *See* Order at 6-7.

[29] *See* 7 C.F.R. 1.147(c)(1) ("Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or an agent thereof, on the date of delivery by certified or registered mail to the . . . last known principal place of business of the attorney or representative of record of such party . . . *Provided that*, if any such document or paper is sent by certified or registered mail but is *returned marked by the postal service as*

by certified mail to the last known principal place of business of Respondent's named attorney of record at the time and date specified above. Therefore, service was complete and met not only the requirements of the Rules of Practice but also the requirements of due process under the law.[30]

Establishing that the Complaint was delivered by certified mail to the last known principal place of business of the attorney of record and that the mailing was not returned to the Department by USPS is sufficient to effectuate service under section 1.147(c) of the Rules of Practice.[31] Complainant is not required to show "in hand delivery" to Respondent to effectuate service.

In an order denying a petition to reconsider filed in *Morgan*, 65 Agric. Dec. 1188 (U.S.D.A. 2006), the Judicial Officer held that:

> 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). As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):
>
> Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably*

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unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.") (emphasis added).

[30] *See, e.g.*, *Trimble v. U.S. Dep't of Agric.*, 87 F. App'x 456, 458 (6th Cir. 2003) ("Service by certified package is a constitutionally adequate method of notice. *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 800 (1983). The fact that [the respondent] may not have received the certified package does not negate the constitutional adequacy of the attempt to accomplish adequate notice."); *see supra* note 32 and accompanying text.

[31] 7 C.F.R. § 1.147(c).

> *calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343 (emphasis added); *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]
>
> Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79,455 N.E.2d 1344, 1346 (Ohio Ct. App. 1982), the court held: It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized 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.

Morgan, 65 Agric. Dec. 1188, 1191 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider).[32]

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[32] *See also Trimble*, 87 F. App'x at 458 (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); *Harrington*, 66 Agric. Dec. 1061, 1067-68 (U.S.D.A. 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); *Kwon*, 55 Agric. Dec. 78, 93 (U.S.D.A. 1996) (Order Den. Late Appeal) (stating proper service by certified mail is made

Delivering the Complaint by certified mail to the last known principal place of business of the attorney of record was "reasonably calculated" to apprise interested parties of the pendency of this action. Doing so met the requirements of due process and satisfied service requirements in the applicable Rules of Practice. Not only was the mailing in this proceeding not returned to the Department by USPS, it is noteworthy that Complainant's Motion for Default, filed on January 23, 2018, was also served to the last know principal place of business of Respondent's attorney of record in precisely the same manner as the Complaint[33] and was apparently received by the Respondent, as evidenced by the February 2, 2018 filing of a Notice of Appearance and Suggestion of Bankruptcy by the Chapter 7 Trustee affirming knowledge of this disciplinary proceeding as of January 31, 2018.

In his March 30, 2018 Order, the ALJ suggested that service of the Complaint may have been defective because "the certified mail green card has never been returned to her [Hearing Clerk's] office by the Post Office."[34] However, as Complainant correctly points out, the Rules of Practice do not require that the certified mail green card be returned in order to effectuate service. While the Rules do specify that the return of the certified or registered mail receipt (certified mail green card) is one way to prove service was effective, it is not the only way. In section 1.147(e), the Rules state, in pertinent part:

> (e) *Proof of service*. ***Any*** of the following, in the possession of the Department, showing such service, shall

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when a respondent is served with a certified mailing at his or her last known address and someone signs for the document); *Kaplinsky*, 47 Agric. Dec. 613, 619 (U.S.D.A. 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*, 46 Agric. Dec. 925, 929 (U.S.D.A. 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 two weeks later).

[33] USPS Certified Mail Tracking No. 7015 3010 0001 5187 3507.

[34] Order at 6.

be deemed to be ***accurate***:

> (1) A certified or registered mail receipt returned by the postal service with a signature;
>
> (2) An official record of the postal service; . . . .

7 C.F.R. § 1.147(e) (emphasis added).

Regardless of whether or not the certified mail green card was returned to the Hearing Clerk's Office, the Department is in possession of "an official record of the postal service" that outlines the specifics of when the Complaint was delivered in this matter. The Tracking Report attached to Complainant's Appeal Petition as "Attachment A" provides proof that the Complaint was delivered by certified mail to the last know principal business address for Respondent's attorney of record. In accordance with the Rules of Practice, this official record of USPS "shall be deemed accurate," and a "strong presumption" of effective service arises.[35]

Relevant Procedural History as to PACA-D Docket No. 18-0024

The captioned docket *Lewis Macleod*, No. 18-0024, involves a petition for review of the February 15, 2018 determination of the Director of the United States Department of Agriculture, Agricultural Marketing Service, PACA Division, that under the PACA Lewis Macleod ("Mr. Macleod" or "Petitioner") was responsibly connected to Huxtable's Kitchen, Inc., the Respondent in Docket No. 18-0007.

On March 21, 2018, Mr. Macleod's attorney of record, Mr. Gentile,

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[35] *See Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995) (Interim Decision 3246), *superseded by statute on other grounds,* 8 U.S.C. § 1229(a)(1)*, as stated in Patel v. Holder*, 652 F.3d 962, 968 n.4 (8th Cir. 2011) ("[I]n cases where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises. There is a presumption that public officers, including Postal Service employees, properly discharge their duties.") (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1 (1926); *Powell v. CIR*, 958 F.2d 53 (4th Cir. 1992), *cert. denied*, 506 U.S. 965 (1992)).

sent an email to the Hearing Clerk's Office indicating that Mr. Macleod intended to file a petition for review and requesting an extension of time to do so. The Acting Chief Judge directed the Hearing Clerk to open and assign a docket number to that expected petition to have an established docket in which to consider the request for extension. On March 22, 2018, the Acting Chief ALJ issued an Order Granting Extension of Time for Filing of Petition for Review providing Mr. Macleod until April 27, 2018 to file a petition for review.

Although no petition for review had yet been filed in Docket No. 18-0024, the Acting Chief ALJ's March 30, 2018 Order "consolidated" Docket No. 18-0024 with Docket No. 18-0007 pursuant to Rule 1.137(b).[36]

On April 27, 2018, Mr. Macleod, by and through his counsel and pursuant to section 47.49 of the Rules of Practice Under the Perishable Agricultural Commodities Act ("PACA Rules of Practice")[37] and 7 C.F.R. § 1.135, filed a petition for review ("Petition") of the decision of the Director of the United States Department of Agriculture, Agricultural Marketing Service, PACA Division, that Mr. Macleod was "responsibly connected" to Huxtable's Kitchen, Inc. during the period of the alleged PACA violations.

Decision and Order

For the reasons discussed more fully herein above, it is the determination of the Judicial Officer that delivering the subject Complaint in this PACA disciplinary enforcement action (Docket No. 18-0007) by USPS Certified Mail to the last known principal place of business of Respondent's attorney of record met the requirements of due process and satisfied the service requirements of the applicable Rules of Practice; that

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[36] *See* 7 C.F.R. § 1.137(b) (*Joinder.* The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq*., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations.").

[37] 7 C.F.R. § 47.49(d).

the time for Respondent to answer the Complaint under Rule 1.136(a)[38] has run; and that Respondent is in default under Rules 1.136(c) and 1.139 for failure to timely answer a complaint.[39] Based upon careful consideration of the record, the ALJ's Ruling Denying Complainant's Motion for Decision Without Hearing by Reason of Default in Docket No. 18-0007 is hereby **REVERSED.**

In accordance with the applicable Rules of Practice, it is the determination of the Judicial Officer that because of Respondent Huxtable's Kitchen, Inc.'s failure to answer the Complaint within the time prescribed in 7 C.F.R. § 1.136(a), the Respondent is in **DEFAULT.** [40] The material allegations of the Complaint are deemed admitted and are hereby adopted as findings of fact for all purposes in this proceeding,[41] with the exception that I take judicial notice of the fact that Complainant has affirmed that the amount past due and unpaid as of January 19, 2018, after PACA conducted a compliance check, was $159,985.87—down from the $551,829.47 of the original Appendix A to the Complaint.[42] The lesser balance still due to sellers does not impact the finding regarding Respondent's repeated, willful, and flagrant violations of section 2(4) of

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[38] 7 C.F.R. § 1.136(a).

[39] 7 C.F.R. §§ 1.136(c) and 1.139.

[40] *See* 7 C.F.R. § 1.136(c) ("Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint[.]").

[41] *See McCoy v. U.S. Dep't of Agric.*, No. 16-3842, slip op. at 4-6 (6th Cir. Aug. 21, 2017) (holding that the Judicial Officer "properly granted a default decision in favor of the USDA" and reversed the ALJ's decision denying a motion for default where the respondent failed to file a timely answer to the complaint) ("The JO's determination that the USDA was entitled to a default decision does not constitute an abuse of discretion and was not arbitrary or capricious. It is undisputed that McCoy did not file a timely answer to the complaint. . . . In addition, the JO found that the Hearing Officer provided McCoy with a cover letter that advised McCoy that he had 20 days to answer the complaint. The Rules of Practice also set forth the deadline for answer a complaint and explain that parties may appear in person or by an attorney. 7 C.F.R. §§ 1.136(a) and 1.141(c).").

[42] *See* Complainant's Response at 6; 7 C.F.R. § 1.141(i)(6).

the PACA (7 U.S.C. § 499b(4)).[43]

It is also the Judicial Officer's determination that the Petition for Review of the decision of the Director of the United States Department of Agriculture, Agricultural Marketing Service, PACA Division, that Petitioner Lewis Macleod (Docket No. 18-0042) was "responsibly connected" to Huxtable's Kitchen, Inc. during the period of alleged PACA violations was timely filed in accordance with the extension of time granted by the Chief ALJ. Accordingly, Docket Nos. 18-0007 and 18-0024 shall be segregated, and Docket No. 18-0024 shall be remanded to the Chief ALJ for further proceedings in accordance with the applicable Rules of Practice.

Based on the foregoing, the following Order shall be entered.

ORDER

1. The ALJ's Ruling on Suggestion of Bankruptcy that the Complaint filed in Docket No. 18-0007 is not barred by a Bankruptcy Code Section 362 automatic stay is **AFFIRMED**.

2. The ALJ's Ruling Denying Complainant's Motion for Decision Without Hearing by Reason of Default in Docket No. 18-0007 is **REVERSED**.

3. Because of Respondent Huxtable's Kitchen, Inc.'s failure to answer the Complaint within the time prescribed in 7 C.F.R. § 1.136(a), the Respondent is in **DEFAULT.**

4. Based on the material allegations of the Complaint, which are deemed admitted by reason of Respondent's default, [44] Huxtable's Kitchen, Inc.

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[43] The total unpaid balance due to sellers represents more than a *de minimis* amount, thereby obviating the need for a hearing in this matter. *See The Square Group,* LLC, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

[44] With the exception of an adjustment to the unpaid balance due to the sellers based on Judicial Notice that Complainant has affirmed that the amount past due

has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. The facts and circumstances of Huxtable's Kitchen, Inc.'s PACA violations shall be published.

6. Docket Nos. 18-0007 and 18-0024 are hereby **SEGREGATED**.

7. Docket No. 18-0024 is **REMANDED** to the Chief Judge for further proceedings in accordance with the applicable Rules of Practice.

RIGHT TO SEEK JUDICIAL REVIEW

Huxtable's Kitchen, Inc. has the right to seek judicial review of this Decision and Order as it pertains to Docket No. 18-0007 in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Huxtable's Kitchen, Inc. must seek judicial review within sixty (60) days after entry of this Decision and Order as of the date reflected herein below.[45]

Copies of this Decision and Order shall be served by the Hearing Clerk upon each party, with courtesy copies provided via email where available.

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and unpaid as of January 19, 2018, after PACA conducted a compliance check, was $159,985.87—down from the $551,829.47 of the original Appendix A to the Complaint. *See* Complainant's Response at 6.

[45] 28 U.S.C. § 2344.

REPARATION DECISION

AYCO FARMS, INC. v. MELON ONE, INC.
Docket No. E-R-2018-231.
Decision and Order.
Filed June 27, 2019.

PACA-R.

Practice and Practice – Amount Awarded Limited by Pleading.
When parties fail to agree on a price for disputed transactions thereby requiring the Department to determine a reasonable price, we will not award additional damages beyond the amount sought in the complaint even when the complaint contains a prayer for relief requesting we award such additional damages. We do not deem it appropriate to assign a higher value to the produce at issue than that assigned to them by the complainant.

Complainant, *pro se*.
Respondent, *pro se*.
Leslie S. Veveers, Examiner.
Shelton S. Smallwood, Presiding Officer.
Decision and Order issued by Bobbie J. McCartney, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

Complainant instituted this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (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. Complainant seeks a reparation award against Respondent in the amount of $97,377.90 in connection with 22 truckloads of watermelons shipped in the course of interstate and foreign 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.

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 is applicable. (7 C.F.R.

§ 47.20.) Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's 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 did not file any additional evidence. Neither party submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 1501 N.W. 12th Avenue, Pompano Beach, FL 33069. At the time of the transactions involved herein, Complainant was licensed under the PACA.

2. Respondent is a corporation whose post office address is 26 Brooklyn Terminal Market, Brooklyn, NY 11236-1510. At the time of the transactions involved herein, Respondent was licensed under the PACA.

188432

3. On or about March 6, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 15.) The watermelons were shipped on March 8, 2018, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 17.) Complainant issued invoice number 188432 billing Respondent for 57 bins of 36-count seedless watermelons at $160.00 per bin, for a total f.o.b. invoice price of $9,120.00. (Compl. Ex. 15.)

189303

4. On or about March 22, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 20.) The watermelons were shipped on March 22, 2018, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 22.) Complainant issued invoice number 189303 billing Respondent for 12 bins of 36-count seedless watermelons at $230.00 per bin, or $2,760.00, and 34 bins of 45-count seedless watermelons at $287.00 per bin, or

$9,758.00, plus $5.00 for a temperature recorder, for a total f.o.b. invoice price of $12,523.00. (Compl. Ex. 20.)

189301

5. On or about March 22, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 25.) The watermelons were shipped on March 23, 2018, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 27.) Complainant issued invoice number 189301 billing Respondent for 57 bins of 36-count seedless watermelons at $230.00 per bin, or $13,110.00, plus $5.00 for a temperature recorder, for a total f.o.b. invoice price of $13,115.00. (Compl. Ex. 25.)

189251A

6. On or about March 20, 2018, Complainant sold to Wal-Mart Stores, Inc. 540 cartons of size 06 MiniMe watermelons at $13.80 per carton, for a total delivered invoice price of $7,452.00. (Compl. Ex. 31.) The watermelons were shipped on March 20, 2018, from loading point in the state of Florida, to Wal-Mart Stores, Inc. in Bedford, Pennsylvania. (Compl. Ex. 33.)

7. On March 26, 2018, the watermelons mentioned in Finding of Fact 6 were rejected by Wal-Mart Stores, Inc. and sent to Respondent, who agreed to purchase the watermelons on a PAS basis. (Compl. Ex. 30.) Complainant issued invoice number 189251A billing Respondent for 540 cartons of size 06 MiniMe watermelons at $7.00 per carton, for a total f.o.b. invoice price of $3,780.00. (Compl. Ex. 29.)

189252A

8. On or about March 20, 2018, Complainant sold to Wal-Mart Stores, Inc. 540 cartons of size 06 MiniMe watermelons at $13.80 per carton, for a total delivered invoice price of $7,452.00. (Compl. Ex. 38.) The watermelons were shipped on March 24, 2018, from loading point in the state of Florida, to Wal-Mart Stores, Inc. in Johnstown, New York. (Compl. Ex. 39.)

9. On March 27, 2018, the watermelons mentioned in Finding of Fact 8 were rejected by Wal-Mart Stores, Inc. and sent to Respondent, who agreed to purchase the watermelons on a PAS basis. (Compl. Ex. 37, 39.) Complainant issued invoice number 189252A billing Respondent for 540 cartons of size 06 MiniMe watermelons at $7.00 per carton, for a total f.o.b. invoice price of $3,780.00. (Compl. Ex. 36.)

189291

10. On or about March 29, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 43.) The watermelons were shipped on March 26, 2018, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 45.) Complainant issued invoice number 189291 billing Respondent for 1,200 cartons of size 06 MiniMe watermelons on a PAS basis. (Compl. Ex. 43.) Complainant issued a second invoice number 189291 billing Respondent for 1,200 cartons of size 06 MiniMe watermelons at $6.50 per carton, for a total f.o.b. invoice price of $7,800.00. (Compl. Ex. 42.)

189628

11. On or about March 26, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 48.) The watermelons were shipped on March 26, 2018, from loading point in the state of Florida, to Respondent in Hamilton, New Jersey. (Compl. Ex. 50.) Complainant issued invoice number 189628 billing Respondent for 40 bins of 45-count seedless watermelons at $261.00 per bin, for a total f.o.b. invoice price of $10,440.00. (Compl. Ex. 48.)

189635

12. On or about March 26, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 53.) The watermelons were shipped on March 26, 2018, from loading point in the state of Florida, to Respondent in Hamilton, New Jersey. (Compl. Ex. 55.) Complainant issued invoice number 189635 billing Respondent for 40 bins of 45-count seedless watermelons at $261.00 per bin, for a total f.o.b. invoice price of $10,440.00. (Compl. Ex. 53.)

189636

13. On or about March 26, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 58.) The watermelons were shipped on March 28, 2018, from loading point in the state of Florida, to Respondent in Hamilton, New Jersey. (Compl. Ex. 60.) Complainant issued invoice number 189636 billing Respondent for 40 bins of 45-count seedless watermelons at $261.00 per bin, for a total f.o.b. invoice price of $10,440.00. (Compl. Ex. 58.)

189630

14. On or about March 26, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 63.) The watermelons were shipped on March 29, 2018, from loading point in the state of Florida, to Respondent in Hamilton, New Jersey. (Compl. Ex. 65.) Complainant issued invoice number 189630 billing Respondent for 40 bins of 45-count seedless watermelons at $261.00 per bin, for a total f.o.b. invoice price of $10,440.00. (Compl. Ex. 63.)

189388A

15. On March 30, 2018, Complainant sold and shipped to Paradise Produce Inc. 30 bins of 60-count seedless watermelons and 256 cartons of 5-count seedless watermelons. (Compl. Ex. 71.) The 60-count seedless watermelons were rejected by Paradise Produce Inc. and sent to Respondent, who agreed to purchase the watermelons on a PAS basis. (Compl. Ex. 69-70.) Complainant issued invoice number 189388A billing Respondent for 30 bins of 60-count seedless watermelons at $86.6667 per bin, for a total delivered invoice price of $2,600.00. (Compl. Ex. 68.)

189467A

16. On March 29, 2018, Complainant sold and shipped to Del Monte Fresh Produce 900 cartons of size 06 MiniMe watermelons. (Compl. Ex. 76.) The watermelons were rejected by Del Monte Fresh Produce and sent to Respondent, who agreed to purchase the watermelons on a PAS

basis. (Compl. Ex. 74-75.) Complainant issued invoice number 189467A billing Respondent for 900 cartons of size 06 MiniMe watermelons at $5.34 per carton, for a total delivered invoice price of $4,806.00. (Compl. Ex. 73.)

189736

17. On or about March 29, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 80.) The watermelons were shipped on March 30, 2018, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 82.) Complainant issued invoice number 189736 billing Respondent for 44 bins of 45-count seedless watermelons at $243.00 per bin, for a total f.o.b. invoice price of $10,692.00. (Compl. Ex. 80.)

189741

18. On or about March 29, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 85.) The watermelons were shipped on March 30, 2018, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 87.) Complainant issued invoice number 189741 billing Respondent for 40 bins of 45-count seedless watermelons at $243.00 per bin, for a total f.o.b. invoice price of $9,720.00. (Compl. Ex. 85.)

189753

19. On or about April 4, 2018, Complainant sold to Respondent one truckload of watermelons. (Compl. Ex. 90.) The watermelons were shipped on the same date, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 92.) Complainant issued invoice number 189753 billing Respondent for 57 bins of 36-count seedless watermelons at $175.00 per bin, for a total f.o.b. invoice price of $9,975.00. (Compl. Ex. 90.)

188160A

20. On April 6, 2018, Complainant sold and shipped to C&S Wholesale Produce 1,070 cartons of size 06 MiniMe watermelons. (Compl. Ex.

98.) The watermelons were rejected by C&S Wholesale Produce and sent to Respondent, who agreed to purchase the watermelons on a PAS basis. (Compl. Ex. 96-97.) Complainant issued invoice number 188160A billing Respondent for 1,070 cartons of size 06 MiniMe watermelons at $8.1729 per carton, for a total delivered invoice price of $8,745.00. (Compl. Ex. 95.)

189710A

21. On April 10, 2018, Complainant sold and shipped to WalMart Stores, Inc. 57 bins of 45-count seedless watermelons. (Compl. Ex. 102.) The watermelons were rejected by Wal-Mart Stores, Inc. and sent to Respondent, who agreed to purchase the watermelons on a PAS basis. (Compl. Ex. 100-102.) Complainant issued invoice number 189710A billing Respondent for 57 bins of 45-count seedless watermelons at $125.00 per bin, for a total delivered invoice price of $7,125.00. (Compl. Ex. 99.)

189662A

22. On April 6, 2018, Complainant sold and shipped to WalMart Stores, Inc. 57 bins of 120-count MiniMe watermelons. (Compl. Ex. 106.) The watermelons were rejected by Wal-Mart Stores, Inc. and sent to Respondent, who agreed to purchase the watermelons on a PAS basis. (Compl. Ex. 104, 107-108.) Complainant issued invoice number 189662A billing Respondent for 57 bins of 120-count MiniMe watermelons at $100.00 per bin, for a total delivered invoice price of $5,700.00. (Compl. Ex. 103.)

190184A

23. On April 9, 2018, Complainant sold and shipped to Topco Associates LLC 1,080 cartons of size 08 MiniMe watermelons. (Compl. Ex. 110.) The watermelons were rejected by Topco Associates LLC and sent to Respondent, who agreed to purchase the watermelons on a PAS basis. Complainant issued invoice number 190184A billing Respondent for 1,080 cartons of size 08 MiniMe watermelons at $6.75 per carton, for a total delivered invoice price of $7,290.00. (Compl. Ex. 109.)

189844

24. On or about April 25, 2018, Complainant sold to Respondent on a PAS basis one truckload of watermelons. (Compl. Ex. 112.) The watermelons were shipped on the same date, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 112.) Complainant issued invoice number 189844 billing Respondent for 60 bins of 100-count MiniMe watermelons at $165.00 per bin, for a total f.o.b. invoice price of $9,900.00. (Compl. Ex. 111.)

189845

25. On or about April 25, 2018, Complainant sold to Respondent on a PAS basis one truckload of watermelons. (Compl. Ex. 119.) The watermelons were shipped on the same date, from loading point in the state of Florida, to Respondent in Brooklyn, New York. (Compl. Ex. 120.) Complainant issued invoice number 189845 billing Respondent for 15 bins of 100-count MiniMe watermelons at $165.00 per bin, or $2,475.00, and 45 bins of 120-count MiniMe watermelons at $165.00 per bin, or $7,425.00, for a total f.o.b. invoice price of $9,900.00. (Compl. Ex. 118.)

189666A

26. On April 27, 2018, Complainant sold and shipped to WalMart Stores, Inc. 57 bins of 100-count MiniMe watermelons. (Compl. Ex. 127.) The watermelons were rejected by Wal-Mart Stores, Inc. and sent to Respondent, who agreed to purchase the watermelons on a PAS basis. (Compl. Ex. 125-126.) Complainant issued invoice number 189666A billing Respondent for 57 bins of 100-count MiniMe watermelons at $150.00 per bin, for a total delivered invoice price of $4,650.00. (Compl. Ex. 124.)

27. The informal complaint was filed on June 25, 2018 (ROI Ex. 001), which is within nine months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for 22 truckloads of watermelons purchased from Complainant. Complainant states Respondent accepted the watermelons in compliance with the contracts of sale but has since paid only $85,600.00 of the agreed purchase prices thereof, leaving a balance due Complainant of $97,377.90. (Compl. ¶ 6.) In response to Complainant's allegations, Respondent states it bought some of the loads in question but the majority were loads accepted on a price after sale basis after being rejected from Complainant's other customers. (Answer ¶ 4.)

We will address each of the 22 transactions in question individually by invoice number below:

Invoice No. 188432

Complainant states it sold to Respondent 57 bins of 36-count seedless watermelons from Guatemala at an f.o.b. price of $160.00 per bin, for a total invoice price of $9,120.00, of which Respondent paid $3,800.00, leaving a balance due Complainant of $5,320.00. (Compl. Ex. 7.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 15-17.)

In response to Complainant's allegations, Respondent states the watermelons were "handled" following their rejection by WalMart. (ROI Ex. 108.) In support of this allegation, Respondent submitted evidence showing that the watermelons were rejected by WalMart in Henderson, North Carolina, on March 10, 2018, for undersize and scarring. (ROI Ex. 176-178.) Respondent did not, however, submit any independent evidence, such as a USDA inspection, to substantiate its contentions with respect to the size and quality of the watermelons.

"We have often discounted testimonial evidence concerning the condition of perishable commodities, and stated the necessity of obtaining a neutral inspection showing the exact extent of damage." *Chiquita Brands, Inc. v. Joseph Williams, Jr. Co. Inc.*, 45 Agric. Dec. 374, 376 (U.S.D.A. 1986). As WalMart was Respondent's customer and therefore

had a financial interest in the watermelons, its assessment as to their quality and size can hardly be considered "neutral."

Absent a neutral inspection we find that Respondent has failed to establish that the watermelons did not conform to the contract requirements. Respondent is, therefore, liable to Complainant for the watermelons it accepted at the agreed purchase price of $9,120.00, less the $3,800.00 already paid, or a balance of $5,320.00.[1]

Invoice No. 189303

Complainant states it sold to Respondent 12 bins of 36-count seedless watermelons from Guatemala at $230.00 per bin and 34 bins of 45-count seedless watermelons from Guatemala at $287.00 per bin, for a total f.o.b. invoice price of $12,523.00, of which Respondent paid $10,566.00, leaving a balance due Complainant of $1,957.00. (Compl. Ex. 7.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 20-22.)

In response to Complainant's allegations Respondent states the shipment contained short weight bins and that some bins were lost when the bins were refilled. (ROI Ex. 108.) Respondent did not submit any evidence to substantiate its contention of short weight bins. Without evidence to establish that the watermelons it accepted did not conform to the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $12,523.00, less the $10,566.00 already paid, or a balance of $1,957.00.

Invoice No. 189301

[1] 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 W. Mktg., Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971).

Complainant states it sold to Respondent 57 bins of 36-count seedless watermelons from Guatemala at an f.o.b. price of $230.00 per bin, for a total invoice price of $13,115.00, of which Respondent paid $3,200.00, leaving a balance due Complainant of $9,915.00. (Compl. Ex. 7.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 25-27.)

In response to Complainant's allegations, Respondent states the watermelons were "handled" following their rejection by WalMart. (ROI Ex. 108.) In support of this allegation, Respondent submitted evidence showing that the watermelons were rejected by WalMart on March 23, 2018, for hollow heart and bruising. (ROI Ex. 188.) Respondent did not, however, submit any independent evidence, such as a USDA inspection, to substantiate its contentions with respect to the quality and condition of the watermelons.

Without a neutral inspection to establish that the watermelons it accepted did not conform to the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $13,115.00, less the $3,200.00 already paid, or a balance of $9,915.00.

Invoice No. 189251A

Complainant states it sold to Respondent 540 cartons of 6-count miniature watermelons from Guatemala on a PAS (price after sale) basis, and that it billed Respondent for the watermelons at $7.00 per carton based on Market News, for a total invoice amount of $3,780.00. (Compl. Ex. 7.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted a copy of its invoice to Respondent, as well as a copy of the original invoice billing WalMart for the watermelons, and a report that it prepared showing that WalMart rejected the watermelons because they showed 14 percent decay and soft. (Compl. 28-30.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis after they were rejected by

Complainant's customer. (ROI Ex. 108.) The term "price after sale" is not defined in either the Uniform Commercial Code or the PACA and the Regulations (Other Than Rules of Practice) under the PACA (7 C.F.R. § 46.43(j)). It is considered a subcategory of the "open price term" (U.C.C. § 2-305(1)),[2] and is generally understood as meaning that the parties will agree on a price following the prompt resale of the produce. *See Eustis Fruit Co., Inc. v. The Auster Co., Inc.*, 51 Agric. Dec. 865, 877 (U.S.D.A. 1991). If the parties are unable to agree upon a price, U.C.C. § 2-305(1) provides that the price shall be a reasonable price at the time for delivery.

There is no indication that the parties agreed upon a price for the watermelons. Therefore, a reasonable price must be determined. On the issue of determining a reasonable price, in *Carmack v. Selvidge*[3] we stated that under normal circumstances, we would examine two factors in determining the reasonable price of produce at the time and place of delivery:

> 1) the average price of similar [commodities] at the time and place of delivery as reported in the Market News Service reports; and
>
> 2) any accountings of sale submitted by the parties.

Id. at 898 (1992). Similarly, in *M. Offutt Co., Inc. v. Caruso Produce, Inc.*,[4] we held that even where relevant market quotations are available, "the results of a prompt and proper resale should be given consideration, *i.e.*, they should be looked at, and if circumstances indicate that use of such results would enable us to arrive at a more accurate figure, they should be factored in."[5]

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[2] *See Well Pict, Inc. v. Ag-West Growers, Inc.,* 39 Agric. Dec. 1221, 1227-28 (U.S.D.A. 1980). U.C.C. section 2-305(1) states "the parties if they so intend can conclude a contract for sale even though the price is not settled."

[3] 51 Agric. Dec. 892 (U.S.D.A. 1992).

[4] 49 Agric. Dec. 596 (U.S.D.A. 1990).

[5] *Id.* at 605; *see also Bonanza Farms, Inc. v. Tom Lange Co.*, 51 Agric. Dec. 839, 847 n. 4 (U.S.D.A. 1992) (describing the *Offutt* decision).

Respondent accounted for the 540 cartons of watermelons in this shipment together with the 540 cartons of watermelons billed on Complainant's invoice number 189252A and reported sales of 175 cartons at $16.00 per carton, or a total of $2,800.00, and 10 24-inch bins at $120.00 per bin, or $1,200.00, for total proceeds of $4,000.00. (ROI Ex. 115.) Respondent's accounting shows 134 cartons were re-packed into 10 bins and 706 cartons were dumped. Since Respondent disposed of the majority of the watermelons without obtaining any independent evidence to establish that the watermelons it dumped were without commercial value, we cannot use the accounting supplied by Respondent to determine the reasonable value of the watermelons.

Relevant USDA Market News reports show that 6-count miniature watermelons originating from Guatemala were selling for $20.00 per carton on the New York City terminal market. At this price, the 540 cartons of 6-count miniature watermelons billed on invoice 189251A had a market value of $10,800.00.

As we mentioned, the evidence submitted by Complainant includes a report that it prepared stating that the watermelons showed 14 percent decay and soft. We conclude, on this basis, that the $10,800.00 market value of the watermelons should be reduced by 14 percent, or $1,512.00, to account for these defects. This results in an adjusted market value of $9,288.00.

From the adjusted market value of $9,288.00, Respondent may deduct 20 percent, or $1,857.60, for profit and handling. *A.P.S. Marketing, Inc. v. R. S. Hanline & Co., Inc.*, 59 Agric. Dec. 407, 411 (U.S.D.A. 2000). This leaves a net amount due Complainant from Respondent of $7,430.40 for the watermelons. As Complainant is, however, seeking to recover only $3,780.00 as the reasonable value of the watermelons, Complainant's award will be limited to the amount requested. *See, e.g.*, *Barton Willoughby d/b/a Willoughby Farms v. Frito-Lay, Inc.*, 45 Agric. Dec. 1245, 1263 (U.S.D.A. 1985); *see also Clark Produce v. Primary Export International, 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). In billing Respondent this amount, Complainant presumably attempted to secure the best possible price for the watermelons, i.e., Complainant did not charge less than it thought the watermelons were

worth. As a result, we see no reason to assign a value to the watermelons that is greater than that assigned to it by Complainant.[6] Accordingly, we find that Respondent owes the lesser amount billed by Complainant, or $3,780.00, for this load of watermelons.

Invoice No. 189252A

Complainant states it sold to Respondent 540 cartons of 6-count miniature watermelons from Guatemala on a PAS (price after sale) basis, and that it billed Respondent for the watermelons at $7.00 per carton based on Market News, for a total invoice amount of $3,780.00. (Compl. Ex. 8.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted a copy of its invoice to Respondent, as well as a copy of the original invoice billing WalMart for the watermelons and a copy of the bill of lading showing that WalMart rejected the watermelons for scarring and decay. (Compl. 36-39.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis after they were rejected by Complainant's customer. (ROI Ex. 108.) There is no indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

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[6] In *Perco USA, Inc. v. Eagle Fruit Traders LLC*, 67 Agric. Dec. 645 (U.S.D.A. 2008), we held that where a claim includes a prayer for relief requesting that the claimant be awarded "such amount of damages as it may be entitled to receive according to the facts established," the amount of the award will be based on the Secretary's findings, even where the party specified a different amount in its pleading. *Id*. at 670-671. Most complaints for reparation, including the one at issue here, have such a prayer for relief; however, while the prayer requests that we award additional damages when we consider it appropriate to do so, we do not deem it appropriate to award additional damages in this case. Unlike in *Perco*, the instant case did not involve a dispute wherein the parties had previously agreed upon a contract price for the produce in dispute. Here, the parties failed to agree on a price and as a result, a reasonable price for the disputed produce had to be determined by the Department. Awarding additional damages beyond what the complainant is requesting for transactions with previously unsettled price terms would not be appropriate. Therefore, we will not assign a higher value to the produce at issue than that assigned to them by the seller.

As we mentioned earlier, Respondent accounted for the 540 cartons of watermelons in this shipment together with the 540 cartons of watermelons billed on Complainant's invoice number 189251A. For the reasons already stated, we are unable to use Respondent's accounting to determine a reasonable price for the watermelons. Therefore, we will refer exclusively to relevant USDA Market News reports to determine this value.

The relevant USDA Market News report for the New York City terminal market shows that 6-count miniature watermelons originating from Guatemala were selling for $20.00 per carton. At this price, the 540 cartons of 6-count miniature watermelons billed on invoice 189252A had a market value of $10,800.00. From this amount Respondent may deduct 20 percent, or $2,160.00, for profit and handling. This leaves a net amount due Complainant from Respondent of $8,640.00 for the watermelons. This is substantially more than the $3,780.00 that Complainant billed Respondent for the watermelons. For the reasons already stated,[7] we find that Respondent owes the lesser amount billed by Complainant, or $3,780.00, for this load of watermelons.

Invoice No. 189291

Complainant states it sold to Respondent 1,200 cartons of 6-count miniature watermelons from Guatemala on a PAS (price after sale) basis, and that it billed Respondent for the watermelons at $6.50 per carton based on Market News, for a total invoice amount of $7,800.00. (Compl. Ex. 8.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted copies of its invoices billing Respondent both on a PAS basis and at an f.o.b. price of $6.50 per carton. (Compl. 42-43.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis. (ROI Ex. 108.) There is no indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

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[7] *See supra* note 6.

Respondent reported repacking 214 cartons into 16 bins of 80-count watermelons and dumping the other 986 cartons. (ROI Ex. 122.) Since Respondent disposed of the majority of the watermelons without obtaining any independent evidence to establish that the watermelons it dumped were without commercial value, we cannot use the accounting supplied by Respondent to determine the reasonable value of the watermelons. Therefore, we will refer exclusively to relevant USDA Market News reports to determine this value.

The applicable report for the New York City terminal market shows that 6-count miniature watermelons originating from Guatemala were selling for $20.00 per carton. At this price, the 1,200 cartons of 6-count miniature watermelons billed on invoice 189291 had a market value of $24,000.00. From this amount Respondent may deduct 20 percent, or $4,800.00, for profit and handling. This leaves a net amount due Complainant from Respondent of $19,200.00 for the watermelons. This is substantially more than the $7,800.00 that Complainant billed Respondent for the watermelons. For the reasons already stated,[8] we find that Respondent owes the lesser amount billed by Complainant, or $7,800.00, for this load of watermelons.

Invoice No. 189628

Complainant states it sold to Respondent 40 bins of 45-count seedless watermelons from Guatemala at an f.o.b. price of $261.00 per bin, for a total invoice price of $10,440.00, of which Respondent paid $10,179.00, leaving a balance due Complainant of $261.00. (Compl. Ex. 8.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 48-50.)

In response to Complainant's allegations Respondent states the shipment contained short weight bins and that some bins were lost when the bins were refilled. (ROI Ex. 108.) Respondent did not submit any evidence to substantiate its contention of short weight bins. Without evidence to establish that the watermelons it accepted did not conform to

[8] *See supra* note 6.

the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $10,440.00, less the $10,179.00 already paid, or a balance of $261.00.

Invoice No. 189635

Complainant states it sold to Respondent 40 bins of 45-count seedless watermelons from Guatemala at an f.o.b. price of $261.00 per bin, for a total invoice price of $10,440.00, of which Respondent paid $10,179.00, leaving a balance due Complainant of $261.00. (Compl. Ex. 8.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 53-55.)

In response to Complainant's allegations Respondent states the shipment contained short weight bins and that some bins were lost when the bins were refilled. (ROI Ex. 108.) Respondent did not submit any evidence to substantiate its contention of short weight bins. Without evidence to establish that the watermelons it accepted did not conform to the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $10,440.00, less the $10,179.00 already paid, or a balance of $261.00.

Invoice No. 189636

Complainant states it sold to Respondent 40 bins of 45-count seedless watermelons from Guatemala at an f.o.b. price of $261.00 per bin, for a total invoice price of $10,440.00, of which Respondent paid $10,179.00, leaving a balance due Complainant of $261.00. (Compl. Ex. 8.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 58-60.)

In response to Complainant's allegations Respondent states the shipment contained short weight bins and that some bins were lost when the bins were refilled. (ROI Ex. 108.) Respondent did not submit any evidence to substantiate its contention of short weight bins. Without

evidence to establish that the watermelons it accepted did not conform to the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $10,440.00, less the $10,179.00 already paid, or a balance of $261.00.

Invoice No. 189630

Complainant states it sold to Respondent 40 bins of 45-count seedless watermelons from Guatemala at an f.o.b. price of $261.00 per bin, for a total invoice price of $10,440.00, of which Respondent paid $9,657.00, leaving a balance due Complainant of $783.00. (Compl. Ex. 8.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 63-65.)

In response to Complainant's allegations Respondent states the shipment contained short weight bins and that some bins were lost when the bins were refilled. (ROI Ex. 108.) Respondent did not submit any evidence to substantiate its contention of short weight bins. Without evidence to establish that the watermelons it accepted did not conform to the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $10,440.00, less the $9,657.00 already paid, or a balance of $783.00.

Invoice No. 189388A

Complainant states it sold to Respondent 30 bins of 60-count seedless watermelons from Guatemala on a PAS (price after sale) basis after they were rejected by Paradise Produce Inc., and that it billed Respondent for the watermelons at $86.66 per bin, for a total invoice amount of $2,600.00. (Compl. Ex. 8.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted copies of its invoices billing Respondent for the watermelons both on a PAS basis and at a delivered price of $86.6667 per bin. (Compl. 68-71.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis after they were rejected by

Complainant's customer. (ROI Ex. 108.) There is no indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

Respondent submitted an accounting showing that it repacked 10 bins of watermelons into 120 cartons of size 5 watermelons and dumped the other 20 bins. (ROI Ex. 126.) Respondent reported selling the 120 cartons of size 5 watermelons for $24.00 per carton, for total sales of $2,880.00. Since Respondent disposed of the majority of the watermelons without obtaining any independent evidence to establish that the watermelons it dumped were without commercial value, we cannot use the accounting supplied by Respondent to determine the reasonable value of the watermelons. Therefore, we will refer exclusively to relevant USDA Market News reports to determine this value.

The applicable report for the New York City terminal market does not include prices for 60-count seedless watermelons in bins; however, the f.o.b. price report for Central American imports through South Florida shows that 60-count bins of seedless watermelons were selling for $240.00 to $280.00 per bin on March 28, 2018. Although the watermelons in question were not shipped until March 30, 2018, the reports for that date and the day prior state that supplies were insufficient to quote a price. Therefore, using the average reported price of $260.00 per bin, the 30 bins of 60-count seedless watermelons in question had a shipping point value of $7,800.00. This is substantially more than the $2,600.00 that Complainant billed Respondent for the watermelons. For the reasons already stated,[9] we find that Respondent owes the lesser amount billed by Complainant, or $2,600.00, for this load of watermelons.

Invoice No. 189467A

Complainant states it sold to Respondent 900 cartons of 6-count miniature watermelons from Guatemala on a PAS (price after sale) basis after they were rejected by Del Monte, and that it billed Respondent for the watermelons at $5.34 per carton, for a total invoice amount of $4,806.00. (Compl. Ex. 9.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions,

[9] *See supra* note 6.

Complainant submitted copies of its invoices billing Respondent both on a PAS basis and at a delivered price of $5.34 per carton, and a copy of a report that it prepared showing that Del Monte rejected the watermelons because they showed decay and were soft to the touch. (Compl. Ex. 73-75.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis after they were rejected by Complainant's customer. (ROI Ex. 108.) There is no indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

Respondent reported repacking 400 cartons into 30 bins of 80-count watermelons and dumping the other 500 cartons. (ROI Ex. 130.) Since Respondent disposed of the majority of the watermelons without obtaining any independent evidence to establish that the watermelons it dumped were without commercial value, we cannot use the accounting supplied by Respondent to determine the reasonable value of the watermelons. Therefore, we will refer exclusively to relevant USDA Market News reports to determine this value.

The first date following Respondent's receipt of the watermelons that relevant prices were reported for the New York City terminal market is April 3, 2018. That report shows that 6-count miniature watermelons originating from Guatemala were selling for $16.00 per carton. At this price, the 900 cartons of 6-count miniature watermelons billed on invoice 189467A had a market value of $14,400.00. From this amount Respondent may deduct 20 percent, or $2,880.00, for profit and handling. This leaves a net amount due Complainant from Respondent of $11,520.00 for the watermelons. This is substantially more than the $4,806.00 that Complainant billed Respondent for the watermelons. For the reasons already stated,[10] we find that Respondent owes the lesser amount billed by Complainant, or $4,806.00, for this load of watermelons.

Invoice No. 189736

[10] *See supra* note 6.

Complainant states it sold to Respondent 44 bins of 45-count seedless watermelons from Guatemala at an f.o.b. price of $243.00 per bin, for a total invoice price of $10,692.00, of which Respondent paid $10,206.00, leaving a balance due Complainant of $486.00. (Compl. Ex. 9.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 80-82.)

In response to Complainant's allegations Respondent states the shipment contained short weight bins and that some bins were lost when the bins were refilled. (ROI Ex. 108.) Respondent did not submit any evidence to substantiate its contention of short weight bins. Without evidence to establish that the watermelons it accepted did not conform to the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $10,692.00, less the $10,206.00 already paid, or a balance of $486.00.

Invoice No. 189741

Complainant states it sold to Respondent 40 bins of 45-count seedless watermelons from Guatemala at an f.o.b. price of $243.00 per bin, for a total invoice price of $9,720.00, of which Respondent paid $9,234.00, leaving a balance due Complainant of $486.00. (Compl. Ex. 9.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 85-87.)

In response to Complainant's allegations Respondent states the shipment contained short weight bins and that some bins were lost when the bins were refilled. (ROI Ex. 108.) Respondent did not submit any evidence to substantiate its contention of short weight bins. Without evidence to establish that the watermelons it accepted did not conform to the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $9,720.00, less the $9,234.00 already paid, or a balance of $486.00.

Invoice No. 189753

Complainant states it sold to Respondent 57 bins of 36-count seedless watermelons from Guatemala at an f.o.b. price of $175.00 per bin, for a total invoice price of $9,975.00, of which Respondent paid $8,400.00, leaving a balance due Complainant of $1,575.00. (Compl. Ex. 9.) Complainant states no inspection or account of sales was provided to support the reduced payment. In support of its contentions, Complainant submitted a copy of the invoice, passing and bill of lading for the shipment. (Compl. 90-92.)

In response to Complainant's allegations Respondent states the shipment contained short weight bins and that some bins were lost when the bins were refilled. (ROI Ex. 108.) Respondent did not submit any evidence to substantiate its contention of short weight bins. Without evidence to establish that the watermelons it accepted did not conform to the contract requirements, Respondent is liable to Complainant for the watermelons it accepted at the agreed purchase price of $9,975.00, less the $8,400.00 already paid, or a balance of $1,575.00.

Invoice No. 188160A

Complainant states it sold to Respondent 1,070 cartons of 6-count miniature watermelons from Guatemala on a PAS (price after sale) basis after they were rejected by C&S Wholesale, and that it billed Respondent for the watermelons at $8.17 per carton, for a total invoice amount of $8,741.90. (Compl. Ex. 9.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted copies of its invoices billing Respondent both on a PAS basis and at a delivered price of $8.1729 per carton, and a copy of a report that it prepared showing that C&S Wholesale rejected the watermelons because they showed 16 percent internal decay and 40 percent internal discoloration. (Compl. 95-97.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis after they were rejected by Complainant's customer. (ROI Ex. 108.) There is no indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

Respondent did not submit any evidence concerning its handling of the watermelons in this shipment. Relevant USDA Market News reports issued on or about the date of arrival for the watermelons show that 6-count miniature watermelons originating from Guatemala were selling for $16.00 per carton. At this price, the 1,070 cartons of 6-count miniature watermelons billed on invoice 188160A had a market value of $17,120.00.

As we mentioned, the evidence submitted by Complainant includes a report that it prepared stating that the watermelons showed 16 percent internal decay and 40 percent internal discoloration, for total defects of 56 percent. We conclude, on this basis, that the $17,120.00 market value of the watermelons should be reduced by 56 percent, or $9,587.20, to account for these defects. This results in an adjusted market value of $7,532.80.

From the adjusted market value of $7,532.80, Respondent may deduct 20 percent, or $1,506.56, for profit and handling. This leaves a net amount due Complainant from Respondent of $6,026.24 for the watermelons.

Invoice No. 189710A

Complainant states it sold to Respondent 57 bins of 45-count seedless watermelons from Guatemala on a PAS (price after sale) basis after they were rejected by WalMart, and that it billed Respondent for the watermelons at $125.00 per bin based on Market News, for a total invoice amount of $7,125.00. (Compl. Ex. 9.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted copies of its invoices billing Respondent both on a PAS basis and at a delivered price of $125.00 per bin, and a copy of a report that it prepared showing that WalMart rejected the watermelons because they showed overripe and soft. (Compl. 99-101.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis after they were rejected by Complainant's customer. (ROI Ex. 108.) There is no indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

Respondent reported repacking 53 bins of the watermelons into 472 cartons of 5 size watermelons that it resold for $26.00 per carton, or a total

of $12,272.00. (ROI Ex. 133.) The remaining four bins of watermelons were dumped. As the loss reported by Respondent was minimal and the evidence Complainant submitted shows the watermelons were affected by overripe and soft, we accept the gross sales of $12,272.00 as the best available measure of the reasonable value of the watermelons. From this amount Respondent may deduct 20 percent, or $2,454.40, for profit and handling. This leaves a net amount due Complainant from Respondent of $9,817.60 for the watermelons. Complainant is, however, seeking to recover only $7,125.00 as the reasonable value of the watermelons. For the reasons already stated,[11] we find that Respondent owes the lesser amount billed by Complainant, or $7,125.00, for this load of watermelons.

Invoice No. 189662A

Complainant states it sold to Respondent 57 bins of 120-count miniature watermelons from Guatemala on a PAS (price after sale) basis after they were rejected from a previous customer, and that it billed Respondent for the watermelons at $100.00 per bin based on Market News, for a total invoice amount of $5,700.00. (Compl. Ex. 9.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted copies of its invoices billing Respondent both on a PAS basis and at a delivered price of $125.00 per bin, and a copy of a rejection notification stating that the watermelons showed 16 percent overripe. (Compl. 103-04, 107.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis after they were rejected by Complainant's customer. (ROI Ex. 108.) There is no indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

Respondent reported repacking six bins of the watermelons into 120 cartons of 6-size watermelons, and another 20 bins into 400 cartons of 6-size watermelons, all of which were resold for $16.00 per carton, or a total of $8,320.00. (ROI Ex. 136) Respondent also reported, however, that 120 of the repacked cartons were returned and subsequently dumped, along with the remaining 31 bins of watermelons. (ROI Ex. 136.) Since

[11] *See supra* note 6.

Respondent disposed of the majority of the watermelons without obtaining any independent evidence to establish that the watermelons it dumped were without commercial value, we cannot use the accounting supplied by Respondent to determine the reasonable value of the watermelons. Therefore, we will refer exclusively to relevant USDA Market News reports to determine this value.

The applicable report for the New York City terminal market does not include prices for 120-count miniature watermelons in bins; however, the report does show that 6 and 8-count cartons of miniature watermelons originating from Guatemala were selling for $16.00 and $14.00 per carton, respectively, on April 10, 2018.[12] Presuming an average weight per melon of four pounds for the 8-count watermelons and six pounds for the 6-count watermelons, the cartons weighed approximately 36 and 32 pounds respectively. Applying these weights to the market prices just mentioned, the price per pound for both the 6-count and 8-count watermelons is $0.44. Assuming an average weight per melon of five pounds for the watermelons in question,[13] the watermelons had a market value of $15,048.00 (120 melons per bin at five pounds per melon = 600 pounds at $0.44 per pound = $264 per bin x 57 bins = $15,048.00). This is substantially more than the $5,700.00 that Complainant billed Respondent for the watermelons. For the reasons already stated,[14] we find that Respondent owes the lesser amount billed by Complainant, or $5,700.00, for this load of watermelons.

Invoice No. 190184A

Complainant states it sold to Respondent 1,080 cartons of 8-count miniature watermelons from Guatemala on a PAS (price after sale) basis after they were rejected by Topco Associates, and that it billed Respondent for the watermelons at $6.75 per carton based on Market News, for a total invoice amount of $7,290.00.(Compl. Ex. 9.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted a copy of its invoice

[12] Supplies of watermelons of this type were reported insufficient to quote prior to this date.

[13] Miniature watermelons weigh from four to six pounds on average.

[14] *See supra* note 6.

billing Respondent for the watermelons at a delivered price of $6.75 per carton, and a copy of the bill of lading. (Compl. 109-110.)

In response to Complainant's allegations, Respondent submitted an accounting showing that it received the watermelons and stating that all 1,080 cartons of the watermelons were dumped. (ROI Ex. 143.) Absent any evidence to establish the condition of the watermelons Respondent accepted, we are unable to conclude that the watermelons had no commercial value.

USDA Market News reports issued at or near the time of Respondent's acceptance show that 8-count miniature watermelons originating from Costa Rica were selling for $12.00 per carton. Prices for watermelons of the same type from Guatemala are not provided. Nevertheless, presuming an approximate market value of $12.00 per carton, the 1,080 cartons of watermelons in question would have a market value of $12,960.00. From this amount, Respondent may deduct 20 percent, or $2,592.00, for profit and handling. This leaves a net amount due Complainant from Respondent of $10,368.00. Complainant is, however, seeking to recover only $7,290.00 as the reasonable value of the watermelons. For the reasons already stated,[15] we find that Respondent owes the lesser amount billed by Complainant, or $7,290.00, for this load of watermelons.

Invoice No. 189844

Complainant states it sold to Respondent 60 bins of 100-count miniature watermelons from Guatemala on a PAS (price after sale) basis, and that it billed Respondent for the watermelons at $165.00 per bin based on Market News, for a total invoice amount of $9,900.00. (Compl. Ex. 10.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted copies of its invoices billing Respondent both on a PAS basis and at a delivered price of $165.00 per bin. (Compl. 111-12.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis. (ROI Ex. 108.) There is no

[15] *See supra* note 6.

indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

Respondent reported repacking 29 bins into 480 cartons of 6-size watermelons and dumping the other 31 bins. (ROI Ex. 158.) The evidence submitted by Respondent includes an inspection sheet that was apparently emailed by Complainant's Ken Kodish to Respondent which shows the watermelons were 50 percent overripe and soft and had 25 percent bruising and four percent scars. (ROI Ex. 150-51.) On this basis, we accept the loss of bins reported by Respondent and find that its reported gross sales of $7,680.00 represent the best available measure of the reasonable value of the watermelons. From this amount, Respondent may deduct 20 percent, or $1,536.00, for profit and handling. This leaves a net amount due Complainant from Respondent of $6,144.00 for the watermelons.

Invoice No. 189845

Complainant states it sold to Respondent 15 bins of 100-count and 45 bins of 120-count miniature watermelons from Guatemala on a PAS (price after sale) basis, and that it billed Respondent for the watermelons at $165.00 per bin based on Market News, for a total invoice amount of $9,900.00. (Compl. Ex. 10.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted copies of its invoices billing Respondent both on a PAS basis and at a delivered price of $165.00 per bin. (Compl. 118-19.)

In response to Complainant's allegations, Respondent agrees that it purchased the watermelons on a PAS basis. (ROI Ex. 108.) There is no indication that the parties agreed on a price for the watermelons. Therefore, a reasonable price must be determined.

Respondent reported that the entire shipment of watermelons was unsalable and had to be dumped. (ROI Ex. 159-160, 169.) Respondent submitted evidence indicating that the watermelons in this shipment were similar in condition to the watermelons billed on invoice number 189844. (ROI Ex. 147, 150, 162, 164.) For those watermelons, Respondent reported gross sales $7,680.00. Absent any explanation as to why the former shipment of watermelons was salable and this one was not, we conclude that the watermelons in this shipment had the same value as those

billed on invoice number 189844, i.e., $7,680.00. From this amount, Respondent may deduct 20 percent, or $1,536.00, for profit and handling. This leaves a net amount due Complainant from Respondent of $6,144.00 for the watermelons.

Invoice No. 189666A

Complainant states it sold to Respondent 31 bins of 100-count miniature watermelons from Guatemala on a PAS (price after sale) basis after they were rejected by WalMart, and that it billed Respondent for the watermelons at $150.00 per bin based on Market News, for a total invoice amount of $4,650.00. (Compl. Ex. 10.) Complainant states no inspection or account of sales was provided for the watermelons. In support of its contentions, Complainant submitted copies of its invoices billing Respondent for the watermelons both on a PAS basis and at a delivered price of $150.00 per bin. (Compl. 124-125.)

Respondent reported repacking 15 bins of the watermelons into 240 cartons of 6-size watermelons, all of which were resold for $16.00 per carton, or a total of $3,840.00. (ROI Ex. 174) Respondent also reported that the remaining 16 bins of watermelons were dumped. (ROI Ex. 172, 174.) Since Respondent disposed of the majority of the watermelons without obtaining any independent evidence to establish that the watermelons it dumped were without commercial value, we cannot use the accounting supplied by Respondent to determine the reasonable value of the watermelons. Therefore, we will refer exclusively to relevant USDA Market News reports to determine this value.

The applicable report for the New York City terminal market does not include prices for 100-count miniature watermelons in bins; however, the report does show that 6-count cartons of miniature watermelons originating from Guatemala were selling for $18.00 to $22.00 per carton, or an average of $20.00 per carton, on April 30, 2018. Presuming an average weight per melon of six pounds for the 6-count watermelons, the 6-count cartons weighed approximately 36 pounds. Applying this weight to the market price just mentioned, the price per pound for the 6-count watermelons is $0.56. Assuming an average weight per melon of five pounds for the watermelons in question, the watermelons had a market value of $15,960.00 (100 melons per bin at five pounds per melon = 500

pounds at $0.56 per pound = $280 per bin x 57 bins = $15,960.00). This is substantially more than the $4,650.00 that Complainant billed Respondent for the watermelons. For the reasons already stated,[16] we find that Respondent owes the lesser amount billed by Complainant, or $4,650.00, for this load of watermelons.

The total amount due Complainant from Respondent for the 22 shipments of watermelons at issue in the Complaint is $87,150.24, as set forth in the table below:

INVOICE NO.	AMOUNT DUE
188432	$5,320.00
189303	$1,957.00
189301	$9,915.00
189251A	$3,780.00
189252A	$3,780.00
189291	$7,800.00
189628	$261.00
189635	$261.00
189636	$261.00
189630	$783.00
189388A	$2,600.00
189467A	$4,806.00
189736	$486.00
189741	$486.00
189753	$1,575.00
188160A	$6,026.24
189710A	$7,125.00
189662A	$5,700.00
190184A	$7,290.00
189844	$6,144.00
189845	$6,144.00
189666A	$4,650.00
TOTAL	**$87,150.24**

Respondent's failure to pay Complainant $87,150.24 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be

[16] *See supra* note 6.

awarded to Complainant. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the PACA (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 Rou v. Severt Sons Produce, Inc.*, 70 Agric. Dec. 489, 498 (U.S.D.A. 2011); *Rogers Bros. Farms, Inc. v. Skyline Potato Co.*, 69 Agric. Dec. 1599, 1618 (U.S.D.A. 2010).

Complainant seeks pre-judgment interest on the unpaid produce shipments listed in the Complaint at a rate of 1.5 percent per month (18 percent per annum). Complainant's claim is based on its invoices to Respondent which expressly state: "Past due accounts are subject to interest charge of 1 1/2 % per month, maximum 18% per annum." (*See, e.g.*, Compl. Ex. 15.) There is nothing to indicate that Respondent objected to the interest charge provision stated on Complainant's invoices. In the absence of a timely objection by Respondent, the interest charge provision stated on Complainant's invoices was incorporated into each sales contract. *See Coliman Pacific Corp. v. Sun Produce Specialties LLC*, 73 Agric. Dec. 639, 646 (U.S.D.A. 2014). Accordingly, pre-judgment interest will be awarded to Complainant at the rate of 1.5 percent per month (18 percent per annum). Post-judgment 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 (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 PACA (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $87,150.24, with interest thereon at the rate of 18 percent per annum from June 1, 2018, up to the date of this Order. Respondent shall also pay Complainant interest at the rate of percent per annum on the sum of $87,150.24 from the date of this Order, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

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MISCELLANEOUS ORDERS & DISMISSALS

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. Substantive 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: https://oalj.oha.usda.gov/current.

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: EACH CASE PENDING BEFORE THE USDA OFFICE OF ADMINISTRATIVE LAW JUDGES.
All Dockets Pending Before USDA OALJ.
Blanket Order Extending Filing Deadlines Occurring During Furlough in All Cases Pending Before USDA Administrative Law Judges.
Filed January 11, 2019.

In re: EACH CASE PENDING BEFORE THE USDA OFFICE OF ADMINISTRATIVE LAW JUDGES.
All Dockets Pending Before USDA OALJ.
Blanket Order Amending to February 11, 2019 Filing Deadlines Occurring During the Furlough Period in All Cases Pending Before USDA Administrative Law Judges.
Filed January 29, 2019.

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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: https://oalj.oha.usda.gov/current].

PERISHABLE AGRICULTURAL COMMODITIES ACT

SPIECH FARMS, LLC.
Docket No. 18-0081.
Default Decision and Order.
Filed March 6, 2019.

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CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Paradise Produce, LLC.
Docket No. 18-0056.
Consent Decision and Order.
Filed March 4, 2019.

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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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