AGRICULTURE DECISIONS

Volume 78

Book Two

July – December 2019

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

Published decisions and orders (*i.e.*, those that appear in *Agriculture Decisions*) may be cited by providing the volume number, page number, and year [*e.g.*, 1 Agric. Dec. 472 (U.S.D.A. 1942)].

[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.

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

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AGRICULTURE DECISIONS

Volume 78

Book Two

Part One (General)

Pages 248 – 383

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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ANIMAL WELFARE ACT

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: DOUGLAS KEITH TERRANOVA, an individual; and TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058; 15-0059; 16-0037; 16-0038.
Decision and Order.
Filed August 30, 2019.

AWA – Access – Cease-and-desist order, failure to obey – Civil money penalties – Enclosures – Enrichment – Exhibition – Handling – Housekeeping – Housing facilities – Injury to animal and/or public – Inspection – Itinerary – License , suspension of – Repeated – Sanctions, sufficiency of – Standards, failure to meet – Structural strength – Tiger, escape of – Veterinary care – Violations, nature and number of – Willful.

Colleen A. Carroll, Esq., and Samuel D. Jockel, Esq., for APHIS.
William J. Cook, Esq., for Respondents.
Initial Decision and Order entered by Erin M. Wirth, Administrative Law Judge.
Decision and Order entered by Bobbie J. McCartney, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary enforcement proceeding that initiated with a complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("Complainant"),[1] on January 16, 2015.[2] The Complaint alleged that Douglas Keith Terranova and Terranova Enterprises, Inc. ("Respondents") willfully violated the Animal Welfare Act (7 U.S.C. §§ 2131–2159) ("AWA" or "Act") and the regulations promulgated thereunder (9 C.F.R. §§ 1.1–3.142) ("Regulations") on multiple occasions between August 2010 and September 2013. On February 19, 2015, Respondents filed an answer denying the material allegations of the Complaint.

[1] While I recognize the Administrator is a person, I will use the pronoun "it" when referring to the "Complainant" herein.

[2] The case was assigned AWA Docket Nos. 15-0068 and 15-0069.

On January 29, 2016, Complainant filed a second complaint alleging additional AWA violations by Respondents in 2015.[3] Due to the similarity of the allegations, the case was consolidated with the earlier action against Respondents. On February 22, 2016, Respondents filed an answer denying the material allegations of the second Complaint.

On September 26, 2016, after conducting an in-person hearing and considering post-hearing briefs filed by the parties, Administrative Law Judge Erin M. Wirth ("ALJ")[4] issued an Initial Decision and Order ("Initial Decision" or "IDO") finding that Respondents willfully violated the Act and Regulations, including a finding that Respondents committed willful violations with respect to a tiger escape on April 20, 2013[5] and knowingly failed to obey a cease-and-desist order issued by the Secretary under 7 U.S.C. § 2149(b).[6] The Initial Decision also ordered Respondents to cease and desist from further violations of the Act and Regulations, suspended Respondents' AWA license for a period of thirty days, and assessed Respondents joint-and-several civil penalties of $10,000 for the violations established and $11,500 for their knowing failures to obey the Secretary's cease-and-desist order.[7]

On November 29, 2016, Complainant filed a Petition for Appeal of the Initial Decision and a "Memorandum of Points and Authorities" in support thereof,[8] contending that the number and nature of Respondents'

[3] The case was assigned AWA Docket Nos. 16-0037 and 16-0038.

[4] Judge Wirth is—and was at all material times herein—an Administrative Law Judge of the Federal Maritime Commission. Judge Wirth presided over the above-captioned proceedings on behalf of the United States Department of Agriculture ("USDA") pursuant to the Office of Personnel Management ("OPM") Administrative Law Judge ("ALJ") Loan Program. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

[5] IDO at 3.

[6] *Id.* at 64, 67.

[7] *Id.* at 68.

[8] The Initial Decision was filed on September 26, 2016 and served on Complainant the following date. Complainant had thirty days from the date of service to file an appeal with the Hearing Clerk. 7 C.F.R. § 1.145(a). Weekends and federal

violations are the kind of serious, repeat, and willful violations of the Act and the Regulations and Standards that warrant assessment of higher civil penalties than assessed by the ALJ when the required statutory factors are fully considered.[9]

On January 9, 2017, Respondents filed their Response to Appeal Petition and Cross Appeal Petition.[10] Respondents contend that the ALJ imposed excessive sanctions for what Respondents describe as "a few non-willful paperwork and access violations."[11] Respondents also assert that the ALJ erred in finding Respondents committed willful violations with respect to a tiger escape on April 20, 2013.[12]

The Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision on January 20, 2017. On December 18, 2017, to "put to rest any Appointments Clause claim that may arise in

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holidays shall 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, Complainant's appeal petition was due on or before October 27, 2016; however, per Complainant's request, Judicial Officer Jenson extended the filing deadline to November 29, 2016.

[9] *See* Appeal at 18 ("Consideration of the required statutory factors in accordance with departmental precedent should have led the Judge to conclude that a greater civil penalty was warranted for respondents' ten violations."); *see also* section 19(b) of the Act (7 U.S.C. § 2149(b)).

[10] The Petition for Appeal was filed on November 29, 2016 and served on Respondents' counsel the same day. Respondents had twenty days from the date of service to file a response to Complainant's appeal. 7 C.F.R. § 1.145(b). Weekends and federal holidays shall 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, Respondents' response to the appeal was due on or before December 19, 2016; however, per Respondents' request, Judicial Officer Jenson extended the filing deadline to January 9, 2017.

[11] Response at 1.

[12] *Id.* at 3.

this proceeding,"[13] former Judicial Officer William G. Jenson[14] issued an order remanding the case to the Chief Administrative Law Judge.[15] Following resolution of the issues on remand, described more fully herein below, the Hearing Clerk once again transmitted the record to the Office of the Judicial Officer for consideration and decision of the ALJ's September 26, 2016 Initial Decision.

After careful consideration of the record, including the entirety of the hearing transcripts and all briefs and other filings by the parties, and for the reasons discussed more fully herein below, I concur with Complainant's contention that Respondents' violations are the kind of serious, repeat, and willful violations of the Act and the Regulations and Standards that warrant assessment of higher civil penalties than assessed in the Initial Decision when the required statutory factors are fully considered.[16]

Relevant Procedural History

This proceeding initiated with a complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("Complainant"),[17] on January 16, 2015.[18] The Complaint alleged that Douglas Keith Terranova and Terranova Enterprises, Inc. ("Respondents") willfully violated the Animal Welfare Act (7 U.S.C. §§ 2131 – 2159) ("AWA" or "Act") and the regulations promulgated thereunder (9 C.F.R. §§ 1.1 – 3.142) ("Regulations") on multiple occasions between August 2010 and

[13] Remand Order at 1.

[14] Judicial Officer Jenson retired from the federal service in August 2018.

[15] Remand Order at 1-2.

[16] *See* Appeal at 18 ("Consideration of the required statutory factors in accordance with departmental precedent should have led the Judge to conclude that a greater civil penalty was warranted for respondents' ten violations."). *See also* section 19(b) of the Act (7 U.S.C. § 2149(b)).

[17] While I recognize the Administrator is a person, I will use the pronoun "it" when referring to the "Complainant" herein.

[18] The case was assigned AWA Docket Nos. 15-0068 and 15-0069.

September 2013. On February 19, 2015, Respondents filed an answer denying the material allegations of the Complaint.

The case was originally assigned to former Administrative Law Judge Janice K. Bullard ("Judge Bullard");[19] however, on December 16, 2015, Judge Bullard reassigned the case to Administrative Law Judge Erin M. Wirth ("Judge Wirth" or "ALJ") of the Federal Maritime Commission.[20]

On January 29, 2016, Complainant filed a second complaint against Respondents[21] alleging additional willful violations in 2015.[22] The case (AWA Docket Nos. 16-0037 & 16-0038) was assigned to Judge Wirth, who on February 5, 2016 issued an order consolidating the proceeding with the earlier action (AWA Docket Nos. 15-0068 & 15-0069) and scheduled an oral hearing.[23] On February 22, 2016, Respondents filed an answer denying the material allegations of the second Complaint.

Due to an issue of witness availability, Judge Wirth conducted the hearing in two parts. An in-person hearing commenced March 21, 2016 through March 23, 2016 in Washington, D.C., to address events involving

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[19] Judge Bullard retired from the federal service in April 2016. She was Acting Chief Administrative Law Judge at the time of reassignment.

[20] Judge Wirth is – and was at all material times herein – an Administrative Law Judge of the Federal Maritime Commission. Judge Wirth presided over the above-captioned proceedings on behalf of the United States Department of Agriculture ("USDA") pursuant to the Office of Personnel Management ("OPM") Administrative Law Judge ("ALJ") Loan Program. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

[21] The case was assigned AWA Docket Nos. 16-0037 and 16-0038.

[22] The Complaint alleged, *inter alia*, that Respondents failed to obey a cease and desist order that was issued against them in AWA Docket Nos. 09-0155 and 10-0418. *See* 2015 Complaint ¶¶ 5, 6; *Terranova Enters., Inc.*, 70 Agric. Dec. 925, 978 (U.S.D.A. 2011) (Decision and Order as to Terranova Enterprises, Inc. d/b/a Animal Encounters Inc. and Douglas Keith Terranova) (hereinafter "*Terranova I*").

[23] *See* Order to Consolidate Proceedings and Scheduling Order at 1 ("Due to the similarity of the allegations and to ensure efficient handling of the complaints, it is hereby ORDERED that Dockets 15-0058 and 15-0059 and Dockets 16-0037 and 16-0038 be consolidated.").

allegations that occurred away from Respondents' property in Texas. Events involving allegations that occurred on Respondents' property were addressed when the hearing resumed in Riverdale, Maryland on April 18, 2016 and April 19, 2016.[24] The parties filed post-hearing briefs thereafter.[25]

On September 26, 2016, Judge Wirth issued an Initial Decision and Order ("Initial Decision" or "IDO") finding that Respondents willfully violated the Act and Regulations, including a finding that Respondents committed willful violations with respect to a tiger escape on April 20, 2013[26] and knowingly failed to obey a cease-and-desist order issued by the Secretary under 7 U.S.C. § 2149(b).[27] The Initial Decision also directed Respondents to cease and desist from further violations of the Act and Regulations, suspended Respondents' AWA license for a period of thirty days, and assessed Respondents joint-and-several civil penalties of $10,000 for the violations established and $11,500 for their knowing failures to obey the Secretary's cease-and-desist order.[28]

On November 29, 2016, Complainant filed a Petition for Appeal of the Initial Decision and a "Memorandum of Points and Authorities" in support thereof.[29] On January 9, 2017, Respondents filed their Response to Appeal

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[24] The second part of the hearing was conducted via audio-visual equipment located in Dallas, Texas and Palmetto, Florida.

[25] On June 10, 2016, Complainant filed its proposed findings of fact, conclusions of law, order, and brief in support thereof ("Complainant's Brief"). On July 15, 2016, Respondents filed their post-hearing brief and proposed findings of fact and conclusions of law ("Respondents' Opposition Brief"). On July 29, 2016, Complainant filed its reply brief ("Complainant's Reply Brief").

[26] *See* IDO at 2, 11, 64.

[27] *Id.* at 64, 67.

[28] *Id.* at 68.

[29] The Initial Decision was filed on September 26, 2016 and served on Complainant the following date. Complainant had thirty days from the date of service to file an appeal with the Hearing Clerk. 7 C.F.R. § 1.145(a). Weekends and federal holidays shall 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, Complainant's appeal

Petition and Cross Appeal Petition.[30] The Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision on January 20, 2017.

On December 18, 2017, to "put to rest any Appointments Clause claim that may arise in this proceeding,"[31] former Judicial Officer William G. Jenson ("Judicial Officer Jenson")[32] issued an order remanding the case to the Chief Administrative Law Judge "for assignment to an administrative law judge who has been appointed by the Secretary of Agriculture as an inferior officer in accordance with the Appointments Clause."[33] Judicial Officer Jenson directed that the Administrative Law Judge assigned to the proceeding shall: (1) issue an order giving the parties an opportunity to submit new evidence; (2) consider the record, including any newly submitted evidence the Judge finds relevant, material, and not unduly repetitious, and all substantive and procedural actions taken by Judge Wirth; (3) determine whether to ratify or revise all prior actions taken by Judge Wirth; and (4) issue an order stating that the Administrative Law Judge has completed consideration of the record and setting forth the determination regarding ratification.[34]

The case was reassigned to Administrative Law Judge Jill S. Clifton

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petition was due on or before October 27, 2016; however, per Complainant's request, Judicial Officer Jenson extended the filing deadline to November 29, 2016.

[30] The Petition for Appeal was filed on November 29, 2016 and served on Respondents' counsel the same day. Respondents had twenty days from the date of service to file a response to Complainant's appeal. 7 C.F.R. § 1.145(b). Weekends and federal holidays shall 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, Respondents' response to the appeal was due on or before December 19, 2016; however, per Respondents' request, Judicial Officer Jenson extended the filing deadline to January 9, 2017.

[31] Remand Order at 1.

[32] Judicial Officer Jenson retired from the federal service in August 2018.

[33] Remand Order at 1-2.

[34] *Id.* at 2.

("Judge Clifton"), who, on January 10, 2018, issued an order directing each party to file by January 30, 2018 a position statement in response to the issues set forth in the Remand Order. Judge Clifton also directed the parties to address "the appropriateness of granting or denying a **STAY** of these proceedings,"[35] noting that several consolidated cases challenging the USDA's authority to adjudicate Horse Protection Act cases were pending before the U.S. Court of Appeals for the D.C. Circuit.[36]

On January 29, 2018, Respondents filed their Position Statement indicating they "believe[d] a stay of these proceedings [was] appropriate pending resolution of the appellate proceedings referenced in the [January 10, 2018] Order."[37] Complainant filed its "Statement of Position" on January 30, 2018, requesting, *inter alia*: (1) that Judge Clifton "forbear from taking action in connection with the instant cases until such time as the Supreme Court issues an opinion in *Lucia* or *Bandimere*"; and (2) that the "record of the proceedings be considered, including without limitation ALJ Wirth's adverse rulings on complainant's objections . . . and arguments advanced in complainant's post-hearing briefs and appellate filings, with respect to ALJ Wirth's substantive and procedural rulings made during the hearing and in ALJ Wirth's initial decision and order."[38]

On February 28, 2018, Judge Clifton issued a Notice of Judge's Postponement of Judge's Tasks on Remand, noting in pertinent part:

> Discussion in the courts regarding "Appointment" and "Removal" of Administrative Law Judges is an issue I am observing. My next task in these dockets (AWA Docket Nos. 15-0058 & 15-0059; and 16-0037 & 16-0038), a

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[35] Order Regarding Reassignment of Case and Directing Each Party to File Response to Remand by January 30, 2018 at 2.

[36] *See id.* at 2 n.3 ("In those cases the USDA agreed that the cases should be held in abeyance pending the Supreme Court's disposition of two cases that will impact [them]."). Judge Clifton was referencing *Amelia Haselden, et al. v. USDA*, No. 17-1235 (consolidated with AGRI-HPA Nos. 17-0120, 17-0123, 17-0124, 17-0127, and 17-0128).

[37] Respondents' Position Statement at 1.

[38] Complainant's Statement of Position at 4.

> time-consuming task, is to review the Hearing transcripts and exhibits, and to determine whether to ratify or revise previous actions by Administrative Law Judges, and to determine whether to reconvene the Hearing. I will postpone my review of the record and my determinations until we hear from the U.S. Supreme Court, probably by the end of June 2018, regarding challenges to the authority of Administrative Law Judges.[39]

On June 21, 2018, the Supreme Court issued a decision in *Lucia v. SEC*[40] holding that the Securities and Exchange Commission's administrative law judges are officers of the United States and therefore subject to the Appointments Clause.[41] The Court further held that in cases heard and decided by an administrative law judge who was not appointed in accordance with the Appointments Clause, the appropriate remedy is a new hearing before a different and properly appointed official.[42]

On July 2, 2018, Judge Clifton corresponded with the parties by email, filed on the record, asking the parties to "choose their course under Lucia v SEC" and "request[ing] that Judge Wirth . . . file with the Hearing Clerk[] documentation that the parties may consider with regarding to Judge Wirth's appointment(s) as an administrative law judge." On July 3, 2018, Judge Wirth replied on the record, stating that she "was appointed by the Chairman of the Federal Maritime Commission on January 3, 2010" and attaching a June 28, 2018 Commission Order confirming the same.[43] Neither party responded regarding their preferred course under *Lucia*.

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[39] Notice of Judge's Postponement of Judge's Tasks on Remand at 2.

[40] 138 S. Ct. 2044 (2018).

[41] *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

[42] *See id.* ("And we add today one more thing. That official cannot be Judge Eliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. . . . To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.") (footnotes omitted)).

[43] Judge Wirth's Response to Correspondence at 1; *see In Re: Ratification of Federal Maritime Commission Administrative Law Judges*, Docket No. 18-05, 2018 WL 3250258 (F.M.C. June 28, 2018).

On August 28, 2018, Judge Clifton filed a "Summary of Judge's Observations Prior to Responding to Remand Order and Briefing Deadlines," providing, *inter alia*:

> The current proceedings, over which Judge Wirth presided, commenced on January 16, 2015 after Judge Wirth's January 3, 2010 appointment as an ALJ by the FMC Chairman. The FMC Ratification Order holds that the FMC Chairman is the head of the department and "is vested with authority to appoint 'Officers' at the Commission." Thus, it is my understanding that Judge Wirth had full authority to preside over administrative proceedings as a properly appointed FMC ALJ. . . .
>
> Based on the foregoing, my observation is that Judge Wirth was properly appointed in her employing agency to preside over these dockets via interagency agreement under the OPM ALJ Loan Program, and that Judge Wirth had proper authority to preside over these dockets as an Officer subject to the Appointments Clause and in accordance with 5 U.S.C. § 3344 and 5 C.F.R. § 930.208. While I carefully consider any additional input submitted by the parties, I am inclined to rule in accordance with my above observations in response to the Remand Order by returning these dockets to the Judicial Officer.[44]

The Summary also established briefing deadlines, allowing Complainant until September 28, 2018 to file a brief proposing and supporting the course for proceedings and granting Respondents until October 26, 2018 to file a brief proposing the course for proceedings and responding to Complainant's brief. Neither party submitted a brief or other response to Judge Clifton's Summary of Observations. Neither party appealed Judge Clifton's finding.

On November 28, 2018, Judge Clifton filed a "Notice of Completion

[44] Summary of Judge's Observations Prior to Responding to Remand Order and Briefing Deadlines at 6 ¶ 11.

of Judge's Tasks on Remand," concluding:

> . . . I affirm my Observations contained in my August 28, 2018 issuance; my tasks on Remand are completed; and Docket Nos. **15-0058** & **15-0059**; and **16-0037** & **16-0038**, are ready for completion by the Judicial Officer of the parties' appeals of the Decision issued on September 27, 2016, by Administrative Law Judge Erin M. Wirth.[45]

Neither party appealed this finding. Accordingly, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of the September 26, 2016 Initial Decision.

Summary of the Parties' Positions on Appeal

In her September 26, 2016 Decision and Order ("Initial Decision" or "IDO"), Administrative Law Judge Erin M. Wirth ("Judge Wirth" or "ALJ")[46] found "three willful violations"[47] by Respondents: (1) August 2, 2010 failure to have a responsible person available to provide access to APHIS officials to conduct compliance investigations; (2) April 20, 2013 failure, during public exhibition, to handle an adult tiger with sufficient distance and/or barriers between the tiger and the public and to have the tiger under the direct control and supervision of a knowledgeable and experienced handler; and (3) November 14, 2015 through November 19, 2015 failure to timely submit an accurate travel itinerary.[48] By committing these violations, the ALJ concluded, Respondents knowingly failed to obey a cease and desist order made by the Secretary under 7 U.S.C. §

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[45] Notice of Completion of Judge's Tasks on Remand at 1-2 ¶ 3.

[46] As previously stated, Judge Wirth is – and was at all material times herein – an Administrative Law Judge of the Federal Maritime Commission. Judge Wirth presided over the above-captioned proceedings on behalf of the United States Department of Agriculture ("USDA") pursuant to the Office of Personnel Management ("OPM") Administrative Law Judge ("ALJ") Loan Program. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

[47] IDO at 2.

[48] *Id.* at 2, 64, 67.

2149(b).[49] However, the ALJ also found that while Respondents violated 7 U.S.C. § 2146(a) and 9 C.F.R. §§ 2.126(a) and (b) on September 8, 2012[50] by failing to provide a responsible person to allow APHIS officials access to their place of business to conduct an inspection, the violation "was not willful."[51]

Additionally, the ALJ ruled that Complainant failed to prove by a preponderance of the evidence that Respondents violated the AWA and Regulations as alleged in paragraphs 8, 9(a), 9(b), 9(c), 9(d), 9(e), 9(f), and 9(g) of the 2015 Complaint and in paragraphs 7, 9, 10(a), 10(b), 10(c), 10(d), 10(e), 10(f), 10(g), 10(h), and 10(i) of the 2016 Complaint and dismissed those violations.[52] The ensuing Order: (1) directed Respondents to cease and desist from further violations of the AWA and Regulations; (2) suspended Respondents' AWA license for a period of thirty days; (3) assessed Respondents a joint and several civil-money penalty of $10,000 for the violations established; and (4) assessed Respondents a joint and several civil penalty of $1,650 for each knowing failure to obey the Secretary's cease and desist order, for a total of $11,550.[53]

On appeal, Complainant argues that the ALJ erred by: (1) imposing inadequate sanctions for the violations she found were committed; (2) finding that Respondents' violation of the "access Regulations" on September 28, 2012 was not serious and not willful; and (3) failing to find that Complainant proved the remaining allegations by a preponderance of

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[49] *Id.* at 67.

[50] The 2015 Complaint alleges that the violation was on September 28, 2012 – not September 8, 2012, as the ALJ stated in her Conclusions of Law. *See* IDO at 64 ("On September 8, 2012, Respondents failed to provide access to allow APHIS officials access to their place of business to conduct an inspection . . ."); 2015 Complaint at 5 ¶ 6 ("On or about August 2, 2010, and September 28, 2012, respondents willfully violated the Act and the Regulations by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals and records during normal business hours. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).").

[51] IDO at 9, 64.

[52] *Id.* at 64-67; 2015 Complaint at 5-7; 2016 Complaint at 5-7.

[53] IDO at 67.

the evidence.[54] While the ALJ seemed to accept many of Respondents' arguments as credible defenses to the violations alleged, Complainant characterizes Respondents as unrepentant, repeat offenders who have continued to act in bad faith.

Conversely, Respondents contend that the ALJ imposed excessive sanctions for what Respondents describe as "a few non-willful paperwork and access violations."[55] Respondents also assert the ALJ erred in finding Respondents committed willful violations with respect to a tiger escape on April 20, 2013.[56]

Discussion of Issues

I. Number and Nature of Violations

As an initial matter, Complainant maintains that each Respondent committed ten violations and concludes that the ALJ, when making sanction determinations, undercounted the number of violations she had found.[57] Respondents do not address this argument.

Complainant is correct. Throughout the Initial Decision, the ALJ "refers to the number of violations variously as 'three' and 'four' occurring on 'seven days,' . . . but the number of violations that the Judge found that the Respondents committed is ten."[58] As Complainant observes,[59] the ALJ found that Complainant proved by a preponderance of the evidence that Respondents committed the violations alleged in paragraphs 6 (access) and 7 (handling) of the 2015 Complaint[60] and the violations alleged in

[54] *See* Appeal at 15, 17, 29.

[55] Response at 1.

[56] *Id.* at 3.

[57] *See* Appeal at 15-16.

[58] *Id.* at 16. *See* IDO at 46, 67.

[59] Appeal at 14-15.

[60] *See* IDO at 7-16, 64; 2015 Complaint at 5 ¶¶ 6, 7.

paragraph 8 (itinerary) of the 2016 Complaint:[61]

> 3. On August 2, 2010, Respondents willfully violated the Act and the regulations by failing to have a responsible person available to provide access to APHIS officials to conduct compliance investigations. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).
>
> 4. On September 8, 2012,[62] Respondents failed to provide access to allow APHIS officials access to their place of business to conduct an inspection, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) and (b). This violation, however, was not willful.
>
> 5. On or about April 20, 2013, Respondents willfully violated the regulations by failing, during public exhibition, to handle an adult tiger with sufficient distance and/or barriers between the tiger and the public, *and* to have the tiger under the direct control and supervision of a knowledgeable and experienced animal handler. 9 C.F.R. §§ 2.131(b)(1), 2.131(c)(1), 2.131(d)(3).[63]
>
> 6. From November 14-19, 2015, Respondents willfully violated the regulations, 9 C.F.R. § 2.126(c), by failing to timely submit an accurate travel itinerary.

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[61] *See* IDO at 30-32, 64; 2016 Complaint at 5 ¶ 8.

[62] The Complaint in the 2015 case alleges that the violation occurred on September 28, 2012. *See* 2015 Complaint at 5 ¶ 6.

[63] Although the ALJ's discussion states that Complainant did not prove a violation of section 2.131(b)(1) (9 C.F.R. § 2.131(b)(1)), the Conclusions of Law cite that section as having been violated. *See* IDO at 15, 64. I infer that the citation in the Conclusions of Law was unintended.

Initial Decision at 64.

In short, the ALJ found that Respondents committed one willful violation of the access Regulations, one "not willful" violation of the access Regulations,[64] two willful violations of the handling Regulations,[65] and multiple willful violations of the itinerary Regulations.[66] The Act provides that, when assessing civil penalties, "[e]ach violation and each day during which a violation continues shall be a separate offense."[67] Although the ALJ appears to count the number of itinerary violations as five,[68] the number of days represented by November 14 through November 19 is six. Therefore, the total number of violations found by the ALJ on this issue is ten, and I conclude the ALJ undercounted those violations when determining sanctions.[69]

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[64] Despite noting that "[w]illfulness is not required for . . . a monetary fine," the ALJ chose not to impose any penalties for this violation. IDO at 7, 9 ("Accordingly, the evidence establishes that on September 28, 2012, a violation occurred but the violation was not willful and no additional penalty is imposed from this violation.").

[65] Elsewhere in the Initial Decision, the ALJ improperly treats Respondents' violations of sections 2.131(c)(1) and 2.131(d)(3) (9 C.F.R. §§ 2.131(c)(1), 2.131(d)(3)) as one violation. *See* IDO Order at 2 ("As discussed more fully below, three willful violations are found: August 2, 2010, unable to access facility; April 20, 2013, animal escape; and November 14-19, 2015, itinerary not filed."), 46 ("One of the violations is grave, involving the escape of a tiger in Selina[sic], Kansas.").

[66] *See* IDO at 64.

[67] 7 U.S.C. § 2149(b).

[68] *See* IDO at 67.

[69] *See supra* note 65 and accompanying text; *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 464 n.8 (5th Cir. 2015) ("[N]either the AWA nor the regulations require a showing of willfulness for the imposition of a civil monetary penalty."). Assuming *arguendo* that the ALJ had considered the non-willful violation when assessing civil penalties, she still undercounted the total number of violations established by treating the two handling violations as one and miscounting the number of violation days from November 14 to November 19.

Further, as discussed more fully herein below, the record reflects that the ALJ also utilized a flawed analysis to reject several other violations in their entirety.[70] More specifically, the ALJ improperly declined to find a number of violations on the ground ". . . no animal or person was actually harmed."[71] In so doing, the ALJ "completely missed the point of the Regulations and Standards: prevention."[72]

The ALJ's Initial Decision, when considered as a whole, reflects a fundamental misunderstanding of the severity of the violations and the adverse impact of Respondents' willful, repeated, and prolonged violations of the Act and the Regulations and Standards on the Administrator's ability to enforce the AWA. This is made clear by the fact that the ALJ described only one violation (handling) as "grave" and described the access violations as "minor,"[73] as well the fact that the ALJ utilized a flawed analysis to reject several other violations in their entirety. After careful consideration of the record, including the entirety of the hearing transcripts and all briefs and other filings by the parties, and for the reasons discussed more fully herein below, I concur with Complainant's contention that Respondents' violations are the kind of serious, repeat, and willful violations of the Act and the Regulations and Standards that warrant assessment of higher civil penalties than assessed in the Initial Decision when the required statutory factors are fully considered.[74]

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[70] *See* Appeal at 50-51.

[71] *See id.*

[72] *Id.* at 51 ("The Judge failed completely to apprehend that the purpose of requiring those who have custody of animals subject to the Act to maintain their facilities in a manner that meets the minimum Standards is to ensure against the potential harm to animals from substandard conditions and treatment.").

[73] *See id.* at 18-19 ("Although the Judge described only one violation (handling) as 'grave,' and described the access violations as 'minor,' the respondents' handling violations and failures to provide access for inspection are the kind of serious, repeat violations that merit assessment of the maximum civil penalties.").

[74] *See id.* at 18 ("Consideration of the required statutory factors in accordance with departmental precedent should have led the Judge to conclude that a greater civil penalty was warranted for respondents' ten violations."). *See also* section 19(b) of the Act (7 U.S.C. § 2149(b)).

A. Tiger Escape (April 20, 2013)

On cross-appeal, Respondents assert the ALJ erred in finding that Respondents committed willful handling violations with respect to a tiger escape on April 20, 2013.[75]

> On April 20, 2013, a tiger escaped during a circus performance in Salina, Kansas. . . . The Judge found that Respondents willfully violated 9 C.F.R. § 2.131(d)(3) by failing to have the tiger under direct control and supervision of a knowledgeable and experienced handler. She also found that Respondents willfully violated 9 C.F.R. § 2.131(c)(1) by failing to maintain sufficient barriers or distance between the tiger and the public. The Judge erred.

Response at 13. For the below-stated reasons, I reject Respondents' argument and affirm the ALJ's findings that Respondents willfully violated 9 C.F.R. §§ 2.131(c)(1) and 2.131(d)(3).

Congress intended for the exhibition of animals to be accomplished in a manner that is safe for both animals and humans.[76] To that end, the Regulations require that during public exhibition "any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public" (9 C.F.R. § 2.131(c)(1)) and "dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler" (9 C.F.R. § 2.131(d)(3)).

Respondents argue that: (1) the record does not establish that Respondents failed to maintain a sufficient distance between a tiger and a member of the public after the animal's escape (9 C.F.R. § 2.131(c)(1)) and (2) the evidence shows that the tiger was under the direction control

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[75] Response at 13.

[76] *See* 7 U.S.C. § 2131; *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 444-45 (D.C. Cir. 1998).

and supervision of a knowledgeable and experienced handler at the time of the escape (9 C.F.R. § 2.131(d)(3)).[77] Respondents state:

> The evidence shows that the tiger did not escape due to any willful failures in staffing or training, and after the tiger escaped, Respondents professionally handled the tiger to keep it and the public from harm. If anything, the evidence shows that Respondents should be commended for how expertly they handled the tiger in response to a human error.

Response at 19. Conversely, Complainant contends the fact that the tiger escape occurred essentially proves the violations.[78]

First, the ALJ correctly concluded that "Complainant established that during a public exhibition, the tiger was not "handled 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 animals and the public.'"[79] I agree with the ALJ that there is "little question that having a tiger walking through an arena filled with spectators and out onto a public concourse constitutes a failure to provide sufficient distance and barriers between the animal and the general viewing public."[80] Given that the primary barrier between the tiger and the public during a circus performance is the handler – and, thereafter, the tiger's cage – it is evident Respondents did not provide a sufficient barrier between the tiger and the public in this case.[81]

Respondents challenge the ALJ's finding that Respondents violated 9 C.F.R. § 2.131(c)(1) "on grounds that the tiger was in close proximity to a member of the public in a restroom" and take issue with the ALJ's reliance

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[77] IDO at 16.

[78] Appeal at 35.

[79] IDO at 15.

[80] *Id.*

[81] *See id.* at 52 ("Upon the conclusion of the performance, one of the tigers (Leah) was not placed in an enclosure, but escaped and ran out into the arena's concourse. CX 8; CX 10; CX 11; CX 12; CX 13."), 53-56.

"on [the] extremely questionable testimony of Jenna Krehbiel."[82] However, it is the consistent practice of the Judicial Officer to give great weight to findings by, and particularly the credibility determinations of, administrative law judges since they have the opportunity to hear witnesses testify.[83] I have examined the record in light of Respondents' argument and find no basis for reversing the ALJ's credibility determination regarding Ms. Krehbiel.[84] Furthermore, the ALJ was not required to establish the exact distance between the tiger and Ms. Krehbiel; the fact the tiger escaped and was able to roam into a public restroom while a person was inside shows the distance between the tiger and the public was inadequate.

Second, the ALJ correctly concluded that the tiger was not under the direct control and supervision of a knowledgeable and experienced handler at the time of its escape.[85] Respondents admit that the tiger's handler "left a cage door open that allowed [the tiger] to escape, and then he could not open an empty cage door to allow the tiger into the proper cage."[86] As a result, "[t]he tiger was on the loose from approximately 7:25 p.m. to 7:32

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[82] *See* Response at 18 ("Indeed, the Judge expressly found that the record did not accurately reflect the distance between the tiger and Krehbiel, as she credited the testimony of both Krehbiel and Respondents' witnesses and found it was unclear how far the tiger was from Krehebiel [sic]. Given this lack of clarity, the Judge necessarily erred in finding that Complainant violated 9 C.F.R. § 2.131(c)(1) by failing to maintain a sufficient distance between Leah [and] a member of the public.").

[83] *See Jenne*, 74 Agric. Dec. 358, 368 (U.S.D.A. 2015); *Perry*, 72 Agric. Dec. 635, 647 (U.S.D.A. 2013) (Decision and Order as to Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc.); *KOAM Produce, Inc.*, 65 Agric. Dec. 1470, 1476 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider); *Bond*, 65 Agric. Dec. 1175, 1183 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider).

[84] *See* IDO at 14 ("Ms. Krehbiel's testimony at the hearing was credible. The evidence shows that she was initially told to go back into the restroom, while the tiger was in the concourse, and when the tiger entered the restroom she was told to leave due to the tiger in the restroom. It is not clear exactly how far the tiger was from her.").

[85] *Id.* at 15.

[86] Response at 14.

p.m."[87] If the tiger had been "under the supervision and control" of a knowledgeable and experienced handler as Respondents contend, the animal should not have escaped its cage and entered into the arena, concourse, or public restroom.[88] Further, the fact Mr. Terranova and Carlos Quinones observed, followed, and talked to the tiger after she escaped does not demonstrate direct control and supervision;[89] to the contrary, the record demonstrates that the tiger was "loose in the arena and on the concourse."[90]

Respondents argue "the evidence shows that the Respondents were staffed with experienced handlers."[91] However, that Respondents might have had experienced handlers on staff does not mean that the escaped tiger was under the control and supervision of one such handler. There can be no dispute that Respondents' handling of tigers allowed at least one to escape, potentially causing injury to humans and placing both people and the tiger at risk of injury or death.[92] In fact, Respondents admit that the

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[87] IDO at 56 (citing CX-11 at 1).

[88] Response at 16.

[89] *See* IDO at 15-16; Tr. 3623-64, 454-56. Mr. Quinones was the tiger trainer and presenter at the performance. *See* IDO at 10-11.

[90] IDO at 16.

[91] Response at 13. Respondents' argument is not supported by the record. *See* IDO at 15-16; Response at 14 ("According to Curtis, the circus ringmaster, he had hired four laborers to assist with moving the tiger cages, but he had to fire one of them prior to the first show. Tr. 316-317. It is unclear that Terranova knew how many laborers were working. . ."); CX-14 (Declaration of IES Investigator Toni Christensen) ("Mr. Terranova told me that an individual named 'Jesse' was working on closing and locking the doors and disconnecting the cages, but he was going more slowly than usual because he didn't have anyone else helping him."); Tr. 301 (Testimony of Richard Curtis) ("I think what happened, my knowledge of the event where the cat jumped out, was there were extra hands that came in to help because we were a little short-handed on the crew.").

[92] *See Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) ("[T]he Animal Welfare Act requires secure containment of dangerous animals in part because if they escape and injure a human being they are likely to be killed.") (citing *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 168 (7th Cir. 1996)); *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 168-69 (7th Cir. 1996) ("And

escape occurred as a result of an inexperienced person working with the tiger cages:

> In accordance with Respondents' usual procedure, that night Terranova worked the front door and Jesse Plunkett opened and closed the cage doors. Plunkett was part of the crew supplied by the circus. Plunkett had worked the tiger cages for Terranova before and had opened and closed the doors many times. . . . Terranova trusted Plunkett implicitly to lock the doors. . . .
>
> On the night of the event, Terranova was at the front door listening for Jesse. It was dark and everyone was wearing black. Tr. 303, 446. At the end of the act, Terranova looked at Quinones in the arena and heard Plunkett say, "oh no" so he turned and saw Leah on the floor. Leah was actually trying to get in the cage, but the door had jammed shut. Tr. 447. Unknown to Terranova, Cody Ives, a friend of Plunkett's who was part of the motorcycle act was assisting. Ives was not supposed to be with the tigers and Terranova did not learn of his presence until after the fact. Everybody was dressed in black and working in the dark with eight foot cages. Tr. 448, 519. Apparently Ives had left a cage door open that allowed Leah to escape, and then he could not open an empty cage door to allow the tiger into the proper cage. Tr. 449-450.

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we may also assume that the containment of dangerous animals is a proper concern of the Department in the enforcement of the Animal Welfare Act, even though the purpose of the Act is to protect animals from people rather than people from animals. Even Big Cats are not safe outside their compounds . . . if one of those Cats mauled or threatened a human being, the Cat might get into serious trouble and thus it is necessary to protect human beings from Big Cats in order to protect the Cats from human beings, which is the important thing under the Act."); *Int'l Siberian Tiger Found.*, 61 Agric. Dec. 53, 78 (U.S.D.A. 2002) (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady) ("Respondents' lions and tigers are simply too large, too strong, too quick, and too unpredictable for a person (or persons) to restrain the animal or for a member of the public in contact with one of the lions or tigers to have the time to move to safety.").

> There is no evidence that Terranova needed or wanted assistance from Ives. According to Curtis, the circus ringmaster, he had hired four laborers to assist with moving the tiger cages, but he had to fire one of them prior to the first show. Tr. 316-317. It is unclear whether Terranova knew how many laborers were working, but he never testified that he was understaffed. . . .

Response at 13-14. Contrary to Respondents' assertion, the manner in which Mr. Ives "became involved" is not relevant here.[93] As the ALJ correctly stated, "Respondents knew or should have known who was working with the tigers" and were responsible for properly training those individuals.[94]

It should be noted that for suspension or revocation to be authorized in this case, "only one of the violations need be willful; the government need not show that all of the violations were willful."[95] Nonetheless, willfulness is present here as Respondents were previously found to have insufficient trained personnel available to work with their animals.[96] As the ALJ stated:

> Respondents have . . . previously been found in violation of the Animal Welfare Act. In the prior case, the Judge found that "Mr. Terranova's laissez-faire supervision led to camels being left unattended and the series of poor decisions that led to Kamba's escape and injury in Enid, Oklahoma" and that "[i]t is clear to me that additional trained personnel and more attention to decision making could have averted or mitigated some of the unfortunate events that led to two elephant escapes." Terranova 2009/2010 Cases at 57. While the escape *sub*

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[93] *See* Response at 16.

[94] IDO at 14, 16.

[95] *Ramos v. U.S. Dep't of Agric.*, 332 F. App'x 814, 823 (11th Cir. 2009) (citing *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991)); *see* 7 U.S.C. § 2149(a); 5 U.S.C. § 558(c).

[96] *See* IDO at 16; *Terranova I* at 57.

> *judicie* did not result in injury to the tiger . . . the problem of insufficient supervision and human error again contributed to the escape.

Initial Decision at 45. Despite having been warned about the consequences of not having sufficient trained personnel, Respondents "willfully proceeded with the exhibition without a sufficient number o[f] sufficiently trained staff."[97] It is immaterial that Respondents "did not intend to place the public in close proximity to the animals."[98] Respondents acted with careless disregard of statutory requirements;[99] therefore, I affirm the ALJ's

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[97] IDO at 16. *See Pearson v. U.S. Dep't of Agric.*, 411 F. App'x 866, 872 (6th Cir. 2011) ("Petitioner's failure to bring his facilities into compliance after repeated warnings also makes clear that his violations were willful.") (citing *Hodgins v. U.S. Dep't of Agric.*, No. 97-3899, 238 F.3d 421, 2000 WL 1785733, at *9 (6th Cir. Nov. 20, 2000)); *see also Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 304-05 (U.S.D.A. 1978) ("There are, of course, differing degrees of willfulness. Although it is not necessary to show that prior warning letters were sent in order to prove willfulness . . . , proof that prior warning letters were sent indicates an intentional disregard of the regulatory requirements, *i.e.*, that respondent's violations were grossly willful."), *aff'd mem.* 582 F.2d 39 (5th Cir. 1978).

[98] IDO at 45. *See Lang*, 57 Agric. Dec. 59, 81-82 (U.S.D.A. 1998) ("An action is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Therefore, the fact that Respondent did not 'intentionally cause harm to the lechwe' . . . would not prevent a finding (with respect to the lechwe that died on June 10, 1994) that Respondent intentionally, or with careless disregard of requirements, failed to handle the animal as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort, in violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)).").

[99] *See Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 567 (D.C. Cir. 2007), *reh'g en banc denied*, 482 F.3d 560 (D.C. Cir. 2007); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991) ("Willfulness, as both parties point out in their briefs, includes not only intent to do a prohibited act but also careless disregard of statutory requirements."), *cert. denied*, 502 U.S. 860 (1991); *Finer Food Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Am. Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900

conclusion that "the evidence compels a finding that Complainant has established that this was a willful violation."[100]

B. Violations of Access and Itinerary Regulations

With regard to access and inspection of records and property and to the submission of itineraries, the Regulations provide as follows:

> **§ 2.126 Access and inspection of records and property; submission of itineraries.**
>
> (a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
>
> (1) To enter its place of business;
>
> (2) To examine records required to be kept by the Act and the regulations in this part;
>
> (3) To make copies of the records;
>
> (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(7th Cir. 1961); *E. Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *Shepherd*, 57 Agric. Dec. 242, 286 (U.S.D.A. 1998). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Willfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *Volpe Vito, Inc. v. U.S. Dep't of Agric.*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999) ("'Willful' means action knowingly taken by one subject to the statutory provisions in disregard of the action's legality; no showing of malicious intent is necessary.").

[100] IDO at 16.

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of records and inspection of the property or animals must be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

(c) Any person who is subject to the Animal Welfare regulations and who intends to exhibit any animal at any location other than the person's approved site (including, but not limited to, circuses, traveling educational exhibits, animal acts, and petting zoos), except for travel that does not extend overnight, shall submit a written itinerary to the AC Regional Director. The itinerary shall be received by the AC Regional Director no fewer than 2 days in advance of any travel and shall contain complete and accurate information concerning the whereabouts of any animal intended for exhibition at any location other than the person's approved site. If the exhibitor accepts an engagement for which travel will begin with less than 48 hours' notice, the exhibitor shall immediately contact the AC Regional Director in writing with the required information. APHIS expects such situations to occur infrequently, and exhibitors who repeatedly provide less than 48 hours' notice will, after notice by APHIS, be subject to increased scrutiny under the Act.

(1) The itinerary shall include the following:

(i) The name of the person who intends to exhibit the animal and transport the animal for exhibition purposes,

including any business name and current Act lice or registration number and, in the event that any animal is leased, borrowed, loaned, or under some similar arrangement, the name of the person who owns such animal;

(ii) The name, identification number or identifying characteristics, species (common or scientific name), sex and age of each animals; and

(iii) The names, dates, and locations (with addresses) where the animals will travel, be housed, and be exhibited, including all anticipated dates and locations (with addresses) for any stops and layovers that allow or require removal of the animals from the transport enclosures. Unanticipated delays of such length shall be reported to the AC Regional Director the next APHIS business day. APHIS Regional offices are available each weekday, except on Federal holidays, from 8 a.m. to 5 p.m.

(2) The itinerary shall be revised as necessary, and the AC Regional Director shall be notified of any changes. If initial notification of a change due to an emergency is made by a means other than email or facsimile, it shall be followed by written documentation at the earliest possible time. For changes that occur after normal business hours, the change shall be conveyed to the AC Regional Director no later than the following APHIS business day.

> APHIS Regional offices are available each weekday, except on Federal holidays, from 8 a.m. to 5 p.m.

9 C.F.R. § 2.126.

1. Violations of Access Regulations (September 28, 2012)

At the outset, it is undisputed that Respondents failed to provide APHIS access for inspection on September 28, 2012.[101] The ALJ made this clear in her Initial Decision, which provides in pertinent part:

> There is no dispute that ACI Fox attempted to inspect Respondents' facility during normal business hours on two occasions and was unable to do so. . . . Respondents were aware that they are required to have an adult present and available to permit access to facilities, as they were found in violation of this section in a prior case. . . .
>
> On September 28, 2012, Mr. Terranova had designated Carlos "Niche" Quinones as a responsible person to be present for the inspection but apparently the gate had been closed inadvertently before ACI Fox arrived for the inspection. Tr. 697-699. Mr. Terranova arranged for ACI Fox to return and inspect within the month. Tr. 699. Mr. Terranova's testimony is credited, particularly as he was forthcoming about the 2010 violation. Respondents do not contest that ACI Fox was unable to inspect the facility on this date. Accordingly, the evidence establishes that on September 28, 2012, a violation occurred but the violation was not willful and no additional penalty is imposed from this violation.

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[101] *See id.* at 8 ("There is no dispute that ACI Fox attempted to inspect Respondents' facility during normal business hours on two occasions and was unable to do so."); 2015 Answer at 2-3 (admitting that on September 28, 2012 an "APHIS inspector arrived [at Respondents' facility] to inspect and could not reach Respondent by telephone and accordingly left.").

Initial Decision at 8-9.

Complainant, however, asserts the ALJ erred in finding that Respondents' violation of the access Regulations on September 28, 2012[102] was not willful.[103] Complainant contends the ALJ manipulated the meaning of "willful"[104] and wrongly characterized Respondents' admitted failure to provide APHIS access for inspection[105] as a "minor," "technical violation" for which no sanction was warranted.[106]

I agree with Complainant's contention that the ALJ erroneously failed to find that Respondents' violation of the access Regulations was not willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) "if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements."[107]

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[102] *See supra* note 50.

[103] Appeal at 26. *See* IDO at 64 ¶ 4 ("On September 8, 2012, Respondents failed to provide access to allow APHIS officials to access their place of business to conduct an inspection, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) and (b). This violation, however, was not willful.").

[104] *See Perry's Wilderness Ranch & Zoo, Inc.*, 71 Agric. Dec. 876, 880 (U.S.D.A. 2012) ("A willful act under the Administrative Procedure Act (5 U.S.C. § 558(c)) is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.").

[105] *See* IDO at 8 ("The Respondents do not contest that the inspectors were not able to see the property[.]") (citing Respondents' Opposition Brief at 2).

[106] Appeal at 26-29.

[107] *Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 567 (D.C. Cir. 2007), *reh'g en banc denied*, 482 F.3d 560 (D.C. Cir. 2007); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Food Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Am. Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *E. Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *Shepherd*, 57 Agric. Dec. 242, 286 (U.S.D.A. 1998). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Willfully' could refer to either

As the ALJ acknowledged, "Respondents were aware that they are required to have an adult present and available to permit access to facilities, as they were found in violation of this section in a prior case."[108] The record plainly establishes that Respondents intentionally left the place of business during normal business hours and did not grant APHIS inspectors access to the facility—intentional conduct that was by definition willful under the Administrative Procedure Act.[109]

Although Respondents introduced testimony that Mr. Terranova had designated a "representative person" to allow APHIS to enter Respondents' place of business to conduct inspections, the designation was meaningless as neither Respondents nor their appointed designee gave APHIS access to the facility.[110] "The requirement that exhibitors allow APHIS officials access to and inspection of facilities, property, records, and animals, during business hours, as provided in 9 C.F.R. § 2.126(a), is unqualified and contains no exemption."[111] That Respondents' gate might have been closed or locked, inadvertently or otherwise, or that no one was

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intentional conduct or conduct that was merely careless or negligent."); *Volpe Vito, Inc. v. U.S. Dep't of Agric.*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999) ("'Willful' means action knowingly taken by one subject to the statutory provisions in disregard of the action's legality; no showing of malicious intent is necessary.").

[108] IDO at 8.

[109] *See Terranova Enters., Inc.*, 71 Agric. Dec. 867, 880 (U.S.D.A. 2012) (Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.) ("It is undisputed that Mr. Perry intentionally left his place of business during business hours . . . without designating a person to allow Animal and Plant Health Inspection Service officials to enter that place of business and that, during Mr. Perry's absence, an Animal and Plant Health Inspection Service official attempted to enter the place of business to conduct activities listed in 9 C.F.R. § 2.126. I conclude Mr. Perry's intentional conduct is by definition 'willful' under the Administrative Procedure Act; thus, I conclude Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 on December 15, 2009.").

[110] *See* Tr. 697-99; Response at 7.

[111] *Greenly*, 72 Agric. Dec. 603, 617 (U.S.D.A. 2013).

available does not excuse their violation.[112] Likewise, the fact that the APHIS inspector could have returned or did return to conduct an inspection at a later date does not eliminate Respondents' violation.[113]

Contrary to the ALJ's assessment, an exhibitor's failure to allow access as shown in the record is serious; it is neither a "minor" violation nor a mere technicality.[114] "Each exhibitor is required to allow inspection by [APHIS] employees to assure the exhibitor is complying with the Animal Welfare Act and the Regulations."[115] As the Judicial Officer has previously held:

> Interference with Animal and Plant Health Inspection Service officials' duties under the Animal Welfare Act and the failure to allow Animal and Plant Health Inspection Service officials access to facilities, animals, and records are extremely serious violations because they thwart the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act.

Mitchell, 60 Agric. Dec. 91, 129 (U.S.D.A. 2001). Thus, the ALJ should have found Respondents' September 28, 2012 violation both serious and willful and imposed appropriate sanctions therefor. Accordingly, I reject the ALJ's conclusion that "[n]o sanction need be imposed for the one technical violation of the Act, on September 8, 2012 (access to facilities), to promote the Act's remedial purposes."[116]

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[112] *See id.* ("The fact that no one was at Respondents' place of business to allow APHIS officials access to the facilities, property, records, and animals is not a defense.").

[113] *See Perry*, AWA Docket No. 05-0026, 2013 WL 8213618, at *5 (U.S.D.A. 2013) ("Dr. Bellin's and Mr. Watson's availability to conduct the inspection at a later date . . . does not excuse Mr. Perry and PWR from their failure to allow inspection.").

[114] *See* IDO at 46, 67.

[115] *White*, 73 Agric. Dec. 114, 118 (U.S.D.A. 2014).

[116] IDO at 67 ¶ 8.

2. Violations of Access and Itinerary Regulations (August 2, 2010 and November 14, 2015 to November 19, 2015)

Although they concede the ALJ correctly found violations on August 2, 2010 (failing to provide access)[117] and on November 14, 2015 to November 19, 2015 (failing to submit an itinerary),[118] Respondents assert the ALJ erred by finding that the violations were willful.[119] Respondents do not, however, offer any explanation or support for their argument. Therefore, I reject Respondents' contention that the violations found on August 2, 2010 and on November 14, 2015 to November 19, 2015 were not willful.

C. Additional Violations Not Recognized by the ALJ

The record reflects that the ALJ also utilized a flawed analysis to reject several other violations in their entirety.[120] For the reasons discussed more fully herein below, I concur with Complainant's contention that the ALJ's failure to affirm these "remaining" violations was error.[121]

1. Respondents Violated the Itinerary Regulation on May 13, 2015.

The 2016 Complaint alleges that "[o]n or about May 13, 2015, respondents willfully violated the Regulations by exhibiting animals at a location other than respondents' facility, and housing those animals overnight at that location, without having timely submitted a complete and accurate itinerary to APHIS. 9 C.F.R. § 2.126(c)."[122]

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[117] 9 C.F.R. § 2.126(a)

[118] 9 C.F.R. § 2.126(c).

[119] Response at 2, 3. Complainant would certainly disagree and challenge Respondents' interpretation of "willfulness."

[120] *See* Appeal at 50-51.

[121] *Id.* at 29.

[122] 2016 Complaint at 5 ¶ 9. *See* 9 C.F.R. § 2.126(c) ("("Any person who is subject to the Animal Welfare regulations and who intends to exhibit any animal at any

Complainant established that: (1) according to Respondents' March 18, 2015 itinerary, all of Respondents' animals would be at Respondents' facility by April 2015;[123] and (2) on May 13, 2015, Animal Care Inspector ("ACI") Donovan Fox and Veterinary Medical Officer ("VMO") Cynthia DiGesualdo conducted a routine inspection at Respondents' facility, whereupon they found that two groups of tigers were not present but instead were off-site performing at Respondents' traveling exhibition.[124] While Respondents insist that "Mr. Terranova submitted an itinerary prior to May 13, 2015 via email," Respondents produced no such email or any other documentary evidence of an itinerary submission after March 18, 2015.[125] Mr. Terranova's testimony was the only evidence Respondents offered to support their claim that they emailed an itinerary to APHIS.

The ALJ's finding of no violation of the itinerary Regulation on May 13, 2015 appears to be based upon Mr. Terranova's testimony that he submitted an itinerary prior to May 13, 2015 via email, which the ALJ apparently credited because Mr. Terranova admitted to not submitting an itinerary in November 2015:

> Respondents contend that Mr. Terranova submitted an itinerary prior to May 13, 2015, via e-mail but he could not find a copy, Tr. 738-739; RX 1; CX 23. Respondents' Opposition Brief at 2. Respondents additionally assert:
>
> > Terranova did not submit an itinerary for his traveling tigers at the time of the November 2015 inspection. In May, the inspectors came when he was not home and cited him for eight violations, which

location other than the person's approved site . . . shall submit a written itinerary to the AC Regional Director. The itinerary shall be received no later than 2 days in advance of any travel and shall contain complete and accurate information concerning the whereabouts of any animal intended for exhibition at any location other than the person's approved site. . . .").

[123] *See* CX-19 at 1; Tr. 607-08; CX-23.

[124] *See* Tr. 608.

[125] *See* IDO at 32, 60; Tr. 609-10, 740-41.

> Terranova believed to be outright lies, and were verbally abusive to his employee. In subsequent discussions with Fox, Terranova got the strong impression that they were waiting until he was gone before they conducted another inspection. Tr. 492-493. He therefore did not fill out another itinerary in hopes that the inspectors would catch him at home so [] he could do the inspection. Tr. 493. As it happened, Terranova was correct. He left on the 18th for San Antonio and inspectors showed up on the 19th. Tr. 493.

Respondents' Opposition Brief at 2-3 (footnote omitted).

. . . .

> *Although Mr. Terranova could not produce a copy of the itinerary he provided regarding the May 13, 2015, travel, his testimony is credited, particularly in light of his admission that he did not provide an itinerary in November. Accordingly, the May 13, 2015, itinerary violation is not established.*

Initial Decision at 31-32 (emphasis added). The ALJ does not explain how Mr. Terranova's conceding later violations of the same Regulation justifies a finding that Respondents did not violate the Regulation on May 13, 2015. Further, even assuming *arguendo* that Mr. Terranova's testimony regarding the email is credited, it is insufficient to rebut the prima facie showing of a violation established by Complainant on this record.

It is well established that Complainant has the burden of proof in this

proceeding.[126] The standard of proof by which the burden is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.[127] In meeting its burden of proof, Complainant bears the initial burden of coming forward with evidence sufficient for a prima facie case.[128] Complainant established that: (1) according to Respondents' March 18, 2015 itinerary, all of Respondents' animals would be at Respondents' facility by April 2015;[129] and (2) on May 13, 2015, Animal Care Inspector ("ACI") Donovan Fox and Veterinary Medical Officer ("VMO") Cynthia DiGesualdo conducted a routine inspection at Respondents' facility, whereupon they found that two groups of tigers were not present but instead were off-site performing at Respondents' traveling exhibition.[130] This evidence of record established a prima facie violation of the itinerary Regulation on May 13, 2015.

The burden of production then *shifted* to Respondents to rebut

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[126] 5 U.S.C. § 556(d); *see JSG Trading Corp.*, 57 Agric. Dec. 640, 709 (U.S.D.A. 1998); *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (U.S.D.A. March 15, 1996).

[127] *Davenport*, 57 Agric. Dec. 189, 223 (U.S.D.A. 1998) ("The burden of proof in disciplinary proceedings under the Animal Welfare Act is preponderance of the evidence, which is all that is required for the violations alleged in the Complaint.").

[128] *See JSG Trading Corp.*, 57 Agric. Dec. 710, 721-22 (U.S.D.A. 1998) (Order Den. Pet. for Recons. as to JSG Trading Corp.); *see also Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 266 (D.C. Cir. 1989), *cert. denied sub nom. Am. Petroleum Inst. v. EPA*, 498 U.S. 849 (1990); *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *see also* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden going forward'"); 3 KENNETH C. DAVIS, ADMIN. LAW TREATISE § 16:9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward and not the ultimate burden of persuasion).

[129] *See* CX-19 at 1; Tr. 607-08; CX-23.

[130] *See* Tr. 608.

Complainant's prima facie showing.[131] Shifting burdens of production are necessary tools in developing a full and complete record and in assessing the weight to assign evidence where, as here, there is a "failure to act" element of the violation.[132] The legislative history of APA section 7(c) (5 U.S.C. § 556(d)) explains:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. . . .

S. REP. NO. 752, 79th Cong., 1st Sess., 22 (1945).[133]

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[131] *See Colette*, 68 Agric. Dec. 768, 783 (U.S.D.A. 2009) (Decision and Order as to Martine Colette and Robert H. Lorsch); *Tollefson*, 54 Agric. Dec. 426, 433 (U.S.D.A. 1995); *see also Garvey v. Nat'l Tr. Safety Bd.*, 190 F.3d 571, 579-80 (D.C. Cir. 1999).

[132] *See Campbell v. United States*, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.") (citing *United States v. New York, N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957)); *Saylor*, 44 Agric. Dec. 2238, 2672-73 (U.S.D.A. 1985) ("The facts concerning the size and effect on the violator's business are 'facts peculiarly within the knowledge of' the violator[.]") ("[A]s the Attorney General's Manual states, . . . under APA section 7(c), an agency is permitted . . . to draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts, or the presumption of continuance of a state of facts once shown to exist.").

[133] *See also* 2 4 J. STEIN, G. MITCHELL, & B. MEZINES, ADMINISTRATIVE LAW § 24.02 at 4-25 (1994) ("The legislative history of the A.P.A. burden of proof provision states that the party initiating the proceeding has, at a minimum, the burden of establishing a *prima facie* case, but a burden of proof may also rest on other parties seeking a different decision by the agency."); *see also Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S.

While Respondents insist that "Mr. Terranova submitted an itinerary prior to May 13, 2015 via email," Respondents produced no such email or any other documentary evidence of an itinerary submission after March 18, 2015.[134] Nor could Mr. Terranova identify the alleged recipient thereof.[135] Accordingly, based on the evidence of record, Respondents have failed to rebut Complainant's prima facie showing of the violation of the itinerary Regulation on May 12, 2015; therefore, the violation is affirmed.

2. Respondents Violated Section 2.131(b)(1) of the Handling Regulations on April 20, 2013.

The 2015 Complaint alleges:

> On or about April 20, 2013, respondents willfully violated the Regulations (1) by failing to handle an animal as carefully as possible in a manner that would not cause physical harm or unnecessary discomfort, (2) by failing, during public exhibition, to handle an animal with sufficient distance and/or barriers between the animal and the public, so as to ensure the safety of the animal and the public, and (3) by failing, during public exhibition, to have a dangerous animal under the direct control and supervision of a knowledgeable and experienced animal handler, and specifically, respondents exhibited a tiger

267, 280 (1994) (*Almy v. Sebelius*, 679 F.3d 297, 305 (4th Cir. 2012) ("[W]hen the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true."); *see, e.g.*, *Colette*, 68 Agric. Dec. 768, 783 (U.S.D.A. 2009) ("The evidence presented by the Administrator meets the burden of proof allowing me to conclude the Administrator proved his prima facie case. However, proving the prima facie case only shifts the burden, allowing Ms. Colette to rebut the Administrator's case. Ms. Colette contends the llamas were not "regulated" animals without presenting any legal or factual support for her theory. Therefore, Ms. Colette failed to overcome the prima facie case.").

[134] *See* IDO at 32, 60; Tr. 609-10, 740-41.

[135] *See* Tr. 740-41; Prehearing Brief at 3.

> (Leah) in a circus in Salina, Kansas, and upon the conclusion of the performance, the tiger was not secured in an enclosure, but was loose and out of respondents' control and supervision in the performance area, and thereafter entered the women's restroom in the public concourse area. 9 C.F.R. §§ 2.131(b)(1), 2.131(c)(1), 2.131(d)(3).

2015 Complaint at 5 ¶ 8. I find that the record supports this allegation, particularly when the evidence relating to this violation is read in conjunction with the evidence supporting the other April 20, 2013 violations.[136]

The Regulations require that the "[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort."[137] The Regulations define "handling" as "petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working, and moving, or any similar activity with respect to any animal."[138]

Here, the ALJ found that "Complainant ha[d] not established that Respondents violated 9 C.F.R. § 2.131(b)(1)" because "[t]he tiger suffered no trauma"[139] and Ms. Krehbiel, the spectator who encountered the tiger in the restroom, "was not injured."[140] The Initial Decision further states:

> The evidence did not show that Complainant established that Respondents failed to handle their tigers "as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive

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[136] *See* IDO at 15-16, 52-56.

[137] 9 C.F.R. § 2.131(b)(1).

[138] 9 C.F.R. § 1.

[139] IDO at 14.

[140] *Id.* at 13.

> cooling, behavioral stress, physical harm, or unnecessary discomfort." The tiger did not exhibit signs of trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort that were documented in the record. Accordingly, Complainant has not established that Respondents violated 9 C.F.R. § 2.131(b)(1).

Initial Decision at 15. However, the evidence that the ALJ found proved violations of both sections 2.131(c)(1) (9 C.F.R. § 2.131(b)(1)) and 2.131(d)(3) (9 C.F.R. § 2.131(d)(3)), which related to the exact incident in question, clearly shows careless handling of tigers by Respondents.[141]

The preponderance of the evidence demonstrates that Respondents failed to exercise sufficient care when assigning particular employees to handle the tigers.[142] That the tiger, Leah, was able to get loose indicates serious problems or, at minimum, confusion among employees. Such a lapse reflects failure to handle the animal as carefully as possible to prevent harm, injury, or distress. Certainly, a tiger who escaped its cage, roamed through the concourse of a circus arena, entered a public restroom, and walked toward an individual in the restroom could have caused harm to that individual or other members of the public.[143] This dangerous situation was the direct result of Respondents' failing to handle the tiger as carefully as possible.[144] Under the facts accepted by the ALJ in the

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[141] *See id.* at 15-16.

[142] *See id.* at 16 ("Respondents were previously warned about the consequences of not having sufficient trained personnel and willfully proceeded with the exhibition without a sufficient number or sufficiently trained staff.").

[143] *See supra* note 92; IDO at 14 (stating that "[t]he tiger entered the concourse area, *where food stands and restrooms are located*, and entered the women's restroom") (citing CX-8, video 3) (emphasis added); *supra* note 92.

[144] *See, e.g.*, *Vergis*, 55 Agric. Dec. 148, 165 (U.S.D.A. 1996) ("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 . . . a 450-pound male Bengal tiger, so that there was minimal risk of harm to [the tiger] and to members of the public, in willful violation of 9 C.F.R. § 2.131(b)(1). Respondent's violation was the direct cause

Initial Decision, Respondents handled tigers in a manner that placed the tigers at risk of "trauma, . . . behavioral stress, physical harm, or unnecessary discomfort."[145]

Furthermore, injury to the animal or to the public is not an element required to prove a handling violation; rather, it can be a consequence of a handling violation.[146] The purpose of the Regulation is to *prevent* "trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort" as a result of mishandling;[147] indeed, the Judicial Officer has held that Complainant need not establish that an animal actually sustained "trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort" to prove the violation.[148] That that no tiger or human was ultimately injured is not

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of the severe injuries, including a broken leg and numerous lacerations and puncture wounds, suffered by [a member of the viewing public][.]").

[145] 9 C.F.R. § 2.131(b)(1). *See* IDO at 15-16 (stating that although "Respondents knew or should have known who was working with the tigers," they nevertheless allowed someone who was clearly "not qualified to work with tigers" handle tigers inside "an arena filled with spectators") (stating that the tiger Leah "was not under the direct control and supervision while loose in the arena and on the concourse"), 52-56 (Findings of Fact 29-55).

[146] *See supra* notes 71, 72, and accompanying text; *Vergis*, 55 Agric. Dec. 148, 165 (U.S.D.A. 1996) (stating that where a tiger escaped, injured a member of the viewing public by biting the person's leg, and was "harmed" from being "repeatedly struck with hard objects, often on the head" and having a "broom handle inserted into" its mouth, the exhibitor's "violation was extremely serious and resulted in the very harm that compliance with the regulation is designed to prevent.").

[147] 9 C.F.R. § 2.131(b)(1); *see Lang*, 57 Agric. Dec. 59, 83 (U.S.D.A. 1998) ("While one of the purposes of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) is to prevent death, the regulatory provision is *explicitly designed to prevent* trauma, overheating, excessive cooling, behavioral stress, physical harm, and even unnecessary discomfort to animals.") (emphasis added).

[148] *See Lang*, 57 Agric. Dec. 91, 107 (U.S.D.A. 1998) (Order Den. Pet. for Recons.) (stating that "death is not an element that must be proven to prove a violation of section [2.131(b)(1)] of the Regulations").

dispositive of whether a violation occurred.[149]

Accordingly, I agree with Complainant's contention that the evidence the ALJ found to have proved violations of sections 2.131(c)(1)[150] and 2.131(d)(3)[151] of the Regulations sufficed to support a finding that Respondents also violated section 2.131(b)(1).[152] Accordingly, I conclude that Respondents willfully violated section 2.131(b)(1) the Regulations (9 C.F.R. § 2.131(b)(1)) on April 20, 2013 by failing to handle tigers as carefully as possible in a manner that would not cause physical harm or unnecessary discomfort.

3. Respondents Violated the Veterinary Care Regulations Between February 11, 2015 and May 13, 2015.

The 2016 Complaint alleges that during the period of February 11,

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[149] *See Lang*, 57 Agric. Dec. 59, 82 (U.S.D.A. 1998) ("An action is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Therefore, the fact that Respondent did not 'intentionally cause harm to the [animal] . . . would not prevent a finding . . . that Respondent intentionally, or with careless disregard of statutory requirements, failed to handle the animal as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort, in violation of section 2.131(a) of the Regulations (9 C.F.R. § 2.131(a)(1).") (current section 2.131(b)(1) was previously numbered as section 2.131(a)(1)); *Vergis*, 55 Agric. Dec. at 161 ("Although this caused no reported trauma to the animal, Mr. Vergis must be sanctioned upon his failure to protect both the animal and the public.").

[150] 9 C.F.R. § 2.131(c)(1) ("During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of the animals and the public.").

[151] 9 C.F.R. § 2.131(d)(3) ("During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.").

[152] 9 C.F.R. § 2.131(b)(1) ("Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.").

2015 and May 13, 2015, "[R]espondents willfully violated the Regulations by failing to employ an attending veterinarian under formal arrangements that included a written program of veterinary care, and specifically, [R]espondents' written program of veterinary care was incomplete with respect to vaccinations of [R]espondents' animals. 9 C.F.R. § 2.40(a)(1)."[153] Complainant asserts that during a compliance inspection on May 13, 2015, Respondents produced a program of veterinary care ("PVC") "that did not set forth a vaccination schedule for dogs in Respondents' custody" and that Respondents were "unable to locate an original or complete PVC."[154] In her Initial Decision, however, the ALJ found that "Respondents at all times had a program of veterinary care" and that "[t]he evidence shows that Respondents had a complete program of veterinary care on-site."[155] I reverse the ALJ's finding and conclude that Complainant proved the violation by a preponderance of the evidence.

With regard to veterinary care, the Regulations provide that "[e]ach dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals"[156] and "[e]ach dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor."[157] Complainant's evidence comprised the May 13, 2015 inspection report;[158] a photograph of the PVC provided by Respondents' authorized person, Michelle Wallace;[159] and the testimony of ACI Fox and VMO DiGesualdo, who testified that that the written program presented for inspection – a photocopy of the original – was missing a portion of the

[153] 2016 Complaint at 5 ¶ 7.

[154] Complainant's Brief at 9.

[155] IDO at 30.

[156] 9 C.F.R. § 2.40(a).

[157] 9 C.F.R. § 2.40(a)(1).

[158] CX-19.

[159] CX-20.

section regarding vaccinations.[160]

Despite acknowledging that "the document provided to the inspectors . . . did not contain the entirety of Section II.A.," the ALJ found no violation, stating that "it is undisputed that [Respondents' dogs ha[d] been vaccinated" and "should have been immediately obvious that this was a photocopying error which could have been resolved if the inspectors had inquired further."[161] However, while it might have appeared that there was just a problem with the copy of the PVC presented to the inspectors,[162] Ms. Wallace was unable to locate the original PVC or another copy of a complete PVC.[163] Because the PVC provided did not show the vaccination information, "the inspectors could only assume that[] '[t]he dogs didn't have the shots since there was nothing given to [the inspectors] that said they did."[164]

The failure to maintain an accurate PVC and to make the PVC available to APHIS constitutes a violation of the veterinary care Regulations.[165] That Respondents' on-site copy of its PVC was a miscopied version of the original does not obviate the violation and does not make it incumbent on

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[160] *See* Tr. 576, 580, 647 (Testimony of ACI Fox); Tr. 684-87 (Testimony of VMO DiGesualdo).

[161] IDO at 30. "Section II.A. of the PVC form contains a space for the schedule and frequency of vaccinations for dogs and cats." *Id.* at 29.

[162] The PVC presented to the inspectors was described as the current PC. *See* Tr. 576.

[163] *Id.* at 737-38.

[164] Tr. 686; *see* Tr. 684-85, 686-87 ("In the way that we look at things, if it's not documents on that program of veterinary care, then it hasn't occurred. And that's explained to all the licensees.").

[165] *See Tri-State Zoological Park of W. Md. Inc.*, 72 Agric. Dec. 128, 158 (U.S.D.A. 2013); *Pearson*, 68 Agric. Dec. 685, 698 (U.S.D.A. 2009) ("Dr. Smith testified that the program of veterinary care he was given to review, did not include the 14 bears and did not mention that the bears were receiving a heartworm preventative that bears housed outdoors need.").

the inspectors to demand or search for another, better version.[166] "[T]he Animal and Plant Health Inspection Service has the right to see records at an unannounced inspection to assure that records have not been changed to conform with the Regulations."[167] Thus, Respondents' argument that APHIS inspectors issued the violation citation for merely "a simple photocopying error" is without merit.[168]

Further, the ALJ also states:

> This photocopying error is nothing like the violations found in *In re Tri-State Zoological Park of Western Maryland, Inc.*, AWA Docket No. 11-0222, 2013 WL 8214620 (2013) (refusal to keep records on-site) or *In re Lorenza Pearson, d/b/a L & L Exotic Animal Farm*, 68 Agric. Dec. 685, 698 (2009) (program of veterinary care did not include multiple animals). The evidence shows that Respondents had a complete written program of veterinary care on-site. Accordingly, Complainant has not established this violation.

Initial Decision at 30. I reject this conclusion for two reasons.

First, the ALJ misconstrued the facts of *Tri-State*[169] when comparing it to the instant case, effectively downplaying the seriousness of violations at issue. *Tri-State*[170] did not involve a "refusal to keep records on-site" but "resistance" toward doing so based on the particular circumstances:

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[166] *See Parr*, 59 Agric. Dec. 601, 616 (U.S.D.A. 2000) ("[T]he Animal and Plant Health Inspection Service's ability to ensure that each exhibitor establishes and maintains a written program of veterinary care would be thwarted if each exhibitor was allowed to keep his or her written program of veterinary care in a location at which the program was not readily available to Animal and Plant Health Inspection Service officials during inspection.").

[167] *Tri-State Zoological Park*, 72 Agric. Dec. at 159 (citing *S.S. Farms Linn Cty., Inc.*, 50 Agric. Dec. 476, 489 (U.S.D.A. 1991)).

[168] Response at 8.

[169] *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128 (U.S.D.A. 2013).

[170] *Id.*

> On June 2, 2008, and September 3, 2008, Tri-State and Mr. Candy failed to provide Dr. McFadden with a copy of a written program of veterinary care. As a result, Dr. McFadden was unable to determine whether Tri-State and Mr. Candy had a veterinarian on call or had developed a plan for care. *Mr. Candy testified that he has no place to keep his records on site since Tri-State lost a building in a fire*. He is reluctant to keep records in a gift shop or any other builsding open to the public. However, he is aware that Dr. McFadden generally spends two days inspecting the Tri-State facility, *and he consistently provides her with all the records, including plans of veterinary care* and enrichment for nonhuman primates, on the morning of the second day of Dr. McFadden's inspection.
>
> When pressed to explain why he could not maintain the records in the place where he keeps check lists, Mr. Candy testified that he did not think it was appropriate to keep the records in that location, which is a kitchen that stores animal feed. He distinguished those records from the logs, which are used daily. Despite being cited for repeated violations, he never failed to provide the records.

Tri-State Zoological Park of Western Maryland, Inc., 72 Agric. Dec. 128, 158-59 (U.S.D.A. 2013) (emphasis added) (internal citations to record omitted). As stated in *Pearson*, "[e]ach Animal Welfare Act licensee *must always be in compliance in all respects* with the Animal Welfare Act and the Regulations."[171] A photocopying error, then, does not excuse Respondents' failure to have a complete PVC on site.

Second, nothing in the Act, Regulations, or case law requires that the violations in one case must parallel those in another to affirm a violation. Indeed, "case-by-case determinations are the hallmark of administrative

[171] *Pearson*, 68 Agric. Dec. 685, 735 (U.S.D.A. 2009) (emphasis added), *aff'd sub nom. Pearson v. United States*, 711 F. App'x 866 (6th Cir. 2011).

and judicial adjudications[.]"[172] I therefore conclude that Respondents' failure to provide APHIS with a complete, written PVC constitutes a violation of section 2.40(a)(1) (9 C.F.R. § 2.40(a)(1)).

4. Respondents Violated the Handling Regulations on March 10, 2011.

The 2015 Complaint alleges that on March 10, 2011, Respondents violated the handling Regulations by failing to handle tigers as carefully as possible and by failing, during public exhibition, to handle tigers with sufficient distance and/or barriers between the animals and the public so as to ensure the safety of the tigers and the public.[173] The 2015 Complaint also alleges that the tiger enclosure was in disrepair, that the tiger enclosure did not comply with the Standards, and that the tigers were housed in enclosures that did not provide sufficient space.[174]

i. Handling and Structural Strength

Congress intended for the exhibition of animals to be accomplished in a manner that is safe for both animals and humans.[175] The handling Regulations require exhibitors, such as Respondents, to handle animals carefully and safely for the protection of both the animals and the public.[176] To that end, the Standards provide that animals shall be housed in enclosures that are structurally sound and maintained in good repair.[177]

The 2015 Complaint alleges that on March 10, 2011, Respondents failed to meet the minimum Standards with respect to structural strength and containment; specifically, the Complaint alleges that Respondents'

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[172] *Koretoff v. Vilsack*, 614 F.3d 532, 543 n.3 (D.C. Cir. 2010) (Henderson, J., dissenting in part).

[173] *See* Complaint at 5-6 ¶ 8.

[174] *See id.* at 6 ¶ 9a-b.

[175] *See* 7 U.S.C. § 2131; *Haviland v. Butz*, 543 F.2d 169, 173 (D.C. Cir. 1976).

[176] *See* 9 C.F.R. § 2.131.

[177] *See* 9 C.F.R. § 3.125(a).

exhibit and exercise enclosure was inadequate.[178] For the reasons more fully discussed below, I conclude that on March 10, 2011 Respondents failed to meet the minimum Standards with respect to structural strength and containment.

> Section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) provides: The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. § 3.125(a). The record shows that Respondents' facility – specifically, Respondents' performance and exercise arena for tigers – was inadequate in three respects.

First, the cables that held the enclosure together were in disrepair.[179] ACI Bonguard identified and photographed numerous areas where the wires were loose or had become detached completely, leaving sizable gaps.[180] The disrepair of the wires meant that the enclosure was not structurally sound and represented an inadequate barrier between the tigers and the public.[181] APHIS' Big Cat Specialist, Dr. Laurie Gage, testified that tigers are "very powerful," opportunistic predators who "can take fairly large prey down because of their physical strength."[182] That no injuries were reported is irrelevant to whether Respondents maintained the enclosure in good repair.[183]

Moreover, Respondent Terranova, himself, admitted the tiger

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[178] *See* 2015 Complaint at 6 ¶ 9a.

[179] *See* Tr. 103-04, 106, 112-13, 114-15.

[180] CX-4.

[181] ACI Bonguard testified that the disrepair could allow a tiger to extend its paw or head through the enclosure or to break through the arena. Tr. 114-18, 119, 139.

[182] *Id.* at 167.

[183] *See* IDO at 21-22.

enclosure was in disrepair.[184] The ALJ erred in failing to acknowledge this admission. In addition, the ALJ erred by crediting Respondents' statements that the enclosure cables were corrected.[185] It is well established that the subsequent correction of a violation does not negate that the violation occurred.[186] As the previous Judicial Officer has explained:

> [E]ach . . . exhibitor . . . must always be in compliance in all respects with the Regulations in 9 C.F.R. Part 2 and the Standards in 9 C.F.R. Part 3. (9 C.F.R. § 2.100(a)). This duty exists regardless of a "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, *even the immediate correction of a violation* does not operate to eliminate the fact a violation occurred and does not provide a basis for the dismissal of the alleged violation.

Volpe Vito, Inc., 56 Agric. Dec. 166, 254 (U.S.D.A. 1997) (emphasis added) (citing *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (U.S.D.A. 1996); *Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (U.S.D.A. 1992)).

Second, the presence of pedestals inside the tigers' enclosure reduced the height of the structure. The evidence shows that Respondents exhibited six tigers in a twelve-foot-high circular wire enclosure that had multiple thirty-one-inch pedestals within it.[187] The height and location of the pedestals effectively reduced the height of the enclosure itself and offered

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[184] *See* Tr. 103-04, 106, 112-13, 114-15; Respondents' Verified Motion in Opposition to Motion for Summary Judgment at 6.

[185] IDO at 21.

[186] *See, e.g.*, *Parr*, 59 at 624 ("It is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred."); *see also Drogosch*, 63 Agric. Dec. 623, 644 n.5 (U.S.D.A. 2004).

[187] CX-4.

the tigers a potential means to escape the enclosure.[188]

Third, the top of the enclosure was exposed, and the lack of a "kick-in" or roof did not ensure that the tigers could be contained.[189] Dr. Gage testified that having a kick-in at the top of an enclosure helps prevent the tiger from going up and over the top of the fencing. "[A] 12-foot enclosure with no kick-in is not going to contain a tiger whether there are platforms there or not. If the tiger wants to get out, it will get out of that."[190]

Furthermore, I find that Respondents' use of the inadequately repaired tiger enclosure presented a danger to the animals' well-being and safety. Given the obvious risks presented by animals as large, swift, strong, and predatory as tigers, Respondents should have known that their exhibit – which not only failed to have a kick-in or roof but also had cables that were in disrepair and pedestals that reduced the height of the enclosure – was unsafe. Accordingly, I reject the ALJ's conclusion that "[t]he evidence is not sufficient to find that the tiger cages were not structurally sound or maintained in good repair to protect the animals from injury and to contain the animals."[191]

ii. Space

The 2015 Complaint alleges that on March 10, 2011, Respondents failed to meet the minimum Standards with respect to space requirements for tigers.[192] Specifically, the Complaint alleges that Respondents used transport cages as primary enclosures and that those cages were too small

[188] *Id.*; CX-5; CX-6; CX-14 at 3. ACI Bonguard testified that "because tigers can jump out at nine feet without even trying," there was a potential for escape. Tr. 119.

[189] CX-4.

[190] Tr. 177 (Testimony of Dr. Gage).

[191] IDO at 21.

[192] *See* 2015 Complaint at 6 ¶ 9b.

for the tigers housed in them.[193]

The ALJ found no violation, in part because she argued that the applicable Regulation is section 3.137(c) (9 C.F.R. § 3.137(c)).

> The agency cited Respondents for violating the rule governing space requirements for facilities, which requires that enclosures allow animals to "make normal postural and social adjustments with adequate freedom of movement." 9 C.F.R. § 3.128 These were transport cages, however, and the applicable rule governing transport cages states that animals must have enough space merely "to turn about freely and to make normal postural adjustments." 9 C.F.R. § 3.137(c).

Initial Decision at 23. The ALJ concluded that "[t]he evidence does not establish that the transport cages were too small for the tigers to turn freely and to make normal postural adjustments or to make normal postural and social adjustments with adequate freedom of movement."[194] The ALJ reasoned, "[t]here was no evidence of contorting such as wear marks or health issues. The tigers were exercised out of the transport cages every day and the transport cages were used to transport for shows."[195]

Twenty years ago, however, the previous Judicial Officer held that when a "transport" enclosure is used as a primary enclosure, it must meet the Standard in 9 C.F.R. § 3.128.

> [W]hen animals are transported to a new or "temporary" facility, they may only be housed in so-called "transport cages" for a reasonable time. After such reasonable time, which will be determined on a case-by-case basis, the space requirement standards (9 C.F.R. § 3.128) will be

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[193] *See id.* ("Respondents utilized transport enclosures as primary enclosures for six tigers, and the enclosures did not offer the tigers the sufficient space to make normal postural and social adjustments.") (citing 9 C.F.R. § 3.128).

[194] IDO at 23.

[195] *Id.*

> applied to the "transport" enclosures, which actually have become the primary spacing holding such animals, regardless of whether the primary enclosures could also be called "transport cages."
>
> At some point, it is not reasonable to consider what are really stationary housing facilities to be "transport" or "travel" facilities, merely because the facilities were at one time mobile, and could be mobile again. The animals require a certain amount of space for health reasons. A short time of close confinement in transport cages is not often deleterious to their health – hence the transport cage exception (9 C.F.R. § 3.137) to the space requirement standards (9 C.F.R. § 3.128).
>
> However, it takes no great analytical skill to determine that unscrupulous operators could maintain animals in an artificially-constant "travel" status, in very small "transport cages," to the greater detriment on the health of the animals. This has happened here. Pending clarifying standards, on a case-by-case, reasonable basis, travelling apparatuses, i.e., "transport cages," which are reasonably shown to be used as primary housing, shall be regulated under the space requirement standards in 9 C.F.R. § 3.128.

Berosini, 54 Agric. Dec. 886, 918 (U.S.D.A. 1995).

The evidence in this case shows that Respondents used "transport" enclosures as primary enclosures for their tigers. ACI Bonguard testified to that;[196] her inspection report specifically states: "The transport enclosures are used as(at) the primary enclosures for the 6 tigers."[197] Therefore, the ALJ should have applied section 3.128 (9 C.F.R. § 3.128) of the Standards.

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[196] *See* Tr. 110-11.

[197] CX-4 at 1.

I find that Respondents' tiger enclosures failed to meet the requirements of section 3.128 (9 C.F.R. § 3.128). Section 3.128 provides:

> Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

9 C.F.R. § 3.128. Here, ACI Bonguard noted in her inspection report:

> The measurement on the enclosures is 7 feet by 3 inches in length, 43 inches in width, and 4 feet in height. The enclosures do not expand in any way to allow proper space for normal postural and social adjustments. At 43 inches in width the enclosures do not allow the tigers to turn around using normal postural movements.

CX-4 at 1. ACI Bonguard's contemporaneous photographs corroborate her finding of noncompliance.[198]

When determining whether enclosures are adequate, exhibitors must consider the size of the animal to be housed therein.[199] At the hearing, ACI Bonguard testified that the tigers were "full-size, full-grown adult tigers"[200] and that the transport cages were too small:

> [I]n my opinion, there's no way that tiger could lay the width of that primary enclosure because it's too big. And even just to turn around in that enclosure, they, you know, kind of have to contort a little bit to turn, make a full turn in the enclosure.

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[198] *Id.* at 27-32.

[199] *See Davenport*, 57 Agric. Dec. 189, 210-11 (U.S.D.A. 1998); *see also Pearson*, 68 Agric. Dec. at 693.

[200] Tr. 108.

Tr. 109. Dr. Gage corroborated ACI Bonguard's findings. She observed from the photographs that the cages "look very narrow" for the tigers housed inside.[201] Looking at Complainant's Exhibit 4,[202] Dr. Gage testified that "if he's five feet long, he's very much wider, but it's very clear to me to see even from the picture the tiger is much longer than the cage is wide."[203] Respondents' transport cages measured seven feet and three inches in length; forty-three inches in width; and four feet in height.[204] Therefore, the enclosures violated section 3.128 of the Regulations (9 C.F.R. § 3.128).

5. Respondents Violated the Regulations by Failing to Provide Their Enrichment Plan for Inspection on May 13, 2015.

The 2016 Complaint alleges that on May 13, 2015, Respondents failed to have a written plan for environmental enrichment of Respondents' primates available for inspection in violation of section 3.81 of the Regulations (9 C.F.R. § 3.81).[205] Section 3.81 provides, in pertinent part:

> Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. This plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency.

9 C.F.R. § 3.81.

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[201] *Id.* at 160.

[202] CX-4 at 27.

[203] Tr. 161.

[204] CX-4 at 1.

[205] 2016 Complaint at 5-6 ¶ 10(e).

The ALJ found this violation not proven, stating as follows:

> Respondents contend that they had an environmental enhancement plan and that the inspectors simply did not look at it because they did not wish to return to the barn where it was located. Respondents' Opposition Brief at 18.
>
> The testimony shows that when the inspectors asked to see the enhancement plan, they were told that it was not in the book that was there but was most likely in the barn and the inspectors did not ask to go see it. Tr. 831. This issue could have been resolved by the inspectors while they were on-site. It is undisputed that the monkeys had enhancement. Tr. 657-659. Accordingly, this violation is not established.

Initial Decision at 38.

Whether Respondents provided enrichment is not at issue, however.[206] The Regulations require Respondents to make their enhancement plan available for inspection.[207] Section 3.81 (9 C.F.R. § 3.81) is specific in requiring a documental plan, and the evidence shows that Respondents failed to make their environmental enrichment for nonhuman primates available for review by APHIS.[208] In his inspection report, ACI Fox wrote that "[a]t the time of inspection the plan for Environmental Enhancement to promote psychological well-being and any logs or documentation showing the plan was being followed was unavailable for review when requested by APHIS officials."[209] At the hearing, Ms. Wallace[210] testified

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[206] *See* 2016 Complaint at 5-6 ¶ 10e.

[207] *See* 9 C.F.R. § 3.81.

[208] *See id.*

[209] CX-19 at 3.

[210] As previously introduced herein (*see supra* note 159 and accompanying text), Ms. Wallace was the "authorized person" who accompanied APHIS inspectors during their May 13, 2015 inspection of Respondents' facility. *See* Tr. 823-25.

that the plan was not given to the inspectors.[211] ACI Fox testified that Ms. Wallace did not know where the plan was kept[212] and that she did not present the plan to the APHIS inspectors.[213] Accordingly, I conclude that the ALJ erred in finding the May 13, 2015 violation of section 3.81 (9 C.F.R. § 3.81) not proven.

6. Respondents Failed to Meet the Remaining Standards.

Section 2.100(a) of the Regulations provides:

> Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 of this subchapter and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, and transportation of animals.

9 C.F.R. § 2.100(a).[214] In addition to those occasions discussed above where Respondents willfully violated section 2.100(a) of the Regulations by failing to comply with the minimum Standards, Complainant demonstrated additional violations on September 25, 2013; January 8, 2015; and May 13, 2015. The ALJ erred in failing to conclude that a preponderance of the evidence supports findings that Respondents violated the Regulations by failing to comply with the applicable Standards.[215]

In the main, the ALJ's rationale for declining to find violations or to fully credit Complainant's documentary, photographic, and testimonial evidence was that she found no evidence that animals were actually sick, injured, or suffering at the time of the alleged violations because of the

[211] *Id.* at 831.

[212] *Id.* at 592.

[213] *Id.* at 591-92.

[214] This Regulation applies to all of the alleged noncompliance with the Standards promulgated under the Act.

[215] IDO at 16-42.

non-compliance.[216] The ALJ utilized this flawed analysis to reject several violations in their entirety. In so doing, the ALJ completely missed the point of the Regulations and Standards: prevention.[217] The purpose of requiring those who have custody of animals subject to the Act to maintain their facilities in a manner that meets the *minimum* Standards is to ensure against the potential harm to animals from substandard conditions and treatment.[218]

i. September 25, 2013 (Lighting for Nonhuman Primates, Housing for Tigers, and Housekeeping)

The 2015 Complaint alleges that on September 25, 2013, Respondents failed to meet the minimum Standards with respect to lighting for nonhuman primates, housing for tigers, and housekeeping.[219]

With respect to lighting, section 3.76(c) of the Standards (9 C.F.R. § 3.76(c)) provides:

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[216] *See, e.g., id.* at 25, 28, 33, 35.

[217] *See supra* note 72 and accompanying text.

[218] *See Hodgins v. U.S. Dep't of Agric.*, No. 97-3899, 238 F.3d 421 (Table), 2000 WL 1785733, at *25 (6th Cir. Nov. 20, 2000) ("[I]t is difficult to see how there could have been any risk of 'injury' to the animals – which is what the regulation[s] [are] aimed at preventing."); *Zimmerman v. U.S. Dep't of Agric.*, No. 98-3100, 173 F.3d 422 (Table), 57 Agric. Dec. 869, 873 (3d Cir. Dec. 21, 1998) ("The Judicial Officer also found that '[t]here is no evidence that Zimmerman deliberately harmed his animals.' However, in regard to the effect and potential effect of Zimmerman's violations on the health and well-being of his animals, it is found that . . . [Zimmerman's] . . . violations, while not 'serious,' are 'significant' in that they constitute violations of the Regulations and Standards which *could have affected the health and well-being of animals* under certain circumstances.") (emphasis added); *Mitchell*, 60 Agric. Dec. 91, 128-29 (U.S.D.A. 2001) ("The gravity of Respondents' violations is clearly evident. . . . While there is no allegation in the Complaint that Respondents' animals actually suffered injury, dehydration, or malnutrition, many of Respondents' violations constitute threats to the health and well-being of the animals in Respondents' facility.").

[219] *See* 2015 Complaint at 6-7 ¶ 9.

> Indoor housing facilities must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed in the housing facility to as to protect the nonhuman primates from excessive light.

9 C.F.R. § 3.76(c). The 2015 Complaint alleges that Respondents violated section 3.76(c) on September 25, 2013 by housing two nonhuman primates (spider monkeys) in a barn that had inadequate lighting – specifically, diurnal lighting.[220] I agree with Complainant that the ALJ erred in dismissing this violation. In his inspection report, ACI Fox wrote:

> At time of inspection the Spider Monkeys had lighting available that did not provide a diurnal lighting cycle for them and this was not available to them by natural light. Additional lighting for these non-human primates either by natural or artificial light needs to be provided that makes their enclosure lighting uniformly diffused throughout the enclosure and that provides for a diurnal lighting cycle which will help to provide for the well-being of these non-human primates as well as make the required husbandry and housekeeping practices for this facility easier.

CX-16 at 1. At the hearing, ACI Fox testified that the spider monkeys were located in the very back northeastern corner of a barn,[221] that certain items in the barn "prevented the natural lighting that would have been coming

[220] *See* Complaint at 6 ¶ 9c; Appeal at 52.

[221] Tr. 552-53.

through [the] doorway to diffuse uniformly throughout that environment,"[222] and that there was no additional lighting source.[223] Further, ACI Fox testified that lack of diurnal lighting negatively affects non-human primates in that "it does not allow them to properly metabolize the food sources and to . . . have a light cycle that would provide them with good piece [sic] of mind," noting that "[i]t would have an ability to cause depression."[224]

In her Initial Decision, the ALJ emphasizes that "Mr. Terranova installed lights as requested by the inspector, and once he understood the need for diurnal lighting, put the lights on a timer and also built an outside enclosure connected by a tunnel."[225] Respondents make the same argument in response to Complainant's appeal.[226] As previously discussed, however, "APHIS does not give time to come into compliance; the regulated party must always be in compliance."[227] The September 25, 2013 lighting violation is adequately supported by the record.

With respect to housing, section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) requires that "[t]he facility must be constructed of such material and of such strength as appropriate for the animals involved."[228] The 2015 Complaint alleges that on September 25, 2013, "[r]oof panels on the top of the covered portion of the tiger exercise yard had become unfastened from the top rails of the enclosure" in violation of section 3.125(a) (9

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[222] *Id.* at 555.

[223] *Id.* at 559.

[224] *Id.* at 558.

[225] IDO at 24 (citing Tr. 719-21).

[226] *See* Response at 20.

[227] *Berosini*, 54 Agric. Dec. 886, 914 (U.S.D.A. 1995); *see also Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (U.S.D.A. 1997) ("[E]ach . . . exhibitor . . . must always be in compliance in all respects with the Regulations in 9 C.F.R. Part 2 and the Standards in 9 C.F.R. Part 3."). It is well settled that the subsequent correction of a violation does not eliminate the fact that the violation occurred. *See, e.g.*, *Parr*, 59 Agric. Dec. 601, 624 (U.S.D.A. 2000); *see also Drogosch*, 63 Agric. Dec. 623, 644 n.5 (U.S.D.A. 2004).

[228] 9 C.F.R. § 3.125(a).

C.F.R. § 3.125(a)).[229]

I agree with Complainant that the evidence shows that Respondents' tiger exercise yard and enclosures were in disrepair and structurally compromised.[230] In his inspection report, ACI Fox wrote:

> At the time of inspection the covered portion of the tiger exercise yard on the west side of the yard had areas along the top were the heavy gauge panels attached to the top rails of the enclosure had become unfastened. These roof panels need to be re-fastened along the top rail to make this structurally so und and to keep it in good repair as well as make certain the animals are contained.

CX-16 at 1. At the hearing, ACI Fox testified that the tigers were using an exercise yard but "the panels had become unfastened and were not structurally stable, so needed to be refastened."[231] He observed that more clamps or welding were need to secure the top panels[232] and further stated: "If a strong wind or winds that we have in our area or [Mr. Terranova] has experienced in his area were to take place and knock those down, then, yes, it certainly could" fall down, which could harm the tigers.[233] I therefore reject the ALJ's finding that "[t]here is no evidence that the sections of panels which were loose posed any danger to the animals[.]"[234] Moreover, the fact that "the panels were in the process of being repaired" does not eliminate the violation.[235] I reject the ALJ's finding that "this

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[229] 2015 Complaint at 6-7 ¶ 9d.

[230] *See* Appeal at 53.

[231] Tr. 561.

[232] *Id.*

[233] *Id.* at 562.

[234] IDO at 25. The ALJ also states there is no evidence "that any animals were injured by" the panels. *Id.* However, actual injury to animals is not required to establish a violation of 9 C.F.R. § 3.125(a)). *See supra* notes 148, 149, and accompanying text.

[235] *See supra* note 186 and accompanying text.

violation is not established."[236]

With respect to housekeeping, section 3.31(c) of the Standards (9 C.F.R. § 3.131(c)) provides:

> Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleaned as necessary to protect the health of the animals.

9 C.F.R. § 3.131(c). Although the Standards refer specifically to trash, the Secretary has found noncompliance based on accumulation of other items.[237]

The 2015 Complaint alleges Respondents failed to meet the housekeeping Standard in multiple respects:

> e. September 25, 2013. Respondents failed to remove from an area adjacent to the tiger facility an accumulation of unused building materials, including livestock panels and old lumber, and other miscellaneous items not used for animal husbandry. 9 C.F.R. § 3.131(c).
>
> f. September 25, 2013. There were weeds and grasses growing in and around the premises and animal areas that offered harborage to rodents and other animals and pests. 9 C.F.R. § 3.131(c).
>
> g. September 25, 2013. Respondents maintained unused chain link pens containing wooden structures that were in disrepair, and had weeds

[236] IDO at 25.

[237] *See Pearson*, 68 Agric. Dec. at 713 (old cages, railroad ties, tires, miscellaneous junk, excessive weeds, empty plastic and metal barriers, old tires, and plastic buckets).

> growing inside of them that could provide harborage for pests. 9 C.F.R. § 3.131(c).

2015 Complaint at 6-7 ¶ 9.

On September 25, 2013, ACI Fox observed an accumulation of unused building materials – including livestock panels and old lumber, and other miscellaneous items not used for animal husbandry – adjacent to the tiger enclosures.[238] His inspection report states:

> At the time of inspection the south side of the tiger facility currently in use had an accumulation of building materials, old lumber, livestock panels and other odds and ends not used in the day to day husbandry practices of this facility which prevents the required husbandry practices to be carried out in this area.

CX-16 at 3. At the hearing, ACI Fox testified that the issue with the "accumulation of different building materials"[239] is they were "not used in the day-to-day husbandry practices of the animals . . . and consequently, that was allowing for weeds and grass to grow up and around them,"[240] which "allows for . . . hiding places for such things as reptiles, snakes, rodents, field mice and rats, insects, any of which can cause potential harm or injury to the animals."[241]

Respondents contend that "[t]he supposed accumulation of building materials, old lumber and other odds and ends . . . was in an unused area that would not interfere with the animals."[242] The ALJ makes the same argument.[243] ACI Fox observed, however, that the accumulated building materials in and near animal areas interferes with performing the required

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[238] *See* 2015 Complaint at 7 ¶ 9e; CX-16 at 3.

[239] Tr. 563.

[240] *Id.*

[241] *Id.* at 564.

[242] Response at 21 (citing Tr. 709).

[243] *See* IDO at 26.

husbandry practices[244] because "in order to maintain the weeds and grass, you would either have to move those [building materials] to do so or you would . . . be unable to do so."[245] I find that Complainant has proved this violation by a preponderance of the evidence.

The evidence also shows that on September 25, 2013, there were weeds and grass growing in and around Respondents' premises and animal areas, offering harborage to rodents and other animals and pests.[246] In his inspection report for that date, ACI Fox states:

> There are weeds and grass that have grown up and need to be cut down to a manageable height so that rodents, pests and snakes which could cause health and disease risks to these animals are not afforded an area to hide and make a home for themselves.

CX-16 at 3. At the hearing, ACI Fox testified that there were several areas with tall, unmowed grass as high as two feet[247] and that the overgrowth would allow ". . . such things to cause potential injury to them as snakes, reptiles, and other sorts, rats, mice, insects."[248] Moreover, Respondents admit the presence of "high grass" and weeds on the premises.[249] I therefore reject the ALJ's finding "there is not sufficient evidence to find a violation."[250]

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[244] *See* Tr. 626 (Testimony of ACI Fox) (stating that "husbandry practice" refers to the "ability to clean properly, to make necessary repairs, to feed the animal, to get in and do what's necessary to ensure the health and well-being of the animal.").

[245] *Id.* at 564.

[246] *See* 2015 Complaint at 7 ¶ 9f.

[247] Tr. 564.

[248] *Id.* at 565.

[249] *See* Response at 21 ("The inspectors had no problems with grass inside the tiger enclosure, the high grass is considered enrichment. Tr. 565. Terranova and Fox discussed this, and Fox agreed that the long grass was enrichment, but he still wanted it mowed outside the enclosures. Tr. 706").

[250] IDO at 28.

Finally, the 2015 Complaint alleges, and the evidence shows, that on September 25, 2013, Respondents maintained unused chain-link pens containing wooden structures that were in disrepair and had weeds growing inside of them that could provide harborage for pests.[251] In his inspection report, ACI Fox wrote:

> There are a number of chain link pens with old wooden structures which are no longer currently in use and need to be removed or they need to be maintained by cutting the weeds that grow inside of them and to remove the old wooden structures from them that are not being maintained.

CX-16 at 3. Further, ACI Fox testified that there were unused pens along the south perimeter fence and tall grass growing alongside the perimeter fence, about three to four feet away from the tigers.[252] Respondents' 2015 Answer admits "that there were unused pens that were not attached to any other structure that head been weathered and become damaged," but Respondents have failed to address the issue on appeal.[253] Complainant has proven the violation by a preponderance of the evidence.[254]

ii. January 8, 2015 (Shelter from Inclement Weather for Tigers Housed Outdoors)

Complainant alleges that on January 8, 2015, Respondents failed to meet the minimum Standards with respect to shelter from inclement weather for five tigers housed outdoors.[255] Section 3.127(b) of the

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[251] *See* 2015 Complaint at 7 ¶ 10f.

[252] Tr. 565.

[253] 2015 Answer at 3 ¶ D.9g.

[254] In declining to find a violation, the ALJ noted: "There is no evidence of any rodents or pests in these unused pens." IDO at 28 (citing Tr. 710). The Standard, however, relates to protection and prevention; evidence of actual infestation is not required.

[255] Appeal at 57. Although Complainant references five tigers in its Appeal Petition, the 2016 Complaint mentions six tigers. *See* 2016 Complaint ¶ 10a.

Standards (9 C.F.R. § 3.127(b)) provides:

> Natural or artificial shelter appropriate to the climatic conditions for the species concerned shall be provided for all animals and kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

9 C.F.R. § 3.127(b). Exhibitors are required to provide *each* animal housed outdoors with adequate shelter from the elements.[256]

The evidence shows that on January 8, 2015, Respondents' enclosures contained a single shelter for five tigers; this was not appropriate under the circumstances.[257] In his inspection report, ACI Fox wrote:

> At time of inspection the enclosures housing the 5 tiger cubs at the facility had only one housing structure which was completed and allowed protection and comfort from the elements. We are currently experiencing temperatures and wind chills into the high tens and 20 degree range with the chance for a winter mix being possible. There is construction that has been started on additional housing structures that once completed will provide tigers protection and will help to prevent discomfort to the animals during period of inclement weather.

CX-18 at 1; *see* Tr. 569. The tigers weighed about sixty pounds each, and

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[256] *See Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 122-23 (U.S.D.A. 1996) ("On a[n] . . . inspection of Big Bear Farm, Inc., two APHIS inspectors found that 'the petting zoo enclosure housed 1 potbellied pig, 5 sheep and 7 goats was equipped with 2 wood shelter boxes and 1 plastic barrel. This was not enough total shelter space to accomodate [sic] all animals housed in this enclosure at the same time."); *see also Pearson*, 68 Agric. Dec. at 709 ("Mr. Pearson housed a bobcat in an enclosure with a damaged roof that did not provide the animal with shelter from inclement weather, in willful violation of section 3.127(b) of the Regulations").

[257] *See* CX-18 at 1.

they could not all fit comfortably in the solitary shelter.[258] ACI Fox noted that all five tigers could not lie down, stand, turn, and make normal postural adjustments one time.[259] Instead, the tigers could elect either to sleep outdoors or to crowd into the shelter.[260]

Respondents contend that ACI Fox "was not aware that there was a door between each enclosure that would allow the tigers to roam freely among the enclosures."[261] Respondents state that "[t]he tigers had access to all of the houses, and there was hay in the two houses that could have sheltered the tigers."[262] The record shows, however, that only one of three "houses" was completely finished on the day of the inspection.[263] I find sufficient evidence to support Complainant's allegation that Respondents' five tigers were not provided with access to adequate shelter from inclement weather, in violation of 9 C.F.R. § 3.127(b), on January 8, 2015.

iii. May 13, 2015 (Housing Facilities for Nonhuman Primates and Tigers and Tiger Enclosures)

The 2016 Complaint alleges that on May 13, 2015, Respondents failed to comply with multiple provisions of the Standards relating to housing facilities and enclosures: 9 C.F.R. §§ 3.75(b), 3.75(c)(1)(i), 3.77(c), 3.125(a), and 3.131(c). Complainant contends the ALJ improperly declined to find these violations on the ground no animal or person was actually harmed.[264] In so doing, Complainant argues, the ALJ "completely missed the point of the Regulations and Standards: prevention."[265]

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[258] Tr. 567, 568, 570.

[259] *Id.* at 568.

[260] *Id.* at 570.

[261] Response at 22 (citing Tr. 641-42, 729).

[262] *Id.* (citing Tr. 729).

[263] *See* Tr. 726-29.

[264] *See* Appeal at 50-51.

[265] *Id.* at 51.

a. Spider-Monkey Housing Facilities – Clutter

With regard to the condition and site of housing facilities for nonhuman primates, section 3.75(b) of the Standards (9 C.F.R. § 3.75(b)) provides:

> Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, or stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures and equipment necessary for proper husbandry practices and research needs. . . .

9 C.F.R. § 3.75(b). The 2016 Complaint alleges that Respondents' housing facilities for nonhuman primates were not kept free of clutter and specifically contained, *inter alia*, horse equipment, hay, building materials, and a fifty-five gallon barrel.[266] This was documented in an inspection report written by ACI Fox.[267] Photographs taken on the date of inspection corroborate ACI Fox's inspection report and show additional items, including hay, a freezer unit, an old cage on top of the primate enclosure, and plywood.[268] Nonetheless, the ALJ declined to find a violation:

> There is no evidence of illness or injury to the spider monkeys. There is no evidence of rodents or other pests. The barn where the spider monkeys were housed was also used as a storage area. There had been recent weather issues and routine maintenance was required, although, the evidence does not establish that the clutter rises to a level of a violation. Accordingly, this violation is not established.

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[266] 2016 Complaint at 6 ¶ 10b.

[267] CX-19 at 2.

[268] CX-20 at 13; Tr. 584-85, 586.

Initial Decision at 35.

The ALJ's rationale is misplaced. Section 3.75(b) of the Standards (9 C.F.R. § 3.75(b)) does not require "evidence of illness or injury"[269] to support a violation.[270] Moreover, the fact that the spider monkeys were housed in a barn that "was also used as a storage area"[271] and experienced "recent weather issues"[272] does not excuse the presence of clutter therein.[273] As ACI Fox testified:

> [T]he building itself must be kept in compliance status, as well as the immediate area. And by allowing all the storing of this various equipment, it allowed again for various types of rodents, reptiles, insects, et cetera, that could come into the proximity of the non-human primates and potentially threaten the health and well-being.

Transcript at 54. ACI Fox also testified that the clutter was "basically allowing for the inability to take and perform the proper husbandry required of that building." [274] Based on the evidence of record, Respondents have failed to rebut Complainant's showing of the May 13, 2015 violation of 9 C.F.R. § 3.75(b);[275] therefore, the violation is affirmed.

b. Spider-Monkey Housing Facilities – Rust

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[269] IDO at 35.

[270] *See* 9 C.F.R. § 3.75(b).

[271] IDO at 35.

[272] *Id.*

[273] *See* Response at 23 ("The monkeys were kept in a barn that was used as such, and things had been stored there for years. The tractor had been there for 16 years. . . . In addition, two days prior to the inspection, there had been a tornado and bad flooding and the wind had 'blown a lot of stuff around.' Tr. 741. Respondents were cleaning it up.").

[274] Tr. 583.

[275] *See* Response at 23-24.

Further, section 3.75(c)(1)(i) of the Standards (9 C.F.R. § 3.75(c)(1)(i)) specifically requires that the surfaces of housing facilities for nonhuman primates "[b]e free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]"[276] The 2016 Complaint alleges that on May 13, 2015, "Respondents housed nonhuman primates in enclosures that were not free of excessive rust, and could not be cleaned and sanitized as required."[277] Respondents admit "[t]here was about eight inches of rust on a monkey cage"[278] but state that "[t]he rust was not affecting the integrity of the structure."[279]

Despite acknowledging that "[t]here is some surface rust visible on the photos,"[280] the ALJ declined to find a violation:

> The rust does not affect the integrity of the structure. CX 20; Tr. 742. The evidence does not support a finding that the rust was excessive or that it prevented the required cleaning and sanitation or that it affected the structural strength of the surface. Accordingly, this violation is not established.

Initial Decision at 36. While there is some evidence that the rust did not "impact the structural integrity of the metal,"[281] the preponderance of the evidence – including ACI Fox's inspection report,[282] photographs,[283] and

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[276] 9 C.F.R. § 3.75(c)(1)(i).

[277] 2016 Complaint at 6 ¶ 10c.

[278] Response at 23 (citing CX-20).

[279] *Id.* (citing Tr. 740).

[280] IDO at 36 (citing CX-20 at 15).

[281] Tr. 743.

[282] CX-19.

[283] CX-20 at 15.

testimony[284] – shows that the rust was excessive[285] and prevented the cage from being "properly cleaned and sanitized."[286] Therefore, I conclude that the ALJ erred in failing to find a violation.

c. Spider-Monkey Housing Facilities – Lighting

With regard to the lighting of sheltered housing facilities for nonhuman primates, the Standards provide:

> *The sheltered part of sheltered housing facilities must be lighted well enough to permit routine inspection and cleaning of the facility*, and observation of the nonhuman primates. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed in the housing facility so as to protect the nonhuman primates from excessive light.

9 C.F.R. § 3.77(c) (emphasis added). The evidence shows that on May 13, 2015, Respondents failed to provide sheltered areas housing nonhuman primates (spider monkeys) with adequate lighting to permit inspection and cleaning, as alleged in the 2016 Complaint.[287] ACI Fox documented in his inspection report that the lighting to the indoor area of the sheltered housing facility for nonhuman primates failed to provide enough light to permit routine inspection and cleaning of the facility, as well as to observe

[284] Tr. 581-83.

[285] ACI fox testified that rust was flaking off the door of the enclosure and coming into contact with the animals. *Id.* at 581. He also testified that there was no attempt to remove the rust, encapsulate it, or cover it. *Id.*

[286] *Id.*

[287] 2016 Complaint at 6 ¶ 10d (citing 9 C.F.R. § 3.77(c)).

the animals.[288] Moreover, ACI Fox testified that the lighting was the same issue as discovered in the September 2013 inspection.[289]

The ALJ rejected ACI Fox's testimony as "not credible" on the basis that "[t]he inspectors were able to see the monkeys and speak with them."[290] That fact, however, came from the testimony of Michelle Wallace – a contractor employed by Respondents.[291] The ALJ also noted that the inspectors "photographed the monkeys while they were outside, in more than sufficient light for inspection and their well-being";[292] however, the ALJ failed to consider whether the light was sufficient to permit routine cleaning.[293] The record shows that it was not. The spider monkeys' cage had become rusted in many areas; in fact, rust was flaking off the front door of the enclosure and coming into contact with the animals.[294] As previously discussed, the rusted metal prevented proper cleaning and sanitation of the cage.[295]

Although Respondents placed a spotlight in the barn, the lighting was inadequate for the spider monkeys.[296] When asked whether materials in the barn posed an obstacle to providing lighting to the spider monkeys, ACI Fox testified:

> Yes, they do, very much so. . . . [T]here are several of them. If the freezer wasn't located there, and then I'm not certain what that is behind the freezer that's actually directly behind it, but as you can see, it blocks the wire of the enclosure. You have the horse material to the top of

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[288] CX-19 at 2.

[289] Tr. 587-88.

[290] IDO at 37.

[291] *See* Tr. 822-23, 827.

[292] IDO at 37.

[293] *See* 9 C.F.R. § 3.77(c).

[294] Tr. 581-83.

[295] *See supra* note 286 and accompanying text; Tr. 581.

[296] Tr. 588-89.

> that, shelving units to the left of that. You have all the material that's stored on top. You have the paneling or the lumber that's on the alleyway. You have all of the barrels and non-used materials, pipe rack, et cetera, next to the alleyway wall, which makes it difficult for what natural light might be coming through that door to be uniformly distributed and to provide for the elements of husbandry, observation, and the diurnal lighting cycle required for the primates.

Tr. 589-90.[297] When asked how the lighting affected his inspection, ACI Fox responded:

> Same problems that it posed for Mr. Terranova it posed for myself. . . . The inability to assess the overall health and well-being of the primates at the time and to assess the husbandry practices that should have been ongoing within the enclosure at the time of the inspection and prior to that.

Tr. 590-91. The record reflects that Complainant proved this violation by a preponderance of the evidence; the ALJ erred in finding otherwise.

d. Tiger Housing Facilities – Floors and Roof

With regard to structural strength of facilities, section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) provides:

> The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. § 3.125(a). The 2016 Complaint alleges that Respondents failed to maintain their housing facilities for tigers in good repair so as to protect the animals from injury; specifically: (1) the plywood and pallets covering

[297] *See* CX-19.

the floors of Respondents' housing facilities for tigers were rotted and in disrepair and (2) the roof of one of Respondents' housing facilities for tigers was damaged and in need of replacement.[298] In her Initial Decision, the ALJ states:

> The evidence shows that these enclosures were not in use and that they did not pose a risk of injury to or escape of the animals. Accordingly, the evidence does not establish a violation.

Initial Decision at 39. I disagree with the ALJ's conclusion.

The evidence shows that on May 13, 2015, plywood and pallets covering the floors of Respondents' housing facilities for tigers were rotted and in disrepair.[299] Multiple tiger units had floors that were rotted to the point that portions of the plywood was missing.[300] The photographs taken on the date of the inspection reveal rotted wood, holes in the wood, and wet and decaying hay.[301] ACI Fox testified that the effect of the disrepair on the flooring was a potential for injury to the tigers as openings of the pallet were exposed to the tigers.[302] ACI Fox also testified that the wet and decaying hay could potentially cause disease as decaying hay turns into mold, which allows for bacteria organisms to grow.[303]

The evidence also shows that on May 13, 2015, the roof of one of Respondents' housing facilities for tigers was damaged and in need of replacement.[304] ACI Fox's investigation report notes that there was a

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[298] 2016 Complaint at 6 ¶ 10f.

[299] *Id.* at 6 ¶ 10f(i).

[300] CX-19 at 3; Tr. 596.

[301] CX-20 at 9, 10, 11; Tr. 593-96.

[302] CX-20 at 9, 10, 11; Tr. 593-94 ("If he were to walk in or run into that den and that foot was to not have the ability to land on a flat surface but actually insert itself into that opening, that could potentially allow for injury to the paw itself and/or the paw and anklet of the cat.").

[303] Tr. 594-95.

[304] 2016 Complaint at 6 ¶ 10f(ii).

section of material covering the plywood that was damaged.[305] The photograph taken on the date of inspection also shows that the material on the roof was separating and splintering.[306] Moreover, ACI Fox testified that the splintering of the roof had the potential to cause injury to the tigers.[307]

On cross-appeal, Respondents merely state that "[t]hese enclosures were not in use"[308] and "[t]he tiger depicted in one of the photographs of the enclosure had come into the enclosure through a guillotine door that Michelle Wallace had opened at the inspector's request."[309] Apart from Ms. Wallace's testimony, however, there is no evidence that the enclosure was not in use. Indeed, ACI Fox testified that more than one tiger could use the enclosure, but the other tigers were "on the road" at the time of inspection.[310] The preponderance of the evidence establishes that Respondents failed to maintain their tiger housing facilities for tigers in good repair so as to protect the tigers from injury, in violation of 9 C.F.R. § 3.125(a), on May 13, 2015.

e. Tiger Housing Facilities – Enclosure Construction, Climbing Structures, and Rust

The 2016 Complaint alleges that on May 13, 2015 Respondents failed to maintain their housing facilities for tigers in good repair so as to contain them, in violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)).[311] As previously discussed, section 3.125(a) requires that "housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the

[305] CX-19 at 3.

[306] CX-20 at 12; Tr. 597.

[307] Tr. 598 ("[I]f they were to turn around and hit that with a paw, you know, just flexing, their normal postural adjustments, if they were to hit the cage's edges, it can cause injury to the paw itself."), 599.

[308] Response at 25 (citing Tr. 769).

[309] *Id.* (citing CX-20 at 9-12; Tr. 830).

[310] Tr. 596.

[311] 2016 Complaint at 6-7 ¶ 10g.

animals."[312]The Complaint specifically alleges that: (1) Respondents' tiger enclosure was not constructed in a structurally sound manner; (2) Respondents' tiger enclosure contained climbing structures that could provide opportunities for the animals to escape; and (3) areas of Respondents' tiger enclosures were rusted, which could reduce the enclosures' structural integrity.[313]

In her Initial Decision, the ALJ concluded:

> The evidence does not support a finding that the tiger enclosure was not structurally sound. The evidence does not show that the roof panels were unsecured or that climbing structures posed a risk of escape. The evidence also does not support a finding that the rust was excessive or that it prevented the required cleaning and sanitation or that it affected the structural strength of the surface. Accordingly, this violation is not established.

Initial Decision at 41.

The evidence shows that on May 13, 2015, Respondents' tiger enclosure was not constructed in a structurally sound manner; specifically, the panels on the east side of the roof were not attached to the structure's framework and support pipe, as alleged in the 2016 Complaint.[314] In his inspection report, ACI Fox wrote that "the panels on the east side of the roof . . . [were] simply laying on the pip [sic] roof supports and framework for the sidewalls and overlap one another."[315] During his testimony, ACI Fox further explained:

> [T]he entire roof of the exercise yard was now covered by panels and support pipe, supporting apparatus. At the time of this inspection, the panels on the eastern side, they were not connected to the support brackets on the east side of

[312] 9 C.F.R. § 3.125(a).

[313] 2016 Complaint at 7 ¶ 10g.

[314] *Id.* at 7 ¶ 10(g)(i).

[315] CX-19 at 3.

> that cage, on the north side of that cage, next to what would be the south side of the actual enclosure for the tiger next to -- or the start of the northern wall for the exercise yard, was not attached there. And the panels themselves were not attached to one another, nor the support pipe that ran on the length of the exercise yard.

Transcript at 599. Moreover, photographs taken on the date of inspection show that the top of the tiger enclosures on the east side are not connected to the sidewalls, pipe support, or to each other.[316] When viewing one such photograph[317] at the hearing, ACI observed:

> You're looking at the eastern wall of the exercise yard . . . . And on top of that is the panels that constitute the covering of the exercise yard on the east side of the exercise yard. It shows the overlaying of panels in a couple different directions, and it shows that there are no clamps that are visible on any of the support structure that's running the length . . . . That support pipe that's running from that corner to the bottom of the photograph is actually a top support for that paneling, okay? It's not attached to that. It's not attached to the support pipe on the east side of the pen, nor was it attached on the side that would have represented the north side of the exercise yard.

Transcript at 600. In addition, ACI Fox testified that he did not observe any attempt to clamp or weld the top of the framework.[318]

Respondents contend that "[t]he panels were not clamped because they had been welded."[319] However, apart from Mr. Terranova's own testimony

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[316] CX-20 at 3, 4.

[317] *Id.* at 3.

[318] Tr. 600-01.

[319] Response at 25.

there is no evidence of such welding.[320] I conclude that the ALJ erroneously found that "[t]he evidence does not support a finding that the tiger enclosure was not structurally sound."[321]

Further, the evidence shows that on May 13, 2015, Respondents' tiger enclosure contained climbing structures that could provide opportunities for animals to escape,[322] as alleged in the 2016 Complaint.[323] In his inspection report, ACI Fox noted that "all sections of the roof need to be attached properly to all wall sections, roof support pipes, and one panel to the other to minimize the potential for escape from the enclosure."[324] Photographs taken on the date of inspection reveal that several climbing structures in the tiger enclosure had climbing platforms for the tigers.[325] ACI Fox testified that because the panels on top of the tiger enclosure were not attached to the structure's framework and support pipe, the elevated climbing structures allowed for potential escape.[326]

Although they failed to address the issue of climbing structures on appeal, Respondents argued before the ALJ that "the panels were not clamped because they had been welded and therefore the climbing structures were not an issue."[327] As previously discussed, however, Respondents failed to produce sufficient evidence of such welding.[328]

The evidence also shows that on May 13, 2015, areas of Respondents' tiger enclosures were rusted, which could reduce the enclosures' structural

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[320] *See* Tr. 756-57.

[321] IDO at 41.

[322] *See* CX-20 at 5, 6.

[323] 2016 Complaint at 7 ¶ 10g(ii).

[324] CX-20 at 5, 6.

[325] *Id.*

[326] Tr. 602.

[327] IDO at 40 (citing Respondents' Opposition Brief at 18).

[328] *See supra* note 320 and accompanying text.

integrity, as alleged in the 2016 Complaint.[329] In his inspection report, ACI Fox observed various metals used in the tiger enclosure to be rusted.[330] Photographs taken on the date of the inspection show rust on the entire door structure and the supports on the sides and the top.[331] When asked to describe "the problem with the metal" at hearing, ACI Fox testified: "It again was rusting and . . . if it had not been or was not maintained, encapsulated or removed with rust inhibitor, then it would cause metal fatigue and structural integrity failure."[332] When asked if he observed any attempt by Respondents to remedy the rust, ACI Fox responded: "Not on these sections at all."[333] Moreover, ACI Fox testified that the tigers could come into direct contact with the rusted door.[334] Because "you cannot properly clean and sanitize rust," ACI Fox testified, "it allows the potential for disease organisms and bacteria to have a foundation to begin" and affect the animals' health.[335]

On cross appeal, Respondents argue that "[t]he rusted doors depicted in the photographs taken during the inspection had never been painted during their 12 to 14 year existence."[336] That Respondents never painted the enclosure door does not excuse the presence of rust; to the contrary, it shows that Respondents failed to maintain the enclosure to preserve its structural integrity.[337] Respondents also contend that the doors "were made from very thick drill-stem pipe, and the surface rust was not going to affect their integrity";[338] however, Respondents offer no evidence or explanation to support this claim.

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[329] 2016 Complaint at 7 ¶ 10g(iii).

[330] CX-19 at 3.

[331] CX-20 at 5, 6; *see* Tr. 606.

[332] Tr. 606.

[333] *Id.* at 607.

[334] *Id.*

[335] *Id.*

[336] Response at 25.

[337] *See supra* note 329 and accompanying text.

[338] Response at 25.

Based on the foregoing, I conclude that Complainant proved by a preponderance of the evidence that on May 13, 2015 Respondents failed to maintain their tiger housing facilities in good repair so as to contain the animals. Accordingly, Respondents' violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) is affirmed.

f. Tiger Housing Facilities – Weeds and Grass

The 2016 Complaint alleges that on May 13, 2015, "there were weeds and grass growing in and around Respondents' premises and animal areas that offered harborage to rodents and other animals and pests."[339] With regard to sanitation and housekeeping, section 3.131(c) the Standards (9 C.F.R. § 3.131(c)) provides in pertinent part: "Premises (building and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart."[340]

Contrary to the ALJ's finding, I conclude that Complainant proved this violation by a preponderance of the evidence.[341] ACI Fox's inspection report notes that grass was growing up through a used pile of bricks in the immediate area of the tiger housing and enclosures.[342] Photographs taken on the date of the inspection show that grass was overgrown inside the tiger compound,[343] and ACI Fox testified that the overgrown grass "would allow insects, rodents, and reptiles to gain refuge and proximity to the animals and potentially cause injury."[344] Respondents have failed to address the issue on appeal.

I disagree with the ALJ's conclusion that "[t]here is no evidence of the

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[339] Complaint at 7 ¶ 10h.

[340] 9 C.F.R. § 3.131(c)).

[341] *See* IDO at 41.

[342] CX-19 at 4.

[343] CX-20 at 7, 8.

[344] Tr. 613.

height of the weeds."[345] While an exact measurement was not given, photographs taken on the date of inspection show tall, overgrown grass.[346] Furthermore, the Standards do not set forth a minimum height requirement; the key question is whether the grass and weeds could potentially cause injury or harm to the animals.[347] Complainant has shown that they could.[348]

Similarly, ALJ appears to rely on the fact that there was "no evidence of rodents or pests"[349] in declining to find a violation. Again, the ALJ has taken the wrong focus. The housekeeping Standards relate to protection and prevention; evidence of actual rodent or pest infestation is not required. In this case, ACI Fox testified that the grass and weeds were not "properly ke[pt] down" and could interfere with Respondents' "ability to carry out the husbandry needs of the animals"[350] and "potentially cause injury."[351]

Accordingly, I reject the ALJ's conclusion that "there is not sufficient evidence to find a violation."[352] Complainant established that Respondents' tiger compound was overgrown with weeds and grass, which could have potentially caused injury to the animals. The May 13, 2015 violation of 9 C.F.R. § 3.131(c) is therefore affirmed.

g. Tiger Housing Facilities – Trash

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[345] IDO at 41.

[346] *See* CX-20 at 7, 8; Tr. 613-14.

[347] *See* 9 C.F.R. § 3.131(c).

[348] *See* Tr. 613.

[349] IDO at 41.

[350] Tr. 613. *See also id.* at 626 (Testimony of ACI Fox) (stating that "husbandry practice" refers to the "ability to clean properly, to make necessary repairs, to feed the animal, to get in and do what's necessary to ensure the health and well-being of the animal.").

[351] Tr. 613.

[352] IDO at 41.

As previously discussed, section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)) requires that premises "be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices."[353] Additionally, section 3.131(c) (9 C.F.R. § 3.131(c)) provides: "Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals."[354]

The 2016 Complaint alleges that on May 13, 2015, Respondents housed tigers in facilities that were not kept clean and free of trash in violation of section 3.131(c) (9 C.F.R. § 3.131(c)).[355] I find that the evidence of record supports this violation. ACI Fox's inspection report notes a variety of items in the immediate area of the tiger housing and enclosures, including a pile of used brick, metal roofing materials, assorted pipe, a two-legged wooden table, an unused dog house, and other miscellaneous items.[356] Photographs taken on the date of the inspection corroborate ACI Fox's inspection report.[357] Moreover, the materials were located "within the confines and immediate area of the tiger enclosures"[358] and "right next to" the tiger exercise yard.[359] When asked how the materials would impact the ability to carry out the husbandry needs of the animals, ACI Fox responded:

> Well, unless they're removed and picked up, there's no way to keep -- properly keep down the grass and weeds that would grow up, *which would allow insects, rodents, and reptiles to gain refuge and proximity to the animals and potentially cause injury.*

Transcript at 613 (emphasis added).

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[353] 9 C.F.R. § 3.131(c).

[354] *Id.*

[355] 2016 Complaint at 7 ¶ 10i.

[356] CX-19 at 4.

[357] CX-20 at 7, 8.

[358] Tr. 611.

[359] *Id.* at 612.

Respondents admit that "[t]he inspection report noted things like used brick, metal roofing, and a wooden table not in use that *should have been stored away from the animals*."[360] However, Respondents also contend:

> The metal roofing had blown off from the storm a few days before the inspection and there was no tiger in the vicinity. Tr. 765. The bricks had been put down to make a walkway, but the job could not be completed until after the rains subsided. Tr. 766, RX 9 p. 2. The table was a pedestal that Terranova used for training. Tr. 767-768.

Response at 25-26. These arguments are rejected. As the previous Judicial Officer held, "[e]ach Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations."[361] The ALJ erred by accepting Respondents' excuses.[362]

Furthermore, the ALJ's statement that "Respondents should not be penalized for their partially completed efforts to improve the property"[363] is misguided. The Animal Welfare Act is a remedial statute enacted to insure that animals are provided humane care and treatment, and AWA proceedings are not penal.[364] The Administrator does not seek to punish Mr. Terranova for his actions.[365]

Based on the foregoing, I reject the ALJ's conclusion that "there is not

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[360] Response at 25 (emphasis added).

[361] *Pearson*, 68 Agric. Dec. 685, 735 (U.S.D.A. 2009), *aff'd sub nom. Pearson v. United States*, 711 F. App'x 866 (6th Cir. 2011).

[362] *See* IDO at 42 ("This is a working farm and it is reasonable that equipment necessary to complete a project, such as a brick walkway, would be in the area and it is also reasonable that after a storm, some items may be in disarray.").

[363] *Id.*

[364] *See Greenly*, 72 Agric. Dec. 586, 592 (U.S.D.A. 2013); *Vigne*, 67 Agric. Dec. 1060, 1068 (U.S.D.A. 2008); *Squires*, 63 Agric. Dec. 590, 620-21 (U.S.D.A. 2004); *Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (U.S.D.A. 1997) (Order Den. Pet. for Recons.).

[365] *Greenly*, 72 Agric. Dec. at 592-93.

sufficient evidence to find a violation."[366] Accordingly, the second May 13, 2015 violation of section 3.131(c) (9 C.F.R. § 3.131(c)) is affirmed.

As previously noted, the standard of proof by which Complainant must meet its burden in this administrative proceeding under the Animal Welfare Act is preponderance of the evidence.[367] In meeting its burden of proof, Complainant bears the initial burden of coming forward with evidence sufficient for a prima facie case.[368] Complainant has done so for these violations. The burden of production then *shifted* to Respondents to rebut Complainant's prima facie showing.[369] Respondents have failed to rebut Complainant's evidence of record as to these violations.

The ALJ's rationale for declining to find violations or to fully credit Complainant's documentary, photographic, and testimonial evidence (*i.e.*, that she found no evidence that animals were actually sick, injured, or suffering at the time of the alleged violations because of the non-compliance) is flawed and fails to fully address "the point of the Regulations and Standards: prevention."[370] The purpose of requiring those who have custody of animals subject to the Act to maintain their facilities

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[366] IDO at 42.

[367] *Davenport*, 57 Agric. Dec. 189, 223 (U.S.D.A. 1998) ("The burden of proof in disciplinary proceedings under the Animal Welfare Act is preponderance of the evidence, which is all that is required for the violations alleged in the Complaint.").

[368] *JSG Trading Corp.*, 57 Agric. Dec. 710, 721-22 (U.S.D.A. 1998) (Order Den. Pet. for Recons. as to JSG Trading Corp.). *See Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 266 (D.C. Cir. 1989), *cert. denied sub nom. Am. Petroleum Inst. v. EPA*, 498 U.S. 849 (1990); *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *see also* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden going forward'"); 3 KENNETH C. DAVIS, ADMIN. LAW TREATISE § 16:9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward and not the ultimate burden of persuasion).

[369] *See supra* note 131.

[370] Appeal at 51.

in a manner that meets the minimum Standards is to ensure against the potential harm to animals from substandard conditions and treatment.[371] Based on the foregoing, I find that the ALJ erred in finding that Complainant failed to establish these violations by a preponderance of the evidence.

II. Sufficiency of Sanctions

On appeal, Complainant argues that the ALJ imposed inadequate sanctions for the violations she found.[372] Specifically, Complainant contends that the ALJ erred by: (1) assessing a joint-and-several civil penalty of only $10,000 for Respondents' violations of the Act and Regulations, an amount far lower than the Administrator's recommended penalty;[373] (2) assessing Respondents a single, shared civil penalty of $11,500 for knowingly disobeying a cease-and-desist order;[374] and (3) suspending Respondents' Animal Welfare Act license for a period of thirty days rather than revoking it.[375] Respondents assert that even these sanctions are "excessive."[376]

The Department's sanction policy is set forth in *S.S. Farms Linn County, Inc.*[377] as follows:

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

[371] *See supra* note 218.

[372] Appeal at 15.

[373] *Id.* at 16.

[374] *Id.* at 21.

[375] *Id.* at 22.

[376] Response at 2.

[377] 50 Agric. Dec. 476 (U.S.D.A. 1991) (Decision as to James Joseph Hickey and Shannon Hansen), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

> administrative officials charged with the responsibility for achieving the congressional purpose.

S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) (Decision and Order as to James Joseph Hickey and Shannon Hansen), aff'd, 991 F.3d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3). "The administrative recommendation as to the appropriate sanction is entitled to great weight, in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry."[378] That recommendation, however, is not controlling.[379] In appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[380]

The Secretary has many discretionary sanctions for remedial purposes in enforcing the Act, including temporary license suspensions without a hearing; lengthier suspensions or revocations after notice and hearing; civil penalties; and cease-and-desist orders.[381] The purpose of administrative sanctions is not to punish violators but to deter future similar behavior by the violator and others.[382] In this case, the Administrator of APHIS, an official charged with the responsibility for achieving the congressional purpose of the Act, recommended that the ALJ: (1) issue a cease-and-desist order against Respondents; (2) revoke Respondents' AWA license; and (3) assess Respondents a joint-and-

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[378] *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 466 (5th Cir. 2015) (quoting *S.S. Farms Linn Cty., Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) (internal quotation marks omitted)).

[379] *Id.* at 466; *see also Pearson*, 68 Agric. Dec. at 731; *Shepherd*, 57 Agric. Dec. 242, 283 (U.S.D.A. 1998).

[380] *Pearson*, 68 Agric. Dec. at 731; *Shepherd*, 57 Agric. Dec. at 283.

[381] *See* 7 U.S.C. § 2149.

[382] *Zimmerman*, 57 Agric. Dec. 1038, 1064 (U.S.D.A. 1998), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998); *see also Chandler*, 64 Agric. Dec. 876, 894 (U.S.D.A. 2005) ("The purpose of an administrative sanction is not to punish one who may have violated governmental regulations; the purpose is instead to take such steps as are necessary to deter the Respondent from future conduct prohibited by the Act.").

several penalty of $35,000 for their violations of the Act and Regulations and assess Respondents separate civil penalties of $36,300 (per Respondent) for their knowing failures to obey the Secretary's 2012 cease-and-desist order.[383] Complainant's proposed sanctions are consistent with those assessed for violations in similar AWA cases.[384] The Department consistently imposes significant sanctions for violations of the Act and the Regulations and Standards.[385]

Furthermore, the Judicial Officer has long held that if the remedial purpose of the Animal Welfare Act is to be achieved, the sanctions imposed must be adequate to deter Respondents and others from violating the Animal Welfare Act, the Regulations, and the Standards.[386] Here, the ALJ failed to appreciate that Respondents' violations are the kind of serious, repeat, and willful violations that thwart the Secretary's ability to enforce the Act and warrant significant sanctions. I therefore agree with Complainant and conclude that the ALJ's sanctions are insufficient in light of the facts and circumstances in this case. Complainant is entitled to the full relief requested in its Appeal Petition based wholly upon the violations affirmed. The fact that additional violations are supported by the record[387]

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[383] Complainant's Post-Hearing Brief at 48-40; *see* Appeal at 14.

[384] *See, e.g.*, *Hampton*, 56 Agric. Dec. 1634, 1634-36 (U.S.D.A. 1997) (Modified Order) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for thirteen violations of the Regulations and Standards); *Everhart*, 56 Agric. Dec. 1400, 1416-19 (U.S.D.A. 1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining an AWA license for three violations of the Act and Regulations); *Vergis*, 55 Agric. Dec. 148, 162-65 (U.S.D.A. 1996) (imposing a $2,500 civil penalty and one-year disqualification from being licensed under the Act for one violation of the Regulations and one violation of the cease-and-desist provision of a consent decision); *Anesi*, 44 Agric. Dec. 1840, 1848-49 (U.S.D.A. 1985) (imposing a $1,000 civil penalty and license revocation for ten violations of the Regulations and a previously issued cease-and-desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

[385] *See Lawson*, 57 Agric. Dec. 980, 1032-34 (U.S.D.A. 1998); *Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273-74 , 277 (U.S.D.A. 1997) (Order Den. Pet. for Recons.).

[386] *See, e.g.*, *Volpe Vito*, 56 Agric. Dec. 269, 273 (U.S.D.A. 1997) (Order Den. Pet. for Recons.).

[387] *See supra* Part I(C).

simply underscores the appropriateness of these sanctions.

A. Civil Money Penalties

1. Civil Penalties for Violations of the Act and Regulations

Complainant contends the ALJ erred by assessing Respondents a joint-and-several civil penalty of only $10,000, reduced from the $35,000 civil penalty Complainant requested.[388] In challenging the appropriateness of the reduced financial penalty, Complainant argues the ALJ failed to give due consideration to the required statutory factors.[389] Section 19(b) of the Act (7 U.S.C. § 2149(b)) provides that the following four factors must be considered when determining the civil penalty to be assessed for violations of the Act and the Regulations and Standards: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations.[390]

According to Complainant, Respondents: (1) "operate a moderately-sized business exhibiting animals in theatrical productions and circuses,"[391] (2) committed serious violations;[392] (3) have not shown good

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[388] Appeal at 16. While it is unclear how the ALJ calculated the civil penalty, it equates to only $500 per Respondent for each violation she found. As Complainant notes, a single penalty of $10,000 represents just five percent of the maximum civil penalty assessable to the two Respondents. *See* Appeal at 18.

[389] *See id.* at 18 ("Consideration of the required statutory factors in accordance with departmental precedent should have led the Judge to conclude that a greater civil penalty was warranted for respondents' ten violations.").

[390] 7 U.S.C. § 2149(b).

[391] Appeal at 18.

[392] *See id.* at 18-19 ("Although the Judge described only one violation (handling) as 'grave,' and described the access violations as 'minor,' the respondents' handling violations and failures to provide access for inspection are the kind of serious, repeat violations that merit assessment of the maximum civil penalties.").

faith;[393] and (4) have an established history of previous violations.[394] Complainant argues the ALJ devalued the gravity of Respondents' violations and Respondents' bad faith, gave no consideration to Respondents' history of previous violations, and erroneously considered license suspension "as an auxiliary factor"[395] in determining the penalty amount.[396]

Respondents counter that the penalty amount is "excessive."[397] In support thereof, Respondents state that: (1) Respondents have "a small operation" of "about eight or nine tigers";[398] (2) the "only willful violations Complainant arguably proved" were not grave, and "none of the violations involved any allegation of harm to an animal or person";[399] (3) Respondents did not, contrary to Complainant's assertions,[400] act in bad faith;[401] and (4) Respondents "have no history of violations related to the

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[393] *See id.* at 19 ("The findings of violations by respondents in two previous enforcement cases established respondents' lack of good faith[.]") (citing *Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093, 1102 (U.S.D.A. 2007)). Complainant also notes that Respondents "failed to comply with the order that Judge Bullard entered against them in 2012, by refusing to pay the civil penalty assessed against them, by failing to provide the required affidavit, and by continuing to commit the very same kinds of violations that they were found to have committed in their first two enforcement cases." *Id.*

[394] *See id.* at 19-20 ("Here, respondents have an established history of two previous enforcement cases wherein they were found to have willfully committed multiple serious violations, including violations similar to those in the two current cases . . . . Moreover, the Judicial Officer has held that 'an ongoing pattern of violations establishes a history of previous violations for the purposes of 7 U.S.C. § 2149(b).") (quoting *Greenly*, 72 Agric. Dec. 603, 625 (U.S.D.A. 2013)).

[395] *Id.* at 18.

[396] *Id.* at 18-21.

[397] Response at 2.

[398] *Id.* at 4.

[399] *Id.*

[400] *See supra* note 393.

[401] Response at 5.

issues in this case."[402]

First, I conclude that Respondents' business is moderately sized. Although Respondents claim to have had a "small operation" of "about eight or nine tigers in 2014,"[403] Respondents "reported custody of some twenty animals in 2011 and 2012."[404] Moreover, Respondents "admitted to operating a moderately-sized exhibition business" in *Terranova I*.[405] Therefore, I affirm the ALJ's finding that "[t]he record reflects that Respondents operate a moderately-sized animal exhibition business[.]"[406]

Second, I conclude that Respondents' violations are grave. Respondents chronically failed to comply with the Act and the Regulations and Standards during the period August 2, 2010 through November 19, 2015.[407] Although the ALJ described only one of Respondents' violations (handling) as "grave" and characterized Respondents' access violations as "minor,"[408] Respondents' handling violations and failures to provide access for inspection are the kind of serious, repeat violations that merit

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[402] *Id.* at 6. Respondents attempt to distinguish the present case from the "earlier ALJ ruling involving two escaped elephants" cited by Complainant. *Id.*; *see supra* note 394. Respondents state that "the circumstances of the elephants' escape were far different from the tiger's" in that "the ALJ found no fault in Mr. Terranova's handling of his cats, and other violations largely were due to the actions of his agents[.]" Response at 6.

[403] Response at 4.

[404] IDO at 4. *See* Stipulations at 2 ("Respondents represented to APHIS that they held 21 animals in 2010, 20 animals in 2011, and 20 animals in 2012.").

[405] *See Terranova Enters., Inc.*, 70 Agric. Dec. 925, 928 (U.S.D.A. 2011) ("Terranova admitted to operating a moderately-sized animal exhibition business."). Pursuant to the Rules of Practice, I take official notice of the Initial Decision and Order and all other documents filed in *Terranova I*. *See* 7 C.F.R. §§ 1.141(h)(6) and 1.145(i).

[406] IDO at 46. *See* 9 C.F.R. § 2.6(c) (Table 2) (guidelines for computing annual license fees for AWA exhibitors); *Mitchell*, AWA Docket No. 09-0084, 2010 WL 5295429, at *9 (U.S.D.A. Dec. 21, 2010).

[407] *See* IDO at 64.

[408] *Id.* at 46.

assessment of the maximum civil penalties.[409] Moreover, I reject Respondents' argument that "none of the violations involved any allegation of harm to an animal or person."[410] The purpose of the Regulations "is to reduce the *risk* of harm to animals and to the public," and many of Respondents' violations constitute threats thereof.[411] The fact that no harm actually resulted from Respondents' violations does not affect my view of the gravity of the violations.

Third, I conclude that Respondents have not shown good faith. Respondents are "habitual violators"[412] whose conduct reveals consistent disregard for, and unwillingness to abide by, the requirements of the Act and the Regulations and Standards.[413] The findings of violations by Respondents in two previous enforcement cases are proof thereof.[414] Moreover, Respondents failed to comply with the order entered against them in 2012 by, *inter alia*, refusing to pay the civil penalty assessed

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[409] *See Mitchell*, 2010 WL 5295429, at *13.

[410] Response at 4.

[411] *Mitchell*, 2010 WL 5295429, at *13 (emphasis added).

[412] *See Shepherd*, 57 Agric. Dec. 242, 287 (U.S.D.A. 1998).

[413] *See Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 464 (5th Cir. 2015) ("The Judicial Officer did not abuse his discretion in finding a lack of good faith, particularly in light of Knapp's previous violations of the AWA and regulations. *See in re Mitchell*, AWA Docket No. 09-0084, 2010 WL 5295429, at *7 (U.S.D.A. Dec. 21, 2010) ('Mr. Mitchell has a history of previous violations and this fact demonstrates an absence of good faith.'); *see also Horton v. U.S. Dep't of Agric.*, 559 F. App'x 527, 535 (6th Cir. 2014) ("[B]ad faith . . . can also be found where a petitioner receives notice of his violations yet continues to operate without a license."); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir. 1991) (upholding the Judicial Officer's finding of a lack of good faith based on a previous AWA violation and a failure to learn facts that would have alerted petitioners to an additional AWA violation.)").

[414] *See Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093, 1102 (U.S.D.A. 2007) ("Lancelot Kollman Ramos has been a respondent in one previous Animal Welfare Act enforcement case establishing . . . Lancelot Kollman Ramos' lack of good faith.").

against them[415] and continuing to commit the same kinds of violations they were found to have committed in the first two enforcement cases.[416] As Complainant also points out, Mr. Terranova admitted that he intentionally violated the itinerary Regulations.[417] Accordingly, I conclude the ALJ erred in finding "there is no evidence that Respondents acted in bad faith."[418]

Lastly, I conclude that Respondents have a history of previous violations. Despite Respondents' arguments to the contrary,[419] Respondents have an established history of *two* previous enforcement cases wherein they were found to have willfully committed multiple serious violations, [420] including violations similar to those in the present case.[421] Therefore, I affirm the ALJ's finding that "Respondents have a history of previous violations of the Act."[422]

Furthermore, I agree with Complainant's contention that the ALJ improperly considered license suspension "as an auxiliary factor"[423] in determining the penalty amount.[424] Collateral effects of suspension of an

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[415] *See* IDO at 45 ("The prior decision imposed a fine of $25,000, *all or most of which has not been paid by Respondents*.") (emphasis added).

[416] *See Terranova Enters., Inc.*, 70 Agric. Dec. at 975-77.

[417] Appeal at 19; *see* Tr. 493-95.

[418] IDO at 46.

[419] *See* Response at 6.

[420] *See Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. at 1102 ("Lancelot Kollman Ramos has been a respondent in one previous Animal Welfare Act enforcement case establishing a 'history of previous violations' for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b))[.]").

[421] *See Terranova Enters, Inc.*, 70 Agric. Dec. at 975-77.

[422] IDO at 46.

[423] Appeal at 18.

[424] *Id.* at 18-21. *See* IDO at 46, 67 ("The Administrator's proposed civil money penalty of $35,000 for 22 alleged offenses is reduced to $10,000, considering the number of offenses established, the size of Respondents' business, the absence of

AWA license are not relevant to the sanction to be imposed for violations of the Act and Regulations,[425] and it is well settled that financial status is not one of the factors to be considered when assessing civil penalties.[426] Furthermore, the Judicial Officer has held that consideration of the financial effect of license revocation in assessing civil penalties is error:

> The financial impact of revocation of an Animal Welfare Act license is not one of the factors considered by the Secretary of Agriculture when determining the amount of the civil penalty. Therefore, the Chief ALJ's consideration of the financial impact of revocation of Mr. Greenly's Animal Welfare Act license when determining the amount of the civil penalty to be assessed against Respondents, is error.

Greenly, 72 Agric. Dec. 603, 625 (U.S.D.A. 2013) (Decision and Order as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.).[427] Thus,

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good faith, *and the determination that license suspension is appropriate*.") (emphasis added).

[425] *Action Wildlife Found., Inc.*, 72 Agric. Dec. 666, 671-72 (U.S.D.A. 2013).

[426] *See, e.g.*, *Knapp v. U.S. Dep't of Agric.* 796 F.3d 445, 465 (5th Cir. 2015) ("Neither the statute nor the regulations require consideration of financial status, and the Judicial Officer's decision [not to consider factors other than those listed in 7 U.S.C. § 2149(b)] is consistent with Department precedent."); *Action Wildlife Found., Inc.*, 72 Agric. Dec. at 668 ("The fact that an entity that violates the Animal Welfare Act and the Regulations is a charitable, non-profit institution wholly funded by one individual is not a factor required to be considered by the Secretary of Agriculture when determining the amount of the civil penalty. While Mr. Mazzarelli's generosity . . . is highly commendable, I find Mr. Mazzarelli's generosity and the fact that Action Wildlife, Inc., is a charitable, non-profit institution . . . irrelevant to the determination of the amount of the civil penalty."); *Bond*, 65 Agric. Dec. 1175, 1180 (U.S.D.A. 2006) ("Respondent's inability to pay the $10,000 civil penalty is not a basis for reducing the $10,000 civil penalty."); *Everhart*, 56 Agric. Dec. 1400, 1417 (U.S.D.A. 1997) (holding that a respondent's disability is not a mitigating factor with respect to the amount of the civil penalty to be assessed).

[427] *See also Ramos*, 75 Agric. Dec. 24, 53 (U.S.D.A. 2016) ("I agree with the Administrator's contention that the ALJ's consideration of APHIS' confiscation of Mr. Ramos' elephant, when determining the amount of the civil penalty to

even if I were to find that license suspension or revocation would have a negative financial impact on Respondents, that collateral effect would not constitute a circumstance to be considered when determining the sanction to be imposed for Respondents' violations of the Regulations.[428] Accordingly, I find the ALJ erred by treating license suspension as a factor in determining the civil penalty amount.

Moreover, as previously discussed the ALJ found that Respondents committed ten violations of the Regulations and Standards during the period of August 2010 to November 2015.[429] Under the Act, each Respondent could have been assessed a civil penalty of up to $100,000 for those violations.[430] The findings of additional violations on appeal underscores the appropriateness of the requested $35,000 penalty.[431]

After examining all the relevant circumstances in light of the Department's sanction policy and taking in to account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the

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assess Mr. Ramos, is error."); *Lang*, 57 Agric. Dec. 91, 106 (U.S.D.A. 1998) (Order Den. Pet. for Recons.) ("The impact on a respondent's business of the institution of a disciplinary proceeding under the Animal Welfare Act is not one of the statutory factors to be considered when determining the amount of the civil penalty to be assessed against a respondent. Therefore, even if I found that the institution of this disciplinary proceeding had a significant adverse impact on the Respondent's business, that impact would not be considered when determining the amount of the civil penalty to be assessed against Respondent.").

[428] *Action Wildlife Found., Inc.*, 72 Agric. Dec. at 672.

[429] *See supra* note 69 and accompanying text.

[430] *See* 7 U.S.C. § 2149(b) ("Any . . . exhibitor . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty of not more than $10,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation."). As Complainant notes, the requested $35,000 civil penalty amounts to only $1,750 per Respondent for each of the ten violations found proven. *See* Appeal at 18 n.34.

[431] *Cf. Colette*, No. AWA Docket No. 03-0034, 2009 WL 2710082, at *12 (U.S.D.A. Aug. 21, 2009) ("I find the Administrator's recommendation is based on many more violations than I conclude Ms. Colette committed; therefore, I do not rely on the Administrator's commendation.").

Animal Welfare Act, I conclude the $35,000 civil penalty recommended by the Administrator is appropriate and necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to thereby fulfill the remedial purposes of the Animal Welfare Act. I reject Respondents' contention that the ALJ's assessment of a $10,000 joint-and-several penalty is excessive.

2. Civil Penalties for Knowingly Disobeying a Cease-and-Desist Order

On appeal, Complainant asserts the ALJ erred by assessing Respondents a single, shared civil penalty of $11,550 for knowingly disobeying the Secretary's cease-and-desist order issued in *Terranova I* instead of assessing the penalty separately to each Respondent.[432] Respondents counter that the ALJ properly held Respondents "joint and severally, but not separately, responsible."[433] Respondents state that because they are "are one and the same for the purposes of this case," the ALJ "was correct in finding that any penalties should be assessed against them jointly and severally, as a 'single, shared civil penalty,' and not against each Respondent separately."[434]

The Act leaves no room for discretion regarding the civil penalty for a knowing failure to obey a cease-and-desist order.[435] "A civil penalty of $1,650 *must* be assessed for *each offense* by *any person* who knowingly fails to obey a cease and desist order."[436] The Act defines the term

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[432] Appeal at 21; *see supra* note 6 and accompanying text. Complainant cites statutory, regulatory, and case law to demonstrate that the ALJ should have assessed separate penalties for each Respondent. *See* 7 U.S.C. § 2132(a); 7 C.F.R. § 3.91; *Mitchell*, WL 5295429, at *14.

[433] Response at 3.

[434] *Id.* Respondents cite no legal authority to support their argument.

[435] *Mitchell*, 2010 WL 5295429, at *14.

[436] *Id.* at *7 (emphasis added). *See also Ramos*, 75 Agric. Dec. at 57-59 ("The Animal Welfare Act provides that the Secretary of Agriculture 'shall' assess a civil penalty against any person who knowingly fails to obey a cease and deist order. The word 'shall' is ordinarily the language of command and leaves no room

"person" to include "any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity."[437] Therefore, I conclude the ALJ erred in assessing Respondents a single, shared civil penalty for knowingly disobeying the Secretary's 2012 cease-and-desist order. As two distinct "persons," Respondent Keith Terranova and Respondent Terranova Enterprises, Inc. should have been assessed separate penalties.

Further, Respondents argue the ALJ wrongly found Respondents violated the cease-and-desist order on August 2, 2010 because "no such order had been entered" at that time.[438] Respondents are correct. In the September 26, 2016 Initial Decision, the ALJ found that "Respondents knowingly failed to obey a cease and desist order made by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)) on three instances: *August 2, 2010 (access to facilities)*; April 20, 2013 (tiger escape); and November 14-19, 2015 (five days/itinerary)."[439] As Respondents correctly point out, the cease-and-desist order was issued against Respondents on December 20, 2011; therefore, Respondents could not have violated such order on August 2, 2010. I conclude the ALJ erred by including the August 2, 2010 violation when calculating the penalty for Respondents' non-compliance with the cease-and-desist order.

B. License Suspension

Complainant asserts that based on the procedural history and facts of this case, the ALJ's decision to suspend Respondents' AWA license for thirty days rather than revoke it is inconsistent with the Act and with case law.[440] Respondents reply that the ALJ "correctly refused to revoke" AWA

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for discretion, and [the Judicial Officer has] consistently interpreted the word 'shall' in 7 U.S.C. § 2149(b) as requiring the assessment of a civil penalty for each knowing violation of a cease and desist order issued by the Secretary of Agriculture.") (citing *Knapp*, 796 F.3d at 465-66).

[437] 7 U.S.C. § 2132(a).

[438] Response at 3.

[439] IDO at 67 (emphasis added).

[440] Appeal at 22.

Respondents' license but "should not have suspended it."[441] Like the ALJ, Respondents rely on the fact that "none of the violations involved any allegation of harm to an animal or person"[442] and argue that the "alleged violations here fall short of the violations that have resulted in license revocations" in other disciplinary cases.[443] I agree with Complainant and conclude the ALJ erred in declining to revoke Respondents' license.

First, I find the ALJ erroneously based her decision not to revoke Respondents' license upon having found that Complainant did not prove enough of the alleged violations. The ALJ states:

> APHIS has recommended that Respondents' license be revoked, relying in large part upon the serious lapses that led to the escape of a tiger. . . . APHIS' recommendation has been given significant weight; however, the majority of the allegations were not proven, which justifies a reduction from the proposed sanction.

Initial Decision at 44. There is no basis for declining to order license revocation based on an apportioning of the violations sought by Complainant and those found by the ALJ. As Complainant correctly notes, the Secretary may revoke an AWA license following a single, willful violation.[444] Considering that Respondents committed not just one but *at minimum* ten violations, prohibiting future licensure by revocation is a fair and fitting sanction. This is especially true in that Respondents committed

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[441] Response at 3.

[442] *Id.* at 4.

[443] *Id.* (citing *ZooCats, Inc. v. USDA*, 417 F. App'x 378, 382 (5th Cir. 2011); *White*, 73 Agric. Dec. 114 (U.S.D.A. 2014); *Palazzo*, 69 Agric. Dec. 173 (U.S.D.A. 2010); *Pearson*, 68 Agric. 685 (U.S.D.A. 2009); *Int'l Siberian Tiger Found., Inc.*, 61 Agric. Dec. 53, 90 (U.S.D.A. 2002)).

[444] Appeal at 22. *See* 7 U.S.C. § 2149(a); *Pearson v. U.S. Dep't of Agric.*, 411 F. App'x 866, 872 (6th Cir. 2011) ("An AWA license may be revoked following a single, willful violation of the Animal Welfare Act.") (citing *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991)).

the violations over a period longer than five years.[445]

I also reject the ALJ's finding that revocation is not appropriate because the violations in this case are not as "serious" as in other cases where licenses were revoked.[446] For one, Respondents' failure to provide APHIS officials access for inspection "is a serious violation because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and severely undermines the Secretary's ability to enforce the Animal Welfare Act."[447] Moreover, nothing in the Act, Regulations, or case law requires that the violations in one case must parallel those in another to justify license revocation. Even if the sanction imposed against Respondents was more severe than sanctions imposed against offenders in similar cases, the sanction in this proceeding would not be rendered invalid.[448] The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the Act, and the Act has no requirement that there by uniformity in sanctions among violators.[449]

Further, I conclude the ALJ erred by injecting an element of intent into

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[445] *See Morgan*, 65 Agric. Dec. 849, 874 (U.S.D.A. 2006) ("[G]enerally, a respondent who violates the Regulations and Standards over a long period of time warrants a more stringent sanction than a respondent who commits the same violations over a short period of time. Violations over a long period of time often demonstrate continued disregard of the Animal Welfare Act and the Regulations and Standards.").

[446] *See* IDO at 44.

[447] *Terranova Enters., Inc.*, 71 Agric. Dec. 876, 881 (U.S.D.A. 2012) (Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).

[448] *See Morgan*, 65 Agric. Dec. at 875 ("A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases.").

[449] *See ZooCats, Inc.*, 68 Agric. Dec. at 1079 n.5 (citing *Morgan*, 65 Agric. Dec. 849, 874-75 (U.S.D.A. 2006); *Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (U.S.D.A. 1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Cir. R. 206), *printed in* 58 Agric. Dec. 85 (U.S.D.A. 1999)).

the determination of whether Respondents' license should be revoked.[450] There was no basis for the ALJ to introduce an additional element of proof not required by the Act or Regulations. As previously discussed, the purpose of 9 C.F.R. § 2.131 is to reduce the risk of harm to animals and to the public.[451] That Respondents "did not intend to place the public in close proximity to the animals" does not render Respondents' violations any less grave.[452] A single, willful violation is all that is required to warrant license revocation,[453] and the ALJ found multiple willful violations – including violations that put people and animals at risk of serious harm and violations that thwart the Secretary's ability to enforce the Act.[454]

Similarly, I conclude the ALJ's focus on whether animals were injured as a result of Respondents' actions – rather than whether Respondents had actually violated the Regulations – was misplaced.[455] Again, there was no basis for the ALJ to impose additional elements of proof that are not required by the Act or Regulations. Actual injury or death of an animal is not a prerequisite to finding that violations were committed, were serious, or were willful.[456]

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[450] *See* IDO at 45 (stating that unlike the respondents in *Zoocats, Inc.*, 68 Agric. Dec. 1072 (U.S.D.A. 2009), *Int'l Siberian Tiger Found., Inc.*, 61 Agric. Dec. 53 (U.S.D.A. 2002), and *Palazzo*, 69 Agric. Dec. 173 (U.S.D.A. 2010), Respondents here "did not intend to place the public in close proximity to the animals" and therefore Respondents' violation is "significantly less" grave). There is no support in the case law for such a comparison.

[451] *Lang*, 57 Agric. Dec. 59, 83 (U.S.D.A. 1998).

[452] IDO at 45.

[453] *See Pearson v. U.S. Dep't of Agric.*, 411 F. App'x 866, 872 (6th Cir. 2011) ("An AWA license may be revoked following a single, willful violation of the Animal Welfare Act.") (citing *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991));

[454] *See* IDO at 15, 64; *Terranova Enters., Inc.*, 71 Agric. Dec. 876, 881 (U.S.D.A. 2012) (Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).

[455] *See* IDO at 45 (". . . the escape *sub judice* did not result in injury to the tiger . . .").

[456] *See Mitchell*, 60 Agric. Dec. 91, 128-29 (U.S.D.A. 2001) ("The gravity of Respondents' violations is clearly evident. . . . While there is no allegation in the

I also agree with Complainant's contention that the ALJ "failed to give [R]espondents' prior history the weight it deserves."[457] Although she took notice of Respondents' previous cases, the ALJ did not appear to fully consider the significance of Judge Bullard's findings regarding Respondents' "laissez-faire supervision," "series of poor decisions" that led to an elephant's escape, and "lack of sufficient trained personnel."[458] In Respondents' prior cases, Judge Bullard found multiple violations of the Regulations with respect to camels, tigers, and elephants in Respondents' custody.[459] In Enid, Oklahoma, one of Mr. Terranova's elephants escaped the grounds of a circus, ran onto a highway, and was struck and injured by a vehicle because Mr. Terranova "exhibit[ed] the elephants under hurried conditions, without adequate personnel."[460] In Wakeeny, Kansas, Respondents' personnel failed to securely house two elephants despite tornado advisories; when a tornado struck, both elephants "spooked," escaped the circus grounds, and wandered into a nearby property where one of the elephants was shot with tranquilizers.[461]

Respondents' previous violations clearly reflect – and presaged – same cavalier approach to safety and inadequate planning as is shown in the present case.[462] Whereas the earlier violations relate to elephant escapes,

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Complaint that Respondents' animals actually suffered injury, dehydration, or malnutrition, many of Respondents' violations constitute threats to the health and well-being of the animals in Respondents' facility.").

[457] Appeal at 25.

[458] IDO at 45. For instance, despite acknowledging that "the problem of insufficient supervision and human error again contributed to the escape" in this case, the ALJ still found that "a short thirty day suspension of Respondents' AWA license . . . is appropriate in this proceeding." *Id.*

[459] *See Terranova Enters., Inc.*, 70 Agric. Dec. 925, 967, 992-93 (U.S.D.A. 2011) (Decision and Order as to Terranova Enterprises, Inc. d/b/a Animal Encounters Inc. and Douglas Keith Terranova).

[460] *Id.* at 977.

[461] *Id.* at 986-87.

[462] *See* IDO at 16 ("Respondents were previously warned about the consequences of not having sufficient trained personnel and willfully proceeded with the exhibition without a sufficient number or sufficiently trained staff.").

the instant proceeding involves a tiger escape that occurred during a circus performance in Salina, Kansas.[463]

> The evidence shows that on April 20, 2013, at the 7 p.m. performance, Respondents exhibited their tigers to the public as part of the Tarzan Zerbini Circus at the Salina Bicentennial Center in Salina, Kansas. CX 8; CX 11. Upon the conclusion of the performance, one of the tigers (Leah) was not placed in an enclosure, but escaped and ran out into the arena's concourse. CX 8; CX 10; CX 11; CX 12; CX 13. The tiger was loose from approximately 7:25 p.m. to 7:32 p.m. and was secured in the women's restroom for part of that time. CX 11 at 1. . . . Jenna Krehbiel, who was at the circus that evening with her family, testified that she went into the women's restroom. . . When Ms. Krehbiel attempted to exit, she was instructed by a staff person to go back into the restroom. Tr. 239; CX 10. She testified that she turned around and went back into the restroom (through the exit door) as instructed, and a tiger was inside the restroom walking towards her. Tr. 240; CX 10.

Initial Decision at 11-13. To allow such careless licensees as Respondents to continue placing both animals and the public in harm's way would be contrary to the goals of the Act.[464]

I also note that the ALJ failed to explain the rationale behind her decision to order "a short thirty day" license suspension or why she believed it to be an appropriate sanction.[465]

> Respondents have, however, previously been found in

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[463] *Id.* at 16 ("Respondents previously have been found to have insufficient trained personnel available to work with their animals."); *id.* at 45 (stating that Respondents "willfully failed to have sufficient trained staff loading the tigers into the cages[,] leading to an escape").

[464] *See supra* note 364 and accompanying text.

[465] IDO at 45.

> violation of the Animal Welfare Act. In the prior case, the Judge found that "Mr. Terranova's laissez-faire supervision led to camels being left unattended and the series of poor decisions that led to Kamba's escape and injury in Enid, Oklahoma" and that "[i]t is clear to me that additional trained personnel and more attention to decision making could have averted or migrated some of the unfortunate events that led to two elephant escapes." Terranova 2009/2010 Cases at 57. While the escape *sub judice* did not result in injury to the tiger and there is no evidence of a laissez-faire attitude, the problem of insufficient supervision and human error again contributed to the escape. The prior decision imposed a fine of $25,000, all or most of which has not been paid by Respondents. Accordingly, a short thirty day suspension of Respondents' AWA license number 74-C-0199 is appropriate in this proceeding.

Initial Decision at 45. It is unclear how Respondents' failure to pay the $25,000 civil penalty assessed in *Terranova I* would justify license suspension over revocation in this proceeding.

Furthermore, I reject the ALJ's conclusion that a thirty-day license suspension is appropriate under the facts. The facts of this case warrant revocation of Respondents' AWA license. Although this sanction may seem relatively severe, Respondents' continued failures to abide by the Regulations and Standards, to the detriment of animal health and safety to the public, shows that Respondents are not qualified to be licensed.[466] Moreover, the Judicial Officer has held that "[i]f the remedial purpose of the Animal Welfare Act is to be achieved, the sanction imposed must be adequate to deter Respondent and others from violating the Animal

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[466] *See Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (U.S.D.A. 1997); *S.S. Farms Linn Cty., Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) ("Respondents contend that the sanction is too severe, but the ALJ's decision reflects the serious nature of the numerous violations, many of which were recurrent. The ALJ's sanction coincides with the sanction recommended by the administrative officials as the sanction necessary to achieve the remedial purposes of the Act.").

Welfare Act, the Regulations, and the Standards."[467] To merely suspend Respondents' license for a period of thirty days will not ensure Respondents' compliance with the Act. Given Respondents' pattern of willful violations, I find that permanent license revocation is appropriate.[468]

CONCLUSIONS OF LAW

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

2. Modification of Judge Wirth's September 26, 2016 Decision and Order is warranted.

3. On August 2, 2010, Respondents willfully violated the Act and Regulations by failing to have a responsible person available to provide access to APHIS officials to conduct compliance inspections. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).

4. On September 28, 2012,[469] Respondents willfully violated the Act and Regulations by failing to provide access to allow APHIS officials access to their place of business to conduct an investigation, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. §§ 2.126(a) and (b).

5. To promote the remedial purpose of the Act, it is appropriate to impose a sanction for Respondents' violation of the Act on September 28, 2012 (access to facilities).

6. On or about April 20, 2013, Respondents willfully violated the Act and Regulations by failing, during public exhibition, to handle an adult

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[467] *Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (U.S.D.A. 1997) (Order Den. Pet. for Recons.).

[468] *Pearson v. U.S. Dep't of Agric.*, 411 F. App'x 866, 872 (6th Cir. 2011) (affirming revocation of respondent's AWA license) ("Petitioner's failure to bring his facilities into compliance after repeated warnings also makes clear that his violations were willful.").

[469] The 2015 Complaint alleges that the violation was on September 28, 2012 – not September 8, 2012, as the ALJ stated in her Conclusions of Law. *See* 2015 Complaint at 5 ¶ 6.

tiger with sufficient distance and/or barriers between the tiger and the public, and to have the tiger under the direct control and supervision of a knowledgeable and experienced animal handler. 9 C.F.R. §§ 2.131(c)(1), 2.131(d)(3).

7. From November 14, 2015 to November 19, 2015, Respondents willfully violated the Regulations, 9 C.F.R. § 2.126(c), by failing to timely submit an accurate travel itinerary.

8. Respondents knowingly failed to obey a cease-and-desist order issued by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)) on September 28, 2012[470] (access to facilities) (one violation); on April 20, 2013 (tiger escape) (two violations); and on November 14, 2015 to November 19, 2015 (itinerary/six days) (six violations). Pursuant to 7 C.F.R. § 3.91(b)(2)(ii), each Respondent is subject to a civil penalty of $1,650 for each knowing failure to obey the Secretary's cease-and-desist order, for a total of $14,850 per Respondent.

9. Revocation of Respondents' AWA license (No. 74-C-0199), as recommended by the Administrator, is warranted under the circumstances.

10. Based on the number of offenses established, the size of Respondents' business, the absence of good faith, and the history of previous violations by Respondents, the Administrator's recommended joint-and-several penalty of $35,000 for violations of the Act and Regulations is appropriate.

11. An order directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations is appropriate.

12. An order assessing Douglas Keith Terranova a civil penalty of $14,850 for his knowing failures to obey the Secretary's 2012 cease-and-desist order is appropriate.

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[470] *See supra* note 469.

13. An order assessing Terranova Enterprises, Inc. a civil penalty of $14,850 for its knowing failures to obey the Secretary's 2012 cease-and-desist order is appropriate.

14. A cease and desist order, revocation of Respondents' AWA license, assessment of a $35,000 joint-and several civil penalty against Respondents, and assessment of separate civil penalties of $14,850 against each Respondent are necessary to ensure Respondents' compliance with the Animal Welfare Act and Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

For the foregoing reasons, the following Order is issued.

ORDER

1. Respondents Douglas Keith Terranova and Terranova Enterprises, Inc., their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, are ORDERED to cease and desist from violating the Animal Welfare Act and the Regulations.

2. Respondents Douglas Keith Terranova and Terranova Enterprises, Inc.'s AWA license (No. 74-C-0199) is REVOKED.

3. Respondents Douglas Keith Terranova and Terranova Enterprises, Inc. are jointly and severally assessed a civil penalty of thirty-five thousand dollars ($35,000) for the ten violations found in Judge Wirth's September 26, 2016 Decision and Order. The civil penalty shall be made by check made payable to the Treasurer of the United States and remitted either by U.S. Mail addressed to USDA, APHIS, Miscellaneous, PO Box 979043, St. Louis, MO 63197-9000, or by overnight delivery addressed to US Bank, Attn: Govt Lockbox 979043, 1005 Convention Plaza, St. Louis, MO 63101.

4. Respondent Douglas Keith Terranova is assessed a civil penalty of $14,850 for his knowing failures to obey the Secretary's 2012 cease-and-desist order, payable as set forth in Paragraph No. 4 above.

5. Respondent Terranova Enterprises, Inc. is assessed a civil money penalty of $14,850 for its knowing failures to obey the Secretary's 2012 cease-and-desist order, payable as set forth in Paragraph No. 4 above.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Terranova 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. Terranova must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[471] The date of entry of the Order in this Decision and Order is August 30, 2019.

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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[471] 7 U.S.C. § 2149(c).

In re: DOUGLAS KEITH TERRANOVA, an individual; and TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058; 15-0059; 16-0037; 16-0038.
Order Denying Petition for Reconsideration.
Filed November 4, 2019.

AWA – Administrative Procedure Act – Burden of persuasion – Burden of proof – Reconsideration, petition for – Recordkeeping requirements.

Ciarra A. Toomey, Esq., and Donna Erwin, Esq., for APHIS.
William J. Cook, Esq., for Respondents.
Initial Decision and Order entered by Erin M. Wirth, Administrative Law Judge.
Order Denying Petition for Reconsideration entered by Bobbie J. McCartney, Judicial Officer.

ORDER DENYING RESPONDENTS' PETITION FOR RECONSIDERATION OF THE JUDICIAL OFFICER'S AUGUST 30, 2019 DECISION AND ORDER

Summary of Procedural Background and Issues in Dispute

On August 30, 2019, in my capacity as USDA's Judicial Officer ("JO"), I issued a Decision and Order ("DO") in this disciplinary enforcement proceeding, initiated on January 16, 2015[1] by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("Complainant"),[2] finding, among other things, that Douglas Keith Terranova and Terranova Enterprises, Inc. ("Respondents") willfully violated the Animal Welfare Act (7 U.S.C. §§ 2131–2159) ("AWA" or "Act") and the regulations promulgated thereunder (9 C.F.R. §§ 1.1–3.142) ("Regulations") on multiple occasions between August 2010 and September 2013.

The Administrative Law Judge's September 26, 2016 Initial Decision

[1] The case was assigned AWA Docket Nos. 15-0068 and 15-0069.

[2] While I recognize the Administrator is a person, I will use the pronoun "it" when referring to the "Complainant" herein.

("ID") was before me for consideration[3] by reason of Complainant's Petition for Appeal of the Initial Decision and a "Memorandum of Points and Authorities" in support filed on November 29, 2016 ,[4] contending that the number and nature of Respondents' violations are the kind of serious, repeat, and willful violations of the Act and the Regulations and Standards that warrant assessment of higher civil penalties than assessed by the ALJ when the required statutory factors are fully considered.[5] On January 9, 2017, Respondents filed their Response to Appeal Petition and Cross Appeal Petition ("Response").[6] Respondents contended that the ALJ imposed excessive sanctions for what Respondents describe as "a few non-willful paperwork and access violations."[7] Respondents also asserted that the ALJ erred in finding Respondents committed willful violations with

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[3] A lengthy procedural history has been provided in the August 30, 2019 Decision and Order.

[4] The Initial Decision was filed on September 26, 2016 and served on Complainant the following date. Complainant had thirty days from the date of service to file an appeal with the Hearing Clerk. 7 C.F.R. § 1.145(a). Weekends and federal holidays shall 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, Complainant's appeal petition was due on or before October 27, 2016; however, per Complainant's request, Judicial Officer Jenson extended the filing deadline to November 29, 2016.

[5] *See* Appeal at 18 ("Consideration of the required statutory factors in accordance with departmental precedent should have led the Judge to conclude that a greater civil penalty was warranted for respondents' ten violations."); *see also* section 19(b) of the Act (7 U.S.C. § 2149(b)).

[6] The Petition for Appeal was filed on November 29, 2016 and served on Respondents' counsel the same day. Respondents had twenty days from the date of service to file a response to Complainant's appeal. 7 C.F.R. § 1.145(b). Weekends and federal holidays shall 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, Respondents' response to the appeal was due on or before December 19, 2016; however, per Respondents' request, Judicial Officer Jenson extended the filing deadline to January 9, 2017.

[7] Response at 1.

respect to a tiger escape on April 20, 2013.[8]

My Decision and Order reversed, amended, or modified a number of rulings made in the Administrative Law Judge's September 26, 2016 Initial Decision in finding that Douglas Keith Terranova and Terranova Enterprises, Inc. willfully violated the Animal Welfare Act and the regulations promulgated thereunder on multiple occasions between August 2010 and September 2013. Further, I found that the number and nature of Respondents' violations are the kind of serious, repeat, and willful violations of the Act and the Regulations and Standards that warrant assessment of higher civil penalties than assessed by the ALJ when the required statutory factors are fully considered.

The Petition for Reconsideration filed by Respondents on September 23, 2019, alleges 21 instances of error in my August 30, 2019 Decision and Order. On October 21, 2019, Complainant timely filed its Reply to Petition for Reconsideration ("CR"), addressing each of the alleged instances of error. Complainant's Reply fully demonstrates that the alleged errors ". . . simply constitute the Petitioners' disagreement with the Judicial Officer's (and the ALJ's) findings and conclusions. Further, Petitioners have rehashed the same arguments made before the ALJ and the Judicial Officer (and rejected by them)."[9] Accordingly, for the reasons discussed more fully below, Respondents' Petition for Reconsideration is ***denied.***

Issues Regarding the Burden of Proof

Because I concur with Complainant's contention that Respondents' Petition for Reconsideration essentially reargues the same points which were made on appeal and which have already been fully considered and addressed in the August 30, 2019 Decision and Order, the 21 alleged errors will not be addressed separately here. Rather, the finding and conclusions set forth in the August 30, 2019 Decision and Order are hereby affirmed and

[8] *Id.* at 3.

[9] CR at 1-2; *see also id.* at 2 n.1 ("The purpose of a motion for reconsideration is to call to the court's attention 'the matters or controlling decisions which counsel believes the Court overlooked in the initial decision and order." *Jones v. Carolina Freight Carriers Corp*., 152 F.3d 918 (2d Cir. 1998)(unpublished).").

adopted herein for all purposes. Further, Complainant's Reply to Respondents' Petition for Reconsideration is consistent with the evidence of record and applicable statutory, regulatory and judicial precedence and is affirmed and adopted herein as well. Accordingly, no further discussion is warranted, ***except*** in regard to issues regarding the burden of proof. Issues regarding the burden of proof are of such importance to the findings and conclusions set forth in the August 30, 2019 Decision and Order in this proceeding, as well as to future regulatory disciplinary proceedings raising similar issues, that the discussion will be revisited here.

Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), requires that "the proponent of a rule or order has the burden of proof," which the Supreme Court has construed as the ultimate "burden of persuasion" on an issue:

> The term, "burden of proof" referenced in the "APA's section 556(d) means "the burden of persuasion." *See, e.g., Kobel v. Hapag-Lloyd A.G., Hapag Lloyd America, Inc., Limco Logistics, Inc. and International TLC, Inc.* 33 S.R.R. 594,597 (ALJ 2014) (quoting *Director, Office of Workers' Comp. Programs v. Greenwich Collieries,* 512 U.S. 267, 276 (1994)). "The party with the burden of persuasion must prove its case by a preponderance of the evidence." *Id.* (quoting *Steadman v. SEC,* 450 U.S. 91, 102 (1981). When the party with the burden of persuasion produces sufficient evidence (characterized as a prima facie case), the burden of production shifts to the other party to produce evidence rebutting that case. *Petition of South Carolina Ports Authority for Declaratory Order,* 27 S.R.R. 1137, 1161 (FMC 1997). See also *Steadman,* 450 U.S. at 101 n.16 ("Where a party having the burden of proceeding has come forward with a prima facie or substantial case, he will prevail unless his evidence is discredited or rebutted.") (internal citations omitted). When direct evidence is unavailable inference may be drawn from certain fact and

> circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. See *Kobel*, 33 S.R.R. at 597 (citing *Waterman* S.S. *Corp v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993)). If the evidence produced by both parties is evenly balanced the party with the burden of evidence loses. *Id.* (citing *Greenwich Collieries*, 512 U.S. at 281).

Gruenberg-Reisner v. Overseas Moving Specialists, Inc., FMC Informal Docket No. 1947(1), 2017 WL 2241031, at *9 (F.M.C. Oct. 7, 2016).

It is well established that the Complainant has the burden of proof in this proceeding.[10] The standard of proof by which the burden is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.[11] In meeting its burden of proof, Complainant bears the initial burden of coming forward with evidence sufficient for a *prima facie* case.[12] The burden of production then *shifts* to

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[10] 5 U.S.C. § 556(d).

[11] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). *See also Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 174-75 (U.S.D.A. 2013); *Schmidt*, 66 Agric. Dec. 159, 210 (U.S.D.A. 2007); *Int'l Siberian Tiger Found., Inc.*, 61 Agric. Dec. 53, 79 n.3 (U.S.D.A. 2002) (Decision and Order as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady); *Parr*, 59 Agric. Dec. 269, 643-44 n.8 (U.S.D.A. 2000) (Order Den. Pet. for Recons.), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001); *Shepherd*, 57 Agric. Dec. 242, 272 (U.S.D.A. 1998).

[12] *JSG Trading Corp.*, 57 Agric. Dec. 710, 721-22 (U.S.D.A. 1998) (Order Den. Pet. for Recons. as to JSG Trading Corp.). *See Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 266 (D.C. Cir. 1989), *cert. denied sub nom. Am. Petroleum Inst. v. EPA*, 498 U.S. 849 (1990); *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *see also* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden going forward'"); 3 KENNETH C. DAVIS, ADMIN. LAW TREATISE § 16:9 (1980 & Supp. 1989) (the burden allocated

Respondents to rebut Complainant's *prima facie* showing.[13] Shifting burdens of production are necessary tools in developing a full and complete record and in assessing the weight to assign evidence where, as here, there is a "failure to act" element of the violation.[14]

The legislative history of APA section 7(c) (5 U.S.C. § 556(d)) explains:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence….

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by the Administrative Procedure Act is the burden of going forward and not the ultimate burden of persuasion).

[13] *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 871-72 (D.C. Circuit 2002) *(*"*Greenwich Collieries* carefully distinguishes agency regulations that shift the burden of proof (prohibited by the APA 'except as otherwise provided by statute,' 5 U.S.C. § 556(d)) from regulations that shift the burden of production (which the APA does not prohibit, *see* 512 U.S. at 270-80, 114 S. Ct. 2251 (distinguishing burden of proof from burden of production)).").

[14] *See Campbell v. United States*, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.") (citing *United States v. New York, N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957)); *Saylor*, 44 Agric. Dec. 2238, 2672-73 (U.S.D.A. 1985) ("The facts concerning the size and effect on the violator's business are 'facts peculiarly within the knowledge of' the violator[.]") ("[A]s the Attorney General's Manual states, . . . under APA section 7(c), an agency is permitted . . . to draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts, or the presumption of continuance of a state of facts once shown to exist.").

S. REP. NO. 752, 79th Cong., 1st Sess., 22 (1945).[15]

Based on my review of the record, I determined that in several instances Complainant came forward with evidence sufficient for a *prima facie* case, and that the burden of production then *shifted* to Respondents to rebut Complainant's *prima facie* showing, but that Respondents failed to do so. For example: Complainant had established that: (1) according to Respondents' March 18, 2015 itinerary, all of Respondents' animals would be at Respondents' facility by April 2015;[16] and (2) on May 13, 2015, Animal Care Inspector ("ACI") Donovan Fox and Veterinary Medical Officer ("VMO") Cynthia Digesualdo conducted a routine inspection at Respondents' facility, whereupon they found that two groups of tigers were not present but instead were off-site performing at Respondents' traveling exhibition.[17] I found that this evidence of record established a *prima facie* violation of the itinerary regulation on May 13, 2015.[18]

Respondents then had the burden of producing evidence to rebut, defeat

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[15] *See also* 2 4 J. STEIN, G. MITCHELL, & B. MEZINES, ADMINISTRATIVE LAW § 24.02 at 4-25 (1994) ("The legislative history of the A.P.A. burden of proof provision states that the party initiating the proceeding has, at a minimum, the burden of establishing a *prima facie* case, but a burden of proof may also rest on other parties seeking a different decision by the agency."); *see also Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 280 (1994) (*Almy v. Sebelius*, 679 F.3d 297, 305 (4th Cir. 2012) ("[W]hen the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true."); *see, e.g.*, *Colette*, 68 Agric. Dec. 768, 783 (U.S.D.A. 2009) ("The evidence presented by the Administrator meets the burden of proof allowing me to conclude the Administrator proved his prima facie case. However, proving the prima facie case only shifts the burden, allowing Ms. Colette to rebut the Administrator's case. Ms. Colette contends the llamas were not "regulated" animals without presenting any legal or factual support for her theory. Therefore, Ms. Colette failed to overcome the prima facie case.").

[16] *See* CX-19 at 1; Tr. 607-08; CX-23.

[17] *See* Tr. 608.

[18] DO at 32.

or otherwise outweigh the evidence supporting the allegation.[19] Such burden of production of evidence is distinct from, and does not shift, the ultimate burden of persuasion on a claim.[7] At the hearing, Respondents provided no material evidence - email or otherwise - to suggest that on May 13, 2015, they had submitted an itinerary showing that two groups of animals were out for exhibit. While Respondents insist that "Mr. Terranova submitted an itinerary prior to May 13, 2015 via email," Respondents produced no such email or any other documentary evidence of an itinerary submission after March 18, 2015.[20] Nor could he could identify the alleged recipient of the purported email.[21] I found that the only evidence Respondents offered to support their claim, Mr. Terranova's testimony, was "insufficient to rebut the prima facie showing of violation established by Complainant on this record."[22] This is not a shifting of the burden of proof; rather it is the weighing of competing evidence, which is an essential element of my responsibilities as the Judicial Officer.

Because of the inherent dangers associated with the handling, transfer and showing of wild animals, it is absolutely essential that the USDA record keeping requirements, which were freely assumed by Respondents upon issuance of their license, be diligently complied with. Considering the totality of facts and circumstances adduced at the hearing in this proceeding, the unsupported testimony by a named Respondent regarding a "failure to act" violation of an affirmative obligation required by regulation of a USDA licensee was insufficient to rebut Complainant's *prima facie* showing. Accordingly, I concluded that Complainant proved the violation by a preponderance of the evidence and determined that "[o]n or about May 13, 2015, respondents willfully violated the Regulations by exhibiting animals at a location other than respondents' facility, and housing those animals overnight at that location, without having timely submitted a complete and accurate itinerary to APHIS. 9 C.F.R. §

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[19] *Id*.

[20] *See* IDO at 32, 60; Tr. 609-10, 740-41.

[21] *See* Tr. 740-41; Prehearing Brief at 3.

[22] DO at 31.

2.126(c)."[23]

Conclusion and Summary

As Complainant's October 21, 2019 Reply demonstrates, Respondents have not shown any "controlling law or material facts" that were overlooked and might be expected to change the outcome.[24] In fact, in connection with some of the arguments, the petition for reconsideration copies verbatim pages from Respondents' initial appeal petition. Petitioners' disagreement with the adverse findings and conclusions by the ALJ and the Judicial Officer is not a basis for reconsideration. "The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. A petition for reconsideration is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law." *In re Bodie S. Knapp, etc., et al.,* 72 Agric. Dec. 766, 768 (2013) (Order Den. Am. Pet. For Recons.).

ORDER

Respondents arguments have been previously considered and are

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[23] 2016 Complaint at 5 ¶ 9. *See* 9 C.F.R. § 2.126(c) ("Any person who is subject to the Animal Welfare regulations and who intends to exhibit any animal at any location other than the person's approved site . . . shall submit a written itinerary to the AC Regional Director. The itinerary shall be received no later than 2 days in advance of any travel and shall contain complete and accurate information concerning the whereabouts of any animal intended for exhibition at any location other than the person's approved site . . . .").

[24] *Speigler v. Israel Disc. Bank of N.Y.*, No. 01 Civ.6264WK, 2003 WL 21983018, at *1 (S.D.N.Y. Aug. 19, 2003) (not reported in F. Supp. 2d) ("Since Plaintiff has not demonstrated controlling law or material facts put before the Court in connection with its underlying motion that the Court overlooked in reaching its decision, reconsideration of the Opinion is not warranted.") ("Reconsideration . . . is not an avenue for relitigation of issues already considered and determined by the court.").

rejected. Accordingly, Respondents' Petition for Reconsideration is ***denied***.

RIGHT TO SEEK JUDICIAL REVIEW

Respondents have the right to seek judicial review of the Decision and Order entered in this proceeding on August 30, 2019 and of this Order Denying Respondents' Petition for Reconsideration in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341–2350. Respondents must seek judicial review within sixty (60) days after entry of this Order.[25] The date of entry of the Order is November 4, 2019.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties (by certified mail as to Respondents), with courtesy copies provided via email where available.

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[25] The appeal deadline for the Decision and Order issued in this proceeding on August 30, 2019 was stayed by the timely filing of Respondents' Petition for Reconsideration and the time for judicial review shall begin to run for the date of entry of this Order as the final action on the petition in accordance with 7 C.F.R. §1.146(b). Respondents must seek judicial review within sixty (60) days of entry of this Order in accordance with 7 U.S.C. § 2149(c).

In re: LEE MARVIN GREENLY, an individual d/b/a MN WILDLIFE and/or MINNESOTA WILDLIFE CONNECTION, INC.
Docket No. 19-J-0075.
Decision and Order.
Filed November 20, 2019.

AWA – Answer, failure to file timely – Default – Default judgment, motion to set aside – Federal licensure – Game farm – Good cause – Jurisdiction of Secretary – Rules of Practice – Supremacy Clause – Willful violation.

John V. Rodriguez, Esq., for APHIS.
Matthew E. Anderson, Esq., for Respondent.
Initial Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.
Decision and Order filed by Bobbie J. McCartney, Judicial Officer.

ORDER DENYING RESPONDENT'S PETITION FOR APPEAL AND TO SET ASIDE THE DEFAULT DECISION AND ORDER OF JULY 24, 2019

Summary of Procedural Background and Issues in Dispute

On July 24, 2019, Chief Administrative Law Judge ("Chief ALJ") Channing D. Strother issued a Decision and Order ("DO") Without Hearing By Reason of Default in this disciplinary enforcement proceeding, initiated on April 19, 2019 by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("Complainant").[1] The Complaint alleged that Lee Marvin Greenly and MN Wildlife and/or Minnesota Wildlife Connection, Inc. ("Respondent"), willfully violated the Animal Welfare Act (7 U.S.C. §§ 2131 – 2159) ("AWA" or "Act") and the regulations promulgated thereunder (9 C.F.R. §§ 1.1 – 3.142) ("Regulations") on multiple occasions between July 2015 and July 2017.

On May 2, 2019, the Hearing Clerk properly served Respondent with a copy of the Complaint. However, Respondent did not file an answer within the twenty (20) day period in accordance with section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). In this case, Respondent's

[1] While I recognize the Administrator is a person, I will use the pronoun "it" when referring to the "Complainant" herein.

answer was due on or before May 22, 2019 [2] As discussed more fully below, even assuming *arguendo* that Respondent's Petition for Appeal were to be construed as an Answer, it would nevertheless have been filed 92 days late. Response at 4.

On May 29, 2019, Complainant filed a Motion for Default ("Motion for Default Decision") and a Proposed Decision and Order ("Proposed Default Decision") in accordance with section l.139 of the Rules of Practice (7 C.F.R. § l.139). On May 30, 2019, the Hearing Clerk mailed a copy of the Motion for Default Decision and a copy of the Proposed Default Decision via certified mail.[3] On June 26, 2019, the Motion for Default Decision and the Proposed Default Decision were returned as "unclaimed."[4] On June 26, 2019, the Motion for Default Decision and Proposed Default Decision were then re-mailed via regular mail in accordance with section 1.147(c) of the Rules of Practice (7 C.F.R. § 1.147(c)). Respondent was properly served with a copy of the Motion for Default Decision and a copy of the Proposed Default Decision and did not file any objections within the twenty (20) day period in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On July 24, 2019, the Chief ALJ issued the Default Decision, finding that, as alleged in the Complaint, Respondent, on four (4) occasions, operated as an exhibitor, as that term is defined in the Act and the Regulations, without holding a valid license, during a period of revocation, in willful violation of section 2134 of the Act (7 U.S.C. § 2134) and section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)); on one (1) occasion operated as a dealer, as that term is defined in the Act and the Regulations,

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[2] United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on May 2, 2019. 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 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 May 22, 2019.

[3] United States Postal Service Domestic Return Receipt for Article Number 7009 1680 0001 9853 2410.

[4] United States Postal Service Domestic Return Receipt for Article Number 7015 3010 0001 5187 6812.

without holding a valid license, during a period of revocation, in willful violation of section 2134 of the Act (7 U.S.C. § 2134) and section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)); and on those five (5) occasions also failed to obey the Secretary's cease and desist order in *In re Lee Marvin Greenly*, et al., 72 Agric. Dec. 603 (U.S.D.A. 2013) (AWA Docket No. 11-0072).

The Chief ALJ ordered twenty-four thousand eight hundred seventy-five dollars ($24,875.00) in civil penalties as requested by the Complainant. *See* Findings, below. On July 29, 2019, the Hearing Clerk served the Respondent with a copy of the Default Decision via certified mail.

The Chief ALJ's July 24, 2019 Default Decision ("DD") is now before me, in my capacity as USDA's Judicial Officer (JO), for consideration by reason of Respondent's Petition for Appeal and to Set Aside the Default Decision, with supporting Memorandum ("Memo") filed on August 22, 2019, contending as follows:

> 1. The USDA lacks jurisdiction when the Respondent operates a game farm[5] entirely within the State of Minnesota;
>
> 2. The facts stated in the Complaint do not establish a willful violation of the Animal Welfare Act; and
>
> 3. Good cause exists to set aside the judgement when Respondent relied on the State of Minnesota's assurances that a federal license was not required for his operation and the overwhelming evidence will prove that Respondent did not need federal licensure.

On September 9, 2019, Complainant filed its Response to Appeal of Decision and Order ("Response"), addressing Respondent's arguments as

[5] The Complaint does not state, nor does the Complainant stipulate, that the Respondent operates as a "game farm and fur farm" nor that it operates as a wholly local business.

to jurisdiction, the question of willfulness, and good cause. Complainant fully addressed the Regulations concerning the issue of default, noting that the Respondent failed to timely file an Answer, and that his Petition for Appeal, even if construed as an Answer, would nevertheless be 92 days late. Response at 4.

Discussion and Findings

I. Respondent Failed to File an Answer to the Complaint.

It is undisputed that the Respondent failed to file an Answer within the time prescribed in 7 C.F.R. § 1.136(a). The Complaint was properly served along with a letter from the Hearing Clerk stating, "[P]lease refer to the rules of practice which govern the conduct of these proceedings found at 7 C.F.R. Part 1, §§1.130 through 1.151 ("the Rules")" and "The rules specify that you have 20 days from the receipt of this letter to file with the Hearing Clerk your written Answer to the Complaint signed by you or your attorney of record." The Complaint was properly served on May 2, 2019.[6] There was no Answer received within the 20 days, nor at any other time. In this case, Respondent's answer was due on or before May 22, 2019.[7] As discussed more fully below, even assuming *arguendo* that Respondent's Petition for Appeal were to be construed as an Answer, it would nevertheless have been filed 92 days late. Response at 4.

Further, the Hearing Clerk's accompanying letter makes very clear that under the Rules of Practice (7 C.F.R. § 1.136(c)) the failure to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the

[6] United States Postal Service Domestic Return Receipt for Article Number 7009 1680 0001 9853 2410.

[7] United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on May 2, 2019. 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 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 May 22, 2019.

complaint. The Hearing Clerk's letter also provided Respondent with a number of different means to file an Answer, including by email or fax to the Hearing Clerk's Office.

In addition, the agency's Motion for Default was filed on May 29, 2019, and, on May 30, 2019, the Hearing Clerk mailed a copy of the Motion for Default Decision and a copy of the Proposed Default Decision via certified mail. On June 26, 2019, the Motion for Default Decision and the Proposed Default Decision were returned as "unclaimed."[8] On June 26, 2019, the Motion for Default Decision and Proposed Default Decision were then re-mailed via regular mail in accordance with section 1.147(c) of the Rules of Practice (7 C.F.R. § 1.147(c)). Respondent was properly served with a copy of the Motion for Default Decision and a copy of the Proposed Default Decision, and did not file any objections within the twenty (20) day period in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

As previously explained, the Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint in this case were properly adopted as findings of fact in the Chief ALJ's July 24, 2019, Default Decision which is fully supported by the record and is hereby affirmed.

II. Respondent Has Not Shown Good Cause for His Default.

Respondent is certainly familiar with the Rules and Regulations that pertain to his business, as this is not the first time he has been faced with similar adverse actions by USDA, including monetary penalties and the revocation of his license. Beginning in 2013, Respondent was fined, and his license revoked, for similar offenses as in the present case. *Greenly*, 72 Agric. Dec. 603 (U.S.D.A. 2013) (AWA Docket No.

[8] United States Postal Service Domestic Return Receipt for Article Number 7015 3010 0001 5187 6812.

11-0072). That case made its way to the Eighth Circuit Court of Appeals, where the Court affirmed the decision below. *See Greenly v. U.S. Dep't of Agric*., 576 F. App'x 649 (8th Cir. 2014). At that time, the revocation of Respondent's license went back into effect. Respondent's current violations revolve around his continued defiance of cease and desist orders, and his continuation of business operations despite having no license.

Respondent's present argument as to good cause[9] purports to be based on advice given to him by the Minnesota Department of Resources. This novel argument, not advanced in the prior action, does not serve to explain why Respondent continued to violate the cease and desist orders which have been in place since 2013, and affirmed by the Eighth Circuit Court of Appeals. Respondent is experienced in the business of sales and exhibition of game and other animals and is not unsophisticated in his awareness of the Rules and Regulations which pertain to him. His arguments as to good cause, still notably lacking an explanation as to why he failed to answer the Complaint, are unpersuasive.

Assuming *arguendo* that the Respondent was given the assurances by the State of Minnesota as purported, it must be noted that "it is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice, findings, or compliance determinations of federal employees."[10] Therefore, pursuant to the Supremacy Clause,[11] even if the Respondent was given erroneous advice by an employee of the State of Minnesota, Respondent was bound by federal law, and knew or reasonably should have known that a proceeding could be instituted

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[9] *See* Memo in Support at 2. Good cause is rare, and there is no general basis for setting aside a default decision based upon the Respondent's failure to file a timely answer. *See Kutz*, 58 Agric. Dec. 744, 758-59 (U.S.D.A. 1999) (Decision as to Nancy M. Kutz).

[10] *Zimmerman*, 57 Agric. Dec. 1038, 1050 (U.S.D.A. 1998) (citing *Davenport*, 57 Agric. Dec. 189, 227 (U.S.D.A. 1998)).

[11] U.S. CONST. art. VI, cl. 2 (federal law constitutes the "supreme Law of the Land," taking priority over any conflicting state laws).

against the Respondent for violations of the Act and the Regulations.

III. The Secretary Has Jurisdiction in this Case.

It is well settled the Secretary of Agriculture ("Secretary") has jurisdiction under the Act and Regulations when intrastate transactions affect interstate commerce.[12] Respondent maintains that the United States Department of Agriculture lacks jurisdiction over his business operations because he operates a "game farm" exclusively within the State of Minnesota and therefore does not engage in interstate commerce.[13]

As previously explained, Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint.

Paragraph 3 of the Complaint notified the Respondent, "At all times material herein, the Respondent operated as either an exhibitor and/or a dealer as those terms are defined in the Act and the Regulations."[14] Section 2132(f) of the Act defines dealer 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….

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[12] 7 U.S.C. § 2131; *Shepard*, 61 Agric. Dec. 478, 482 (U.S.D.A. 2002) (citing, *inter alia*, 3 Att'y Gen. Mem. 326); *see also Good*, 49 Agric. Dec. 156, 168-69 (U.S.D.A. 1990).

[13] Though the Respondent asserts USDA does not have jurisdiction in this case, he stipulates the Secretary does have jurisdiction in intrastate transactions that affect interstate commerce in his Memo in Support at page 2.

[14] *See* Complaint at 1.

Section 2132(h) of the Act defines exhibitor as:

> Any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not. . . .

Specifically, the Complaint notified the Respondent that he operated as an exhibitor; he exhibited animals; the exhibitions affected commerce; and he exhibited to the public for compensation.[15] The Respondent, as noted in paragraph 11, also operated as a dealer; who sold animals; in commerce; for compensation or profit.[16]

Further, the Respondent performed these business activities while his license was under revocation from a previous order. In Paragraphs 7-8of the Complaint, the Respondent was reminded of the previous decisions and orders, specifically Judicial Officer (JO) William G. Jenson's Decision and Order as to the Respondent in *In re Lee Marvin Greenly*, 72 Agric. Dec. 586 (U.S.D.A. 2013) (AWA Docket No. 11-0073), and *In re Lee Marvin Greenly, et al.*, 72 Agric. Dec. 603 (U.S.D.A. 2013) (AWA Docket No. 11-0072).[17] As it pertains to the violations of the cease and desist order in *In re Lee Marvin Greenly, et al.*, 72 Agric. Dec. 603 paragraph 9 notified the Respondent, "At all times material herein, the Respondent knowingly failed to obey the cease and desist order made by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)), in the above captioned case."[18]

As a result, the Complaint repeatedly notified the Respondent he operated as a dealer; that sold animals; in commerce; for compensation

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[15] *See* Complaint at 1, 3, 4.

[16] *Shepard*, 61 Agric. Dec. 478, 490 (U.S.D.A. 2002).

[17] *See* Complaint at 2.

[18] *See* Complaint at 3.

or profit; in commerce, providing the specific dates, locations, types of animals, and section numbers of the violations. The Complaint thereby set forth the elements of the Act and showed how the Respondent was in violation.

In addition to Respondent's admissions of these Complaint allegations by reason of his failure to file an Answer, Respondent admits he operated a business[19] located at 1894 Old Military Rd., Sandstone, MN, 55072;[20] Respondent admits that he exhibited animals across the state line in Danbury, Wisconsin in reference to paragraph 12;[21] and, perhaps most importantly, Respondent has yet to specifically deny that he engaged in the conduct alleged to be prohibited.

Based on the foregoing, it is my determination that Complainant has established sufficient facts to establish that Respondent's intrastate transactions affect interstate commerce, and that he admitted to operating in another state; accordingly, the Secretary of Agriculture has jurisdiction under the Act and Regulations.[22]

IV. The Facts Stated in the Complaint are Sufficient to Establish Willful Violations of the Animal Welfare Act.

The Complaint alleges that the Respondent's violations were willful. Based on Respondent's failure to file an Answer to the Complaint, the Chief ALJ's Default Decision found the Respondent willfully violated, on five occasions, section 2134 of the Act (7 U.S.C. § 2134) and section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)). Respondent appears to believe, erroneously, that "willful" connotes evil intent. It does not. "A

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[19] The inference that the Respondent conducted business activities for compensation whether for profit or not is reasonable.

[20] *See* Memo in Support at 1 and 4.

[21] *See* Memo in Support at 6.

[22] 7 U.S.C. § 2131; *Shepard*, 61 Agric. Dec. 478, 482 (U.S.D.A. 2002) (citing, *inter alia*, 3 Att'y Gen. Mem. 326); *see also Good, Jr.*, 49 Agric. Dec. 156, 168-69 (U.S.D.A. 1990).

willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements."[23]

Moreover, Respondent is certainly familiar with the Rules and Regulations that pertain to his business, as this is not the first time he has been faced with similar adverse actions by USDA, including monetary penalties and the revocation of his license. Beginning in 2013, Respondent was fined, and his license revoked, for similar offenses as in the present case. *Greenly*, 72 Agric. Dec. 603 (U.S.D.A. 2013) (AWA Docket No. 11-0072). That case made its way to the 8th Circuit Court of Appeals, where the Court affirmed the decision below. *See Greenly v. U.S. Dep't of Agric*., 576 Fed. Appx. 649 (8th Cir. 2014). At that time, the revocation of Respondent's license went back into effect. Respondent's current violations revolve around his continued defiance of cease and desist orders, and his continuation of business operations despite having no license. Accordingly, even absent a showing of "evil intent," Respondent acted with "careless disregard of statutory requirements" which, because of his prior violations, he knew, or reasonably should have known, applied to his business.

Based on the foregoing, it is my determination that Complainant has set forth sufficient facts to establish that Respondent's violations of the Animal Welfare Act were "willful" as alleged in the Complaint and affirmed by the Chief ALJ's Default Decision.

CONCLUSION AND SUMMARY

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[23] *Knapp*, 72 Agric. Dec. 766, 779 (U.S.D.A. 2013) (Order Den. Pet. for Recons.) (citing *Terranova Enters., Inc*., No. 09-0155, 71 Agric. Dec. 876, slip op. at 6 (U.S.D.A. July 19, 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.); *Bauck*, 68 Agric. Dec. 853, 860-61 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. 2010); *D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (U.S.D.A. 2009); *Bond*, 65 Agric. Dec. 92, 107 (U.S.D.A. 2006), *aff'd per curium*, 275 F. App'x 547 (8th Cir. 2008); *Stephens*, 58 Agric. Dec. 149, 180 (U.S.D.A. 1999); *Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *Lang*, 57 Agric. Dec. 59, 81-82 (U.S.D.A. 1998)).

Complainant's Motion for Default and Proposed Decision was filed May 29, 2019 ("Motion for Default"), and properly served. [24] On September 16, 2019, Respondent filed a Reply to Complainant's Response, admitting he missed the deadline to file the Answer, but offering no explanation for the lapse which might support his contention of "good cause." Reply Memorandum at 1. Accordingly, for the reasons discussed herein, I adopt the Chief ALJ's Findings of Fact and affirm the Default Decision. Respondent's Petition for Appeal and to Set Aside Default is ***denied.***

Findings of Fact and Conclusions of Law

I hereby adopt and affirm the Chief ALJ's Findings of Fact and Conclusions of Law as set forth in his July 24, 2019, Default Decision, including:

1. The Respondent Lee Marvin Greenly is an individual doing business as MN Wildlife and/or Minnesota Wildlife Connection Inc.

2. From on or about July 7, 2015 through on or about July 4, 2018, the Respondent, on four occasions, operated as an exhibitor, as that term is defined in the AWA and the Regulations, without having been licensed by the Secretary to do so, in willful violation of

[24] United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Respondent via certified mail and returned to the Hearing Clerk's Office as "unclaimed". The Motion for Default and Proposed Decision were then re-mailed (*see* 7 C.F.R. § 1.132) via regular mail on June 26 2019 in accordance with 7 C.F.R. § 1.147(c)(1) ("[I]f 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 of remailing by ordinary mail to the same address."). 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 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 objections were due on or before July 16, 2019. Respondent did not file any objections.

section 2134 of the Act (7 U.S.C. § 2134) and section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)).

3. On or about May 15, 2017, the Respondent operated as a dealer, as that term is defined in the Act and the Regulations, without having been licensed by the Secretary to do so, in that the Respondent, in commerce, sold two wolf pups, in willful violation of section 2134 of the AWA (7 U.S.C. § 2134) and section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)).

4. From on or about July 7, 2015 through on or about July 4, 2018, the Respondent, on five occasions, failed to obey the Secretary's cease-and-desist order issued under section 2149(b) of the AWA (7 U.S.C. § 2149(b)) in *Greenly*, 72 Agric. Dec. 603 (U.S.D.A. 2013) (AWA Docket No. 11-0072).

5. Respondent has not shown good cause for his failure to timely file an Answer in this case.

6. Complainant has established sufficient facts to establish that Respondent's intrastate transactions affect interstate commerce; accordingly, the Secretary of Agriculture has jurisdiction under the Act and Regulations.

ORDER

Respondent's arguments have been considered and are rejected for the reasons discussed herein. Accordingly, Respondents' Petition for Appeal is ***denied***. Penalties assessed total $24,875.00, as detailed in the Default Decision, and the stay is lifted as of the date of this Order.

RIGHT TO SEEK JUDICIAL REVIEW

Respondents have the right to seek judicial review of the Decision and Order entered in this proceeding and of this Order Denying Respondents' Petition for Appeal in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341–2350. Respondents must seek judicial

review within sixty (60) days after entry of this Order.[25] The date of entry of the Order is November 20, 2019.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties (by certified mail as to Respondents), with courtesy copies provided via email where available.

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[25] The appeal deadline for the Decision and Order issued in this proceeding on July 24, 2019 was stayed by the timely filing of Respondents' Petition for Appeal, and the time for judicial review shall begin to run for the date of entry of this Order as the final action on the petition in accordance with 7 CFR §1.146(b). Respondents must seek judicial review within sixty (60) days of entry of this Order in accordance with 7 U.S.C. § 2149(c).

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.

ANIMAL WELFARE ACT

In re: DOUGLAS KEITH TERRANOVA, an individual; and TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058, 15-0059, 16-0037, 16-0038.
Miscellaneous Order.
Filed September 10, 2019.

AWA – Extension of time – Petition for reconsideration.

Colleen A. Carroll, Esq., and Samuel D. Jockel, Esq., for APHIS.
William J. Cook, Esq., for Respondents.
Initial Decision and Order entered by Erin Wirth, Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING RESPONDENTS' UNOPPOSED MOTION FOR TIME EXTENSION TO FILE PETITION FOR RECONSIDERATION

On September 6, 2019, Douglas Keith Terranova and Terranova Enterprises, Inc. [Respondents] filed Respondents' Unopposed Motion for Extension of Time to File Petition for Reconsideration requesting an extension up to and including September 23, 2019. Counsel for Respondents asserts that counsel for the Administrator has advised that the Administrator does not oppose Respondents' request for an extension of time. For good reason shown, Respondents' September 6, 2019 request for an extension of time for filing a Petition for Reconsideration is GRANTED. The time for filing Respondents' Petition for Reconsideration is extended to, and includes, September 23, 2019.

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In re: LEE MARVIN GREENLY, an individual d/b/a MN WILDLIFE and/or MINNESOTA WILDLIFE CONNECTION, INC.
Docket No. 19-J-0075.
Miscellaneous Order.
Filed December 31, 2019.

John V. Rodriguez, Esq., for APHIS.
Matthew E. Anderson, Esq., for Respondent.
Initial Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

AWA – Notice of appearance.

ERRATA ORDER GRANTING PETITION FOR CORRECTION OF THE RECORD AS TO NOTICE OF APPEARANCE

By Petition dated December 27, 2019, Counsel for Respondent Lee Marvin Greenly, Matthew E. Anderson, Esq., seeks to correct the record in this proceeding to reflect that he has entered an appearance only as to Lee Marvin Greenly and that at no point did the he represent or claim to represent Minnesota Wildlife Connections, Inc.. In support, Mr. Anderson points out that his Notice of Appearance filed in this matter on August 12, 2019 only states that he represents Mr. Greenly.

ORDER

Based on the foregoing, the subject petition is granted to have the record reflect that Mr. Anderson has filed a notice of appearance in this proceeding only as to Respondent Lee Marvin Greenly and the November 20, 2019 Order Denying Respondent's Petitioner for Appeal and to Set Aside the Default Order is hereby corrected accordingly. As this errata pertains only to the issue of Mr. Anderson's appearance on behalf of Respondent Lee Marvin Greenly, no other aspect of the November 20, 2019 Order shall be deemed modified for any purpose by entry of this errata and, further, the case caption will be not be changed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties (by certified mail as to Respondents), with courtesy copies provided via email where available.

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FOOD AND NUTRITION ACT

In re: STATE OF VERMONT, DEPARTMENT FOR CHILDREN AND FAMILIES.
Docket No. 18-0060.
Miscellaneous Order.
Filed August 7, 2019.

FNA – Appeal petition, withdrawal of.

Heidi Moreau, Esq., for Petitioner.
Michael Gurwitz, Esq., for FNS.
Initial Decision and Order entered by Channing D. Strother, Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING PETITIONER'S MOTION TO WITHDRAW PETITION FOR APPEAL TO JUDICIAL OFFICER

This is a proceeding under the Food and Nutrition Act of 2008 (7 U.S.C. §§ 2011 *et seq.*). The case was initiated on July 9, 2018 by the State of Vermont, Department for Children and Families ("Petitioner"[1]), with a Notice of Appeal "of the assignment of a payment error rate for federal fiscal year 2017 by the United States Department of Agriculture, Food and Nutrition Service" ("Respondent").[2]

On June 18, 2019, Chief Administrative Law Judge Channing D. Strother entered a Decision and Order dismissing the case for lack of subject-matter jurisdiction.[3] On July 18, 2019, Petitioner filed a "Petition for Appeal to Judicial Officer to Reverse Decision and Order Dismissing Case and Remand for a Decision on the Merits."

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[1] Precedent indicates that "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.1 (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").

[2] Notice of Appeal at 1.

[3] *See* Decision and Order at 19-20.

On August 5, 2019, Petitioner filed a motion "request[ing] that DCF's petition for appeal to the Judicial Officer in the above-captioned case, filed on July 18, 2019, be withdrawn."[4]

ORDER

Petitioner's Motion to Withdraw Petition for Appeal to the Judicial Officer is hereby GRANTED.

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: STATE OF RHODE ISLAND, DEPARTMENT OF HUMAN SERVICES.
Docket No. 19-J-0137.
Order Granting Petitioner's Motion to Withdraw Appeal and Dismissing Case.
Filed November 21, 2019.

HORSE PROTECTION ACT

In re: CHRISTOPHER ALEXANDER.
Docket No. 13-0370.
Dismissal With Prejudice.
Filed September 20, 2019.

In re: BRAD SPIVEY, an individual.
Docket No. 17-0175.
Dismissal With Prejudice.
Filed September 27, 2019.

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[4] Motion at 1.

DEFAULT DECISIONS

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ANIMAL WELFARE ACT

In re: LEE MARVIN GREENLY, an individual, d/b/a MN WILDLIFE and/or MINNESOTA WILDLIFE CONNECTION, INC.
Docket No. 19-J-0075.
Default Decision and Order.
Filed July 24, 2019.

In re: HUGO T. LIEBEL, an individual, d/b/a GREAT AMERICAN FAMILY CIRCUS, LLC, FLORIDA STATE FAMILY CIRCUS, LIEBLING BROTHERS CIRCUS, and LIEBLING BROTHERS FAMILY CIRCUS.
Docket No. 19-J-0077.
Default Decision and Order.
Filed October 9, 2019.

COMMERCIAL TRANSPORTATION OF EQUINE FOR SLAUGHTER ACT / ANIMAL HEALTH PROTECTION ACT

In re: MITCHELL STANLEY and GREGORY STANLEY, d/b/a STANLEY BROS FARMS, LLC; and STANLEY BROS FARMS, LLC.
Docket No. 19-J-0118.
Default Decision and Order.
Filed November 12, 2019.

HORSE PROTECTION ACT

In re: TONY LOWE, an individual. Docket No. 17-0189.
Default Decision and Order.
Filed October 17, 2019.

In re: JEFFREY L. GREEN, an individual. Docket No. 17-0205.
Default Decision and Order.
Filed October 17, 2019.

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CONSENT DECISIONS

AGRICULTURAL MARKETING ACT

Lineage Logistics ICM, LLC, a limited liability company; and Baker Cold Storage, Inc., d/b/a Lineage Logistics-Vernon.
Docket Nos. 19-J-0132; 19-J-0133.
Consent Decision and Order.
Filed July 31, 2019.

ANIMAL HEALTH PROTECTION ACT / COMMERCIAL TRANSPORTATION OF EQUINE FOR SLAUGHTER ACT

Michael McBarron, an individual.
Docket No. 19-J-0117.
Consent Decision and Order.
Filed December 20, 2019.

ANIMAL WELFARE ACT

Renee Ray, an individual d/b/a RDR Transport, LLC, a domestic limited liability company.
Docket Nos. 19-J-0126; 19-J-0127.
Consent Decision and Order.
Filed October 30, 2019.

FEDERAL CROP INSURANCE ACT

Paul D. Koethke.
Docket No. 19-J-0094.
Consent Decision and Order.
Filed July 16, 2019.

Dan Mark Gray.
Docket No. 19-0002.
Consent Decision and Order.
Filed July 23, 2019.

Terry Nicholas.
Docket No. 19-J-0128.
Consent Decision and Order.
Filed October 30, 2019.

FEDERAL MEAT INSPECTION ACT

Jerky Dudes, Inc.; and Ryan Prichard.
Docket Nos. 19-J-0141; 19-J-0142.
Consent Decision and Order.
Filed August 28, 2019.

Captain Hook's Cajun Seafood, LLC; and Lily M. Chapman.
Docket Nos. 19-J-0143; 19-J-0144.
Consent Decision and Order.
Filed August 28, 2019.

Captain Hook's Cajun Seafood, LLC; and Lily M. Chapman.
Docket Nos. 19-J-0143; 19-J-0144.
Amended Consent Decision and Order.
Filed October 9, 2019.

Southwest Native Meats, LLC & SW Native Meats, LLC.
Docket No. 20-J-0010.
Consent Decision and Order.
Filed October 28, 2019.

AA Meat Products, Inc.; Bai Zhi Yan; and Lianjie Kitty Jiang.
Docket Nos. 20-J-0001; 20-J-0002; 20-J-0003.
Consent Decision and Order.
Filed November 19, 2019.

King Meat Service, Inc.; Bai Zhi Yan; and Lianjie Kitty Jiang.
Docket Nos. 20-J-0004; 20-J-0005; 20-J-0006.
Consent Decision and Order.
Filed November 19, 2019.

HORSE PROTECTION ACT

Charles Ray Green, a/k/a Charlie Green, an individual d/b/a Charlie Green Stables.
Docket Nos. 15-0118; 17-0145.
Consent Decision and Order.
Filed July 11, 2019.

Rocky Roy McCoy, an individual.
Docket No. 17-0060.
Consent Decision and Order.
Filed July 25, 2019.

Martha Blackmon Milligan, an individual.
Docket Nos. 16-0029; 17-0148.
Consent Decision and Order.
Filed July 31, 2019.

Gwain Wilson, an individual.
Docket No. 17-0073.
Consent Decision and Order.
Filed August 6, 2019.

Pam Hendrickson, an individual.
Docket No. 17-0147.
Consent Decision and Order.
Filed December 4, 2019.

Paul David Robbins, an individual.
Docket No. 17-0152.
Consent Decision and Order.
Filed December 5, 2019.

Evergreen Horse Farm, Inc., a Tennessee corporation, a/k/a Evergreen Walking Horse Farm.
Docket Nos. 14-0059; 15-0168.
Consent Decision and Order.
Filed December 17, 2019.

Rebecca Emerick, an individual.
Docket No. 17-0086.
Consent Decision and Order.
Filed December 17, 2019.

Tammy Barclay, an individual.
Docket No. 17-0199.
Consent Decision and Order.
Filed December 23, 2019.

Noel Botsch, an individual.
Docket No. 17-0201.
Consent Decision and Order.
Filed December 23, 2019.

POULTRY PRODUCTS INSPECTION ACT

AA Meat Products, Inc.; Bai Zhi Yan; and Lianjie Kitty Jiang.
Docket Nos. 20-J-0001; 20-J-0002; 20-J-0003.
Consent Decision and Order.
Filed November 19, 2019.

King Meat Service, Inc.; Bai Zhi Yan; and Lianjie Kitty Jiang.
Docket Nos. 20-J-0004; 20-J-0005; 20-J-0006.
Consent Decision and Order.
Filed November 19, 2019.

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AGRICULTURE DECISIONS

Volume 78

Book Two

Part Two (P&S Decisions)

Pages 384 –386

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

JULY – DECEMBER 2019

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

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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

In re: JOHN B. HAGLER.
Docket No. 19-J-0078.
Default Decision and Order.
Filed December 18, 2019.

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CONSENT DECISIONS

PACKERS AND STOCKYARDS ACT

Clinton Livestock Auction, LLC; Sandra Berry; and Jake Blake Berry.
Docket Nos. 19-J-0091; 19-J-0092; 19-J-0093.
Consent Decision and Order.
Filed July 30, 2019.

Westminster Livestock & Auction Services, LLC; Victoria Gouker; and Earl Gouker.
Docket Nos. 19-J-0138; 19-J-0139; 19-J-0140.
Consent Decision and Order.
Filed August 28, 2019.

Green Bay Dressed Beef, LLC.
Docket No. 19-J-0145.
Consent Decision and Order.
Filed September 4, 2019.

Keith Jensen, d/b/a Keith Jensen Livestock.
Docket No. 19-J-0123.
Consent Decision and Order.
Filed September 9, 2019.

Four R Ranch, LLC; Greg Ryan; and Tim Ryan.
Docket Nos. 19-J-0058; 19-J-0059; 19-J-0060.
Consent Decision and Order.
Filed October 2, 2019.

Jonathan Allen Sivertson, d/b/a Sivertson Farms.
Docket No. 19-J-0105.
Consent Decision and Order.
Filed October 2, 2019.

CONSENT DECISIONS

Nicholas Meat, LLC; and Eugene Nicholas.
Docket Nos. 18-0061; 19-0013.
Consent Decision and Order.
Filed October 4, 2019.

Calvin Plummer, Jr., d/b/a J&J Cattle and J-J.
Docket No. 19-J-0064.
Consent Decision and Order.
Filed October 8, 2019.

Sisseton Livestock, Inc.
Docket No. 19-J-0072.
Consent Decision and Order.
Filed November 12, 2019.

Hatch Auction, Inc., d/b/a Cow House; and Raymond L. Hatch.
Docket Nos. 19-J-0079; 19-J-0080.
Consent Decision and Order.
Filed November 21, 2019.

Freddy Lamb.
Docket No. 19-J-0148.
Consent Decision and Order.
Filed December 12, 2019.

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AGRICULTURE DECISIONS

Volume 78

Book Two

Part Three (PACA Decisions)

Pages 387 – 446

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

JULY – DECEMBER 2019

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

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--

DEFAULT DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: NICHOLAS ALLEN.
Docket No. 15-0085.
Decision and Order.
Filed August 1, 2019.

PACA-APP – Active involvement – Actual, significant nexus – Authority, delegation of – Good faith – Nominal status – Public face – Purpose of PACA – Responsibly connected – Shareholder – State law – Stock, value of – Totality of circumstances – Transfer of corporate authority, temporary – Two-prong test – Violations period.

Jeffrey M. Chebot, Esq., and Grant E. Fortson, Esq., for Petitioner.
Charles L. Kendall, Esq., for AMS.
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 REVERSING INITIAL DECISION AND AFFIRMING DIRECTOR'S "RESPONSIBLY CONNECTED" DETERMINATION

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (hereinafter "PACA" or "Act"), 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.*) (hereinafter "Rules" or "Rules of Practice").

The issue to be decided on appeal is whether Petitioner Nicholas Allen was "responsibly connected," as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Allens, Inc. during the period of time that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received,

and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.[1]

Based upon careful consideration of the record, as well as applicable statutory, regulatory and adjudicatory precedents, and for the reasons set forth herein below, it is my determination that Petitioner Nicholas Allen has failed to rebut the presumption that he was "responsibly connected" to Allens, Inc. as an officer, director, and shareholder of the firm when Allens, Inc. committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly for produce purchases. The evidence of record supports a finding that Petitioner's actions were willful and facilitated the accomplishment of the violations of section 2(4) of the PACA by Allens, Inc..[2] By virtue of being "responsibly connected" with Allens, Inc. during the period when Allens, Inc. violated section 2(4) of the PACA (7 U.S.C. § 499b), Petitioner Nicholas Allen is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

Summary of Procedural History

On May 8, 2014, a disciplinary complaint was filed against Veg Liquidation, Inc., formerly known as Allens, Inc. (hereinafter "Allens, Inc." or "Allens"),[3] alleging as follows:

> Respondent [Allens, Inc.], during the period October 3, 2013, through January 6, 2014, on or about the dates and in the transactions set forth in Appendix A and incorporated herein by reference, failed to make full

[1] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

[2] Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Haltmier v. Commodity Futures Trading Comm'n*, 554 F.2d 556, 562 (2d Cir. 1977); *Am. Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980). *See also George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

[3] PACA-D Docket No. 14-0109.

> payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.

Complaint at 2. On October 8, 2015, a Default Decision and Order[4] was entered against Allens, Inc. finding that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly as alleged in the Complaint.[5]

On January 30, 2015, Karla Whalen, then-Director of the PACA Division of the Specialty Crops Program (now known as the "Fair Trade Practices Program"), Agricultural Marketing Service, United States Department of Agriculture (hereinafter "Director" or "Respondent"),[6] issued a Director's Determination (formerly referred to as a "Chief's Determination") that Nicholas Allen[7] was responsibly connected with Allens, Inc. during the period that Allens, Inc. violated the PACA.[8]

On March 2, 2015, Nicholas Allen (hereinafter "Petitioner") filed a petition for review of the Director's Determination that he was

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[4] *Allens, Inc.*, 74 Agric. Dec. 488 (U.S.D.A. 2015), *also available at* https://oalj.oha.usda.gov/sites/default/files/10082015_PACA-D_Docket%2014-0109_AllensInc.pdf (last visited July 5, 2019).

[5] Respondent's Brief in Support of Appeal Petition filed on May 29, 2018 contains a useful summary of the procedural history of this proceeding and has been adopted herein.

[6] "AMS" and the pronoun "it" will be used to refer to the Respondent in this Decision and Order, although Karla Whalen, Director, PACA Division, made the January 30, 2015 Determination on review herein. *See* 7 C.F.R. § 47.49.

[7] PACA-APP Docket No. 15-0085.

[8] Also on January 30, 2015, Director Whalen issued determinations that Petitioner's father, Roderick Allen (PACA-APP Docket No. 15-0083) and brother, Joshua Allen (PACA-APP Docket No. 15-0084) were responsibly connected to Allens, Inc. However, this Decision only addresses the responsibly connected status of Petitioner Nicholas Allen (PACA-APP Docket No. 15-00085) solely.

"responsibly connected," as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Allens, Inc. during the period of time that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities, which were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.[9]

A hearing took place before Administrative Law Judge (now Chief Administrative Law Judge) Channing D. Strother (hereinafter "Chief ALJ") on December 13, 2016 and December 14, 2016 in Fayetteville, Arkansas. Petitioner was represented by Jeffrey M. Chebot, Esq., of Whiteman, Bankes & Chebot LLC, Philadelphia, Pennsylvania and Grant E. Fortson, Esq., of Lax, Vaughan, Fortson, Rowe & Threet, PA, Little Rock, Arkansas. Respondent was represented by Charles L. Kendall, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC.

Petitioner testified on his own behalf and presented two additional witnesses: Joshua Allen, owner, director, and CEO of Allens, Inc.; and Lori Sherrell, secretary and comptroller of Allens, Inc. One witness, Josephine E. Jenkins, Chief of the Investigation and Enforcement Branch, PACA Division, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture, testified on behalf of Respondent. The transcript of the proceeding (designated herein as "Tr.") consists of 503 pages.

A total of fifty-six exhibits (marked P1X-#1 through P1X-#56) were admitted into evidence on Petitioner's behalf. Respondent presented the Certified Agency Record compiled for the Director's Determination as to Petitioner Nicholas Allen (marked RX-1 through RX-9), which is part of the record pursuant to section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Respondent presented one additional exhibit (marked RX-18) from the Certified Agency Record compiled for the Director's

[9] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

Determination as to Joshua Allen,[10] which was also admitted into evidence.[11]

In accordance with the briefing schedule, on April 11, 2017, Petitioner filed his "Proposed Findings of Fact, Conclusions of Law, Brief and Order," and Respondent filed Respondent's Brief, which included proposed findings of fact, proposed conclusions of law, and a proposed order. On May 31, 2017, Petitioner and Respondent each filed reply briefs thereto. On April 26, 2017, the Chief ALJ issued his Decision and Order ("Initial Decision" or "IDO") finding that Petitioner was not "responsibly connected" to Allens, Inc. during the period of the subject PACA violations.

On May 29, 2018, Respondent appealed to the Judicial Officer[12] seeking affirmation of the Director's Determination that Petitioner was "responsibly connected" with Allens, Inc. at the time of the subject violations and that, consequently, Petitioner is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)). On July 31, 2018, Petitioner filed his Response to the Appeal Petition and Brief in Support ("Response to Appeal")[13] thereof.[14]

DECISION

Pertinent Statutory, Regulatory, and Adjudicatory Analytical Framework

[10] PACA-APP Docket No. 15-0084 (*see supra* note 7).

[11] Tr. 249:5-14.

[12] The position of Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35), was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g) and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C.A.N. at 1068 (1982).

[13] Included in Petitioner's filing was a request for oral argument before the Judicial Officer. *See* Response to Appeal at 57-58.

[14] On August 3, 2018, Petitioner filed an "Errata Sheet" to correct typographical errors in his July 31, 2018 Response to Appeal.

The Department's interpretation of PACA and policy in cases arising under the Act were succinctly set out in the Judicial Officer's decision, *Baltimore Tomato Company, Inc*.[15] and reaffirmed by the Judicial Officer in *The Caito Produce Co.* ("*Caito Produce*"),[16] which sets forth at length the reasons underlying the Department's policy. As noted by the Judicial Officer, the conclusions in *Caito Produce* are largely taken verbatim from prior decisions (including *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984)), issued for many years in similar cases (many affirmed on judicial review), each of which merely updates the citations previously used.[17] Likewise, this Decision and Order quotes heavily from *Caito Produce*[18] and prior decisions to provide context to the analysis under PACA applicable to this proceeding.

As discussed in pertinent part in *Caito Produce*:

> The "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Marvin Tragash Co. v. United States Dept. of Agr.*[524] F.2d [1255] (C.A. 5), No. 75-1481, decided December 24, 1975. The purpose of the Act was stated in *Zwick v. Freeman*, 373 F.2d 110, 116 (C.A. 2), certiorari denied, 389 U.S. 835, as follows:
>
> > The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or

[15] *See Balt. Tomato Co.*, 39 Agric. Dec. 412, 415-16 (U.S.D.A. 1980).

[16] 48 Agric. Dec. 602 (U.S.D.A. 1989).

[17] *See The Caito Produce Co.*, 48 Agric. Dec. 602, 604 (U.S.D.A. 1989).

[18] Due to the length of the *Caito Produce* decision, only pertinent parts will be reproduced here to provided context to the analysis under PACA in this proceeding, but the full decision is hereby adopted and incorporated herein by reference for all purposes.

> commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).
>
> * * *
>
> If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the consequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from respondent's undercapitalization or bad debt experience.

The Caito Produce Co., 48 Agric. Dec. 602, 619-20 (U.S.D.A. 1989).

The peculiar vulnerability of producers of perishable agricultural commodities and livestock and the importance of the Department's regulatory programs to assure payment for these commodities were also recognized by Congress in specifically excluding PACA disciplinary enforcement actions from section 525 of the 1978 Bankruptcy law (11 U.S.C. § 525). As referenced in *Caito Produce*:

> Congressman Foley, Chairman of the House Agriculture Committee, explained the need for the . . . special provisions applicable to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act as follows (Proceedings and Debates of

the 95th Cong., 1st Sess., Vol. 19, pp. H 11761-H 11762 (October 28, 1977) [now 123 Cong. Rec. 35,671-72 (1977)]):

> Under the Packers and Stockyards Act and the act of July 12, 1943, persons purchasing livestock in commerce are required to conduct their businesses in a financially responsible manner, and market agencies and dealers * * * are required to have a bond and to pay for all livestock purchased. The licenses of market agencies and dealers may be suspended if they become insolvent. Packers may be ordered to cease and desist from failing to pay for livestock and packers who become insolvent may be ordered to cease and desist from operating except under such conditions as the Secretary may impose.
>
> Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.
>
> The Committee on Agriculture has no quarrel with the "fresh-start"

> philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the Act of July 12, 1943.

The Caito Produce Co., 48 Agric. Dec. 602, 621 (U.S.D.A. 1989) (footnotes omitted).[19]

As further explained in *Caito:*

> Revocation of respondent's license, in view of his repeated and flagrant violations of the Act, is not only authorized by the Act (7 U.S.C. § 499h(a)) [footnote omitted], but is also consistent with other provisions of the Act, which are not applicable here. . . . ***Similarly, if a licensee fails to pay a reparation order under the Act, his***

[19] As shown above and in the lengthy quotation from the *Esposito* case cited in *Caito Produce* (*Esposito*, 38 Agric. Dec. 613, 632-40 (U.S.D.A. 1979)), in the 1978 Bankruptcy law, Congress specifically exempted two regulatory programs – the Perishable Agricultural Commodities Act and the Packers and Stockyards Act – from the provisions of section 525 of the Bankruptcy law (11 U.S.C. § 525) that otherwise would have prevented the revocation of a license because of bankruptcy or the failure to pay a debt dischargeable under the Bankruptcy law. Congress also enacted Public Law 94-410, which made extensive amendments to the Packers and Stockyards Act and the Act of July 12, 1943 to assist the Secretary to prevent recurrence of the catastrophic losses to livestock producers which attended the bankruptcies of several large packers in prior years. As the Judicial Officer has cautioned, "[b]oth of these programs must be continued if this Nation is to continue to have a ready source of nutritious food at prices which are reasonable to both the producer and the consumer." *The Caito Produce Co.*, 48 Agric. Dec. 602, 622 (U.S.D.A. 1989).

> ***license is automatically suspended until the reparation order is paid, irrespective of whether he is unable to pay because of circumstances beyond his control (7 U.S.C. § 499g(d)).***
> . . . .
>
> Although the Department's approach to enforcing the Perishable Commodities Act appears harsh, in many cases it is not as harsh as it would seem. For example, many persons who suffer a financial loss or otherwise become in a precarious financial position continue to operate for many months and even increase their business substantially, without obtaining new capital, thereby subjecting many persons who sell produce to them to the risk of financial loss. Such conduct has repeatedly been characterized as "flagrant." *See In re John H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agr Dec 1631, 1640-1641 (1976), [aff'd per curiam, 568 F.2d 772 (4th Cir.) (unpublished), cert. denied, 439 U.S. 819 (1978)]; *Catanzaro*, 35 Agr Dec 26, 31 (1976), *affirmed sub nom.* Catanzaro v. United States and Butz, [556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agr Dec 467 (1977)]; M. & H. Produce Co., 34 Agr Dec 700, 747 (1975), [aff'd, 549 F.2d 830 (D.C. Cir.) (unpublished), cert. denied, 434 U.S. 920 (1977)]; George Steinberg & Son, 32 Agric. Dec. 236, 243-244 (1973), affirmed *sub nom. George Steinberg & Son, Inc v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

The Caito Produce Co., 48 Agric. Dec. 602, 619-22 (U.S.D.A. 1989) (emphasis added).

Statutory Definition and Requirements Pertaining to "Responsibly Connected"

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides:

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker, as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act ***and*** that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9) (emphasis added).

The express language of the statue makes clear that the person seeking relief from the ramifications of established PACA violations based on an assertion that he or she was not "responsibly connected" must demonstrate by a preponderance of the evidence that he or she meets all of the conditions of the two-prong test specifically set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

The standard for determining whether a person was actively involved in the activities resulting in a violation under PACA – the first prong of the "responsibly connected" test – is as follows:

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the

> PACA and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. 604, 611-12 (U.S.D.A. 1999).

The standard for analyzing the "nominal" prong – the second prong of the two-prong "responsibly connected" test – has been explained by the Judicial Officer as follows:

> *Taylor* makes clear to me that I was remiss in failing to abandon the "actual, significant nexus" test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the "actual, significant nexus" test, the power to curb PACA violations, or the power to direct and affect operations. In future cases that come before me, I do not intend to apply the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). Instead, my "nominal inquiry" will be limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder "in name only." While power to curb PACA violations or to direct and affect operations may, in certain circumstances, be a factor to be considered under the "nominal inquiry," it will not be the sine qua non of responsible connection to a PACA-violating entity.

Again, the express language of the statue makes clear that the person seeking relief from the ramifications of established PACA violations based on an assertion that he or she was not "responsibly connected" must demonstrate by a preponderance of the evidence that he or she meets all of the conditions of the two-prong test specifically set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9). Failure to do so will result in a finding that he or she is "responsibly connected" within the meaning of the statue and is therefore subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

Discussion

There is no dispute that during the period October 3, 2013, through January 6, 2014, on or about the dates and in the transactions set forth in Appendix A of the Complaint, Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly to, or to pay at all, forty sellers of the agreed purchase prices or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86. [20] And the Initial Decision acknowledges this;[21] however, the legal analysis and resulting conclusions set forth in the Initial Decision are based on an overly narrow statement of the issue in dispute, introduced in the Initial Decision as follows:

> The primary issue in this proceeding is a legal one of whether Nicholas Allen ("Petitioner"), who was an officer, director, and more than ten-percent shareholder in a licensee company determined to have violated the Perishable Agricultural Commodities Act ("PACA") during a relevant period, is "responsibly connected" to that company if prior to that period Petitioner ceded—legally and effectively under state corporate law—any authority as an officer, shareholder, and more than ten-percent shareholder to directors and a "chief bankruptcy restructuring officer" ("CRO") appointed pursuant to the insistence of certain secured creditors.

IDO at 1 (footnote omitted).

Correctly stated, the issue to be decided in this proceeding, as delineated by the January 30, 2015 Director's Determination giving rise to this disciplinary enforcement action, is whether Petitioner Nicholas Allen was "responsibly connected," as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Allens, Inc. during the period of time that Allens, Inc. willfully, repeatedly, and flagrantly violated

[20] PACA-D Docket No. 14-0109.

[21] *See* IDO at 18.

section 2(4) of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.

For the reasons discussed more fully hereinbelow, and based on careful consideration of the record, including all evidence adduced at the hearing as well as all briefs and petitions filed by the parties to date, it is my determination that Petitioner Nicholas Allen has failed to rebut the presumption that he was "responsibly connected" to Allens, Inc. as an officer, director, and shareholder of the firm when Allens, Inc. committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b). Accordingly, Petitioner Nicholas Allen is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

I. Petitioner Failed to Meet the First Prong of the "Responsibly Connected" Test.

As previously explained, the standard for determining whether a person was actively involved in the activities resulting in a violation under PACA – the first prong of the "responsibly connected" test – is as follows:

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. 604, 611-12 (U.S.D.A. 1999).

Direct involvement in the particular transactions that were not paid in accordance with the PACA is not required, and participation in corporate decision-making is enough to find active involvement in the activities resulting in a PACA violation.[22] The evidence of record in this case supports a finding that the Petitioner exercised substantial influence in corporate decision-making and activities at Allens, Inc. both before and after the period of October 3, 2013 through January 2014.[23] Accordingly, Petitioner has failed to demonstrate by a preponderance of the evidence that he met the requirements of the first prong of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

a. The Chief ALJ Failed to Contemplate the Totality of the Circumstances When Determining the Violations Period.

As the Chief ALJ notes in his Initial Decision, when "evaluating active involvement, the focus is on the petitioner's relationship to the violating entity during the period when PACA was violated."[24] However, the Chief ALJ has too narrowly construed the violations period in this case.[25]

The Chief ALJ focuses on the period of October 3, 2013 through January 2014 (the dates of the purchases which Allens, Inc. failed to pay

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[22] *See Petro*, 71 Agric. Dec. 600, 605 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr) (stating that participation in corporate decision-making has been enough to find active involvement).

[23] *See Satins*, 57 Agric. Dec. 1474, 1489 (U.S.D.A. 1998) (stating there are many functions within a company – corporate finance, corporate decision-making, check writing, and choosing which debts to pay – that can cause an individual to be actively involved in the failure to pay promptly for produce even though the individual never actually purchased produce).

[24] IDO at 10.

[25] *See* IDO at 2 n.5 ("The violations period is the time during which Allens, Inc. 'committed the PACA violations that gave rise to this case.' Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 612 (D.C. Cir. 2011). The violations period took place from October 3, 2013 through January 6, 2014. Allens, Inc., 74 Agric. Dec. 488, 488 (U.S.D.A. 2014); *see* P1X-24 at 2; Tr. 184-185, 194, 396.").

which were identified in the Complaint) as the violations period relevant to the subject "responsibly connected" analysis in this proceeding.[26] However, the violations period in a "responsibly connected" case is not axiomatically defined by or limited to the specific date(s) or time period(s) provided in the disciplinary complaint. In this proceeding, the evidence of record reflects that the violations began well before October 3, 2013 – that is, when the directors, officers, and majority shareholders of Allens, Inc. knew or reasonably should have known that Allens, Inc. could not make full payment for its ongoing purchases of produce – and nevertheless went about a corporate restructuring that would allow the company to continue operating in the produce industry without paying the moneys owed to its producers. This was a breach of fiduciary duty by Petitioner, an officer and director of the violating licensee, and was a PACA violation in and of itself.[27]

Further, the violations continued not only during but well after January 2014. The Chief ALJ affirms that Petitioner retained his titles of officer and director and was listed as an officer and director in various documentation, including filings at the United States Department of Agriculture ("USDA") and the State of Arkansas before, during, and even after the period of October 3, 2013 through January 2014. Notably, Petitioner remained part of the public face of Allens, Inc. by remaining

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[26] *See* IDO at 2 n.5.

[27] *See Golman-Hayden Co. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 351 (5th Cir. 2000) ("[I]ndividual shareholders, officers, or directors of a corporation who are in a position to control trust assets, and who breach their fiduciary duty to preserve those assets, may be held personally liable under PACA."); *Cipriano*, No. 14-14826, 2015 WL 3441212, at *10-11 (E.D. Mich. May 28, 2015) ("[A]n individual officer or shareholder of a corporation who is in a position to control statutory trust assets, and who fails to preserve those assets, may be held personally liable under PACA. . . . This kind of a claim is breach of fiduciary duty claim; not a claim for nonpayment of a debt.") (internal citation omitted); *Sunrise Orchards, Inc.*, 69 Agric. Dec. 726, 743 n.8 (U.S.D.A. 2010) ("Several circuits have held that the PACA statutory trust provision allows a plaintiff to recover against both a corporation and its controlling officers for breach of fiduciary duty."); *see also Arava USA, Inc. v. Karni Family Farm,* LLC, 474 F. App'x 452, 453 (6th Cir. 2012); *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 170-72 (3d Cir. 2010); *Patterson Frozen Foods v. Crown Foods Int'l*, 307 F.3d 666, 669 (7th Cir. 2002).

listed on the company's PACA license as an executive vice president, director, and shareholder.[28] Because Petitioner and his family never alerted USDA or the industry of the "restructuring," produce suppliers would have seen Petitioner as the public face of the reliable, family-owned, ninety-year-old company they had come to rely on and, indeed, the record reflects that they continued to do business with Allens, Inc. to their detriment. Yet, the Chief ALJ goes on to find that because Petitioner arguably succeeded in contractually assigning the rights and authority of his offices over to others under state law during the period of October 3, 2013 through January 2014, Petitioner effectively shielded himself from his responsibilities under PACA.[29]

The Chief ALJ does not, however, adequately address the totality of the circumstances surrounding the Petitioner's efforts to assign (temporarily) the rights and authority of his offices over to others.[30] While Petitioner argues his authority was limited due to the corporate "restructuring" of Allens, Inc. during the period of October 3, 2013 through January 2014, the evidence of record demonstrates the crucial, central role Petitioner played in the company's affairs in making that happen.[31] Notably, but for Petitioner *retaining his titles* as executive vice president, director, and shareholder, Allens, Inc. could not have presented a public face of viability, thereby misleading the industry to continue to do business with it. Until Petitioner undertook the "restructurings" effective August 5, 2013 to accomplish the (temporary) contractual delegation of his authority over the operations of Allens, Inc, Allens, Inc. was apparently still paying its produce suppliers.[32] But for Petitioner's actions, no chief restructuring officer (hereinafter "CRO") would have

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[28] *See* IDO at 30-31 ("Petitioner asserted that he retained the title during the violations period for purposes of maintaining company morale."); IDO at 38, 50 (Finding of Fact No. 4).

[29] *Id.* at 3 (emphasis added).

[30] These corporate machinations are outlined in Respondent's Initial Brief and adopted herein by reference for all purposes. *See* Respondent's Initial Brief at 5-11.

[31] *See Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1274 (U.S.D.A. 1995).

[32] IDO at 62 (Finding of Fact No. 90).

been created or empowered to make financial decisions on behalf of Allens, Inc. But for the continued purchase of produce by the CRO, *whom Petitioner appointed*, Allens, Inc. would not have violated the PACA by failing to pay for its purchases. Taken in context, Petitioner's participation in the activities creating, empowering, and appointing the CRO constitute engaging in the activities that led to Allens, Inc.'s willful, flagrant, and repeated violations of the PACA. I therefore reject the Chief ALJ's finding that by virtue of the corporate restructuring the Petitioner effectively shielded himself from his responsibilities under PACA.[33]

Moreover, the PACA violations are continuing. On October 8, 2015, Administrative Law Judge Janice K. Bullard (hereinafter "ALJ Bullard") issued a Decision and Order as to Allens, Inc., finding that as of October 2, 2014, the $9,759,843.86 that Allens, Inc. owed to forty produce suppliers remained unpaid.[34] Petitioner presented no evidence that any of the debt[35] had been paid as of the date of the hearing held on his Petition, some two years after ALJ Bullard's decision against Allens, Inc. Indeed, Petitioner has made no suggestion that payment has been made in whole or in any part as of the date of this Decision and Order, nearly four years after ALJ Bullard's decision against Allens, Inc. Because the produce debts remain unpaid, there is a continuous failure to pay.[36]

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[33] *Id.* at 2 (ruling that Petitioner's cessation "as an officer, director, and more than ten-percent shareholder over to others prior to the violations period is not an activity resulting in a violation of PACA within the meaning of PACA").

[34] *See Allens, Inc.*, 74 Agric. Dec. 488, 496 (U.S.D.A. 2015).

[35] *See* Complaint, Attachment A (incorporated herein by reference).

[36] *Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. at 930-31. Nothing in the PACA itself, the Regulations promulgated thereunder, or in any case cited by the Chief ALJ or Petitioner indicates that the relevant period for a responsibly connected determination ends when the last in a series of ongoing violations begins. In the context of another USDA statute, the Judicial Officer addressed the appropriate timeframe for applying sanctions for continuing violations, stating:

> However, nothing in the Act precludes the assessment of a civil penalty for a continuing violation for the period after the investigation is completed, or even after the Complaint is filed. Theoretically, at least, civil penalties could accrue even up to the time of the hearing. Each case must be judged in the light of

As PACA precedent makes clear, while failing to pay promptly is a violation, failing to pay at all is much more egregious. In the seminal *Scamcorp*[37] case, the Judicial Officer observed:

> Cases in which a respondent has failed to pay by the date of the hearing are referred to as "no-pay" cases. License revocation can be avoided and the suspension of a license of a PACA licensee who has failed to pay in accordance with the PACA is ordered if a PACA violator makes full payment by the date of the hearing (or, if no hearing is to be held, by the time the answer is due) and is in full compliance with the PACA by the date of the hearing. Cases in which a respondent has paid and is in full compliance with the PACA by the time of the hearing are referred to as "slow-pay" cases. The Gilardi doctrine was subsequently tightened *in In re Carpentino Bros., Inc.*, 46 Agric. Dec. 486 (1987), aff'd, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent's present compliance not involve credit agreements for more than 30 days.
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> The purpose of allowing PACA licensees to convert a "no-pay" case to a "slow-pay" case and avoid license revocation is to encourage PACA violators to pay their produce suppliers and attain full compliance with the PACA. If there were no opportunity to reduce the sanction, a PACA licensee against whom an action is instituted for failure to pay in accordance with the PACA and who has violated the payment provisions of the PACA may have no incentive to pay its produce suppliers. However, PACA requires full payment promptly, and a PACA licensee who has violated the payment provisions

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> all the relevant circumstances in determining when it is no longer appropriate to assess civil penalties for a continuing violation.

Calabrese, 51 Agric. Dec. 131, 150 (U.S.D.A. 1992).

[37] *Scamcorp, Inc.*, 57 Agric. Dec. 527 (U.S.D.A. 1998).

> of the PACA should be given an incentive to pay its produce suppliers promptly.

Scamcorp, Inc., 57 Agric. Dec. 527, 547-48 (U.S.D.A. 1998).

In the instant case, after April 1, 2014, Petitioner had the power, authority, and opportunity to direct Allens, Inc. to pay the produce debts-in-arrears, but he opted not to do so.[38] As pointed out in Respondent's Reply Brief at 4-5:

> After April 1, 2014, Petitioner, along with the other two directors and owners (Joshua Allen and Roderick Allen), had the authority to remove the Special Committee and displace the CRO. P1X-#9-4, Tr. 182:12-21, 188:20-24. There was nothing preventing them from reasserting their control over the company and petitioning the bankruptcy court to permit Allens, Inc. to come into compliance with the applicable law (PACA) by paying the produce suppliers. *See In re Kmart Corp.*, C.A.7 (Ill.) 2004, 359 F.3d 866, rehearing and rehearing en banc denied, certiorari denied 125 S. Ct. 495, 543 U.S. 986, 160 L. Ed.2d 370, certiorari denied 125 S. Ct. 495, 543 U.S. 995, 160 L. Ed.2d 385. 11 U.S.C.A. § 363 (West). Allens, Inc. was not in Chapter 7 liquidation under the control of a trustee, wherein it could not petition the Court, until June 6, 2014. P1X-#10-1. Petitioner testified that there was no other legal constraint on the actions of Petitioner and the other owner/directors (Roderick Allen and Joshua Allen). Tr. 126:22-127:17.

Rather than make any attempt to cure the PACA violations, Petitioner opted to permit corporate funds to be used for other purposes, including continuing to pay his own $800,000 yearly salary.[39] Petitioner's decision

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[38] *See* IDO at 2 ("There is no evidence that Petitioner took any actions regarding the failures to pay producers that are PACA violations here, and Petitioner presented evidence, including testimony, that he did not.").

[39] *Id.* at 64 (Finding of Fact No. 104). *See Salins*, 57 Agric. Dec. 1474, 1495 (U.S.D.A. 1998) ("Petitioner testified that Petitioner knew that the company was

to maintain the failures-to-pay status quo even after April 1, 2014 supports a finding that he was actively involved in the activities that resulted in violations of PACA.[40] That the failures-to-pay were never cured even after Petitioner regained his full status as an officer, director, and more than-ten percent shareholder of Allens, Inc., unencumbered by the restrictions he had unilaterally placed upon himself, demonstrates Petitioner's lack of good faith in accomplishing his (temporary) delegation of authority over the company's operations.[41] Such lack of good faith is underscored by Petitioner's failure to notify both USDA and the public of his "temporary" change in status.[42]

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in financial trouble in the early 1990s, but Petitioner does not explain why Petitioner was getting a bonus when the company was in financial trouble. I conclude that a reasonable explanation for Petitioner's bonus is that Petitioner was much more than a nominal officer[.]").

[40] *See Martindale*, 65 Agric. Dec. 1301, 1319 (U.S.D.A. 2006) ("Check writing and choosing which debts to pay can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA."); *Salins*, 57 Agric. Dec. at 1489, 1495 ("I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce."); *see also Orloff*, 62 Agric. Dec. 264, 279 (U.S.D.A. 2003) ("I reject what I find to be Petitioner's argument: that in order to be actively involved in the activities resulting in a PACA licensee's violation of the PACA, a petitioner must actually commit the PACA violation.").

[41] *See* IDO at 4. *Cf. Havana Potatoes of N.Y. Corp. v. United States*, 136 F.3d 89, 93-94 (2d Cir. 1997) ("[I]solated failures to pay within ten days or even substantial delays in payments fully cured after a temporary period of financial difficulty might justify mitigation. However, PACA simply cannot be read to allow the continued licensing of a produce buyer in the face of its persistent failures to comply with the statute's terms because of the produce buyer's long-standing financial difficulties."); *Petro*, 71 Agric. Dec. 600, 607 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr) ("I agree with the Branch Chief that Mr. Herr could have infused Houston's Finest with capital after he learned of Houston's Finest's failure to pay for produce in accordance with PACA.").

[42] *See* IDO at 3, 3 n.9 (citing 7 C.F.R. § 46.13(a)(2)) ("*See* Cerniglia, 66 Agric. Dec. 844, 854 (U.S.D.A. June 6, 2007) ('As a general rule, I find that any individual identified on a PACA licensee as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee is, for purposes of

Accordingly, it is the determination of this Judicial Officer that Petitioner has wholly failed to demonstrate by a preponderance of the evidence that he met the first prong of the requirements of the two-prong test specifically set forth in section 1(b)(9) (7 U.S.C. § 499a(b)(9)) of the PACA.

b. Regardless of Lawfulness Under State Law, the Temporary Transfer of Corporate Authority Does Not Preclude a Finding of Active Involvement Under the PACA.

PACA precedent makes clear that, within the PACA framework, one cannot divest oneself of fiduciary duties as an officer, director, and shareholder of a PACA licensee with the consequence of facilitating PACA violations by another and not be held accountable.[43] PACA "is admittedly and intentionally a 'tough' law"[44] that has resulted in "one of the nation's most successful regulatory programs."[45] It is, as the U.S. Court of Appeals for the Second Circuit has described, "an intentionally rigorous law whose primary purpose is to exercise control over an industry 'which is highly competitive, and in which the opportunities for sharp

PACA, an officer, director, or shareholder of the licensee until such time that the PACA Branch receives written notice that the person is no longer an officer, director, or holder of more than 10 percent of the outstanding stock of the licensee.').").

[43] *See, e.g.*, *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2dd 601, 614 (D.C. Cir. 1987); *Midland Banana & Tomato Co. v. U.S. Dep't of Agric.*, 54 Agric. Dec. 1239, 1310-11 (U.S.D.A. 1995), *aff'd sub nom. Midland Banana & Tomato Co v. U.S. Dep't of Agric.*, 104 F.3d 139 (8th Cir. 1997); *see also Golman-Hayden Co. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 351 n.18 (5th Cir. 2000) ("While individuals generally are not held responsible for the liabilities of a corporation, we recognize that a corporation can only act through its agents and can fulfill fiduciary obligations only through its agents.").

[44] S. REP. NO. 2507, 84th Cong., 2d Sess. (citing H. REP. NO. 1196, 84th Cong., 1st Sess.), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701).

[45] *Quinn v. Butz*, 510 F.2d 743, 746 (D.C. Cir. 1975).

practices, irresponsible business conduct, and unfair methods are numerous.'"[46] Further, PACA case law has stated:

> [W]hen interpreting a statute, the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of the business activity or the enforcement of standards it has established.

Sebastopol Meat Co. v. Sec'y of Agric., 440 F.2d 983, 985 (9th Cir. 1971).

In his Initial Decision, the Chief ALJ correctly finds that "PACA does not displace Arkansas law regarding the transfer of authority within corporations"[47] and "is not inconsistent with the Arkansas law of corporations."[48] The Chief ALJ also notes that "while the Arkansas corporate law here allowed a transfer of power from Petitioner to other directors and a CRO, it did not eliminate PACA responsibility for all directors and officers."[49] However, the Initial Decision stops short in that it fails to stress an important principle: that although neither of the laws preempts the other, state law may not be used as a shield for circumventing the purposes of the PACA.[50]

In a seminal case under the Act, the Judicial Officer held that state law is not controlling as to whether the corporate veil may be pierced so as to

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[46] *Harry Klein Produce v. U.S. Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (quoting S. REP. NO. 2507, 84th Cong., 2d Sess. 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701).

[47] IDO at 27.

[48] *Id.* at 28.

[49] *Id.* at 28-29.

[50] *See Midland Banana & Tomato Co.*, 54 Agric. Dec. at 1310-11 ("The PACA violator's ability to leap into the next corporate entity to escape the Secretary's regulatory reach should be non-existent. Those individuals who use corporate devices to evade . . . PACA financial requirements are some of the most financially irresponsible Respondents I have seen in my 46 years at USDA.").

make an order applicable to the responsible directing officials and owner, or part owner, of a corporation involved in PACA violations.[51] Similarly, in *Tomato Specialties*,[52] the Chief ALJ found that "[t]he Arizona law of misrepresentation and fraud in sales transactions, in particular that cited by Tomato Specialties, [was] not applicable to the issues in th[e] case."[53] Likewise, in the present case, Petitioner's delegation of authority, even if sufficient for purposes of Arkansas law, is not controlling for purposes of determining Petitioner's "responsibly connected" status under the PACA.[54]

Furthermore, the cited provision of the Arkansas Code[55] does not excuse or exculpate Petitioner from his failure to properly discharge his duties as a director. The Code provides in pertinent part:

> (f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in § 4-27-830.

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[51] *See id.* at 1305-09.

[52] 76 Agric. Dec. 658 (U.S.D.A. 2017).

[53] *Tomato Specialties, LLC*, 76 Agric. Dec. 658, 700 (U.S.D.A. 2017).

[54] *See Sebastopol Meat Co. v. Sec'y of Agric.*, 440 F.2d 983, 984-86 (9th Cir. 1971); *Lloyd Myers Co.*, 51 Agric. Dec. 747, 769, 772 (U.S.D.A. 1992) ("There are many cases that stand for the general principle that the mere form of a business organization is insufficient to shield the practices sought to be prohibited from the reach of a federal regulatory agency.") (citing *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 440 (1938); *FTC v. Standard Ed. Soc'y*, 302 U.S. 112, 119-20 (1937); *H.P. Lambert Co. v. Sec'y of Treas.*, 354 F.2d 819, 822 (1st Cir. 1965); *Joseph A. Kaplan & Sons, Inc. v. FTC*, 347 F.2d 785, 787 n.4 (D.C. Cir. 1965); *S.C. Generating Co. v. FPC*, 261 F.2d 915, 920 (4th Cir. 1958); *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir. 1956); *Keystone Mining Co. v. Gray*, 120 F.2d 1, 6 (3d Cir. 1941); *Ala. Power Co. v. McNinch*, 94 F.2d 601, 618 (D.C. Cir. 1938); *Tractor Training Serv. v. FTC*, 227 F.2d 420, 425 (9th Cir. 1955); *Goodman v. FTC*, 244 F.2d 584, 593-94 (9th Cir. 1957)).

[55] *See* Response to Appeal at 32-34 (citing ARK. CODE ANN. §§ 4-27-1701, 4-27-801, 4-27-1020(b), and 4-27-825(d)).

ARK. CODE ANN. § 4-27-825(f) (West). Further, the referenced standards of conduct with which a director must comply, in pertinent part, provide:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) in a manner he reasonably believes to be in the best interests of the corporation.

ARK. CODE ANN. § 4-27-830(a) (West).

The "care an ordinarily prudent person in a like position would exercise under similar circumstances" would be to comply with the PACA.[56] Empowering others to violate the law (PACA) that governs the heavily regulated produce industry and failing to assure that they did not, as Petitioner did in this case, could hardly be viewed as discharging his duties "in a manner he reasonably believes to be in the best interests of the corporation."[57]

II. Petitioner Failed to Meet the Second Prong of the "Responsibly Connected" Test.

Even assuming *arguendo* that Petitioner could continue to argue that he met the first prong requirements of section 1(b)(9), for the reasons discussed more fully herein below it is the determination of this Judicial Officer that Petitioner also fails the second prong of the "responsibly connected" test.

As previously explained, under section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), a person shall not be deemed to be responsibly connected if

[56] ARK. CODE ANN. § 4-27-830(a)(2).

[57] ARK. CODE ANN. § 4-27-830(a)(3).

the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act ***and*** that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.[58] The second prong, or the test necessary to overcome the statutory presumption, is referred to as the "nominal" standard.[59]

The Chief ALJ identifies the correct standard for analyzing the "nominal" prong of the responsibly connected inquiry and cites a relevant part of the decision that set the standard:

> The Judicial Officer abandoned the "actual, significant nexus" test following the D.C. Circuit's decision in *Taylor*. On remand, the Judicial Officer stated:
>
> > *Taylor* makes clear to me that I was remiss in failing to abandon the "actual, significant nexus" test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the "actual, significant nexus" test, the power to curb PACA violations, or the power to direct and affect operations. In future cases that come before me, I do not intend to apply the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). Instead, my "nominal inquiry" will be limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder "in name only." While power to curb PACA violations or to direct and affect operations may, in certain circumstances, be a

[58] *See* 7 U.S.C. § 499a(b)(9).

[59] *See Taylor*, Nos. 06-0008, 06-0009, 2012 WL 9511765, at *6 (U.S.D.A. Dec. 18, 2012) (Modified Decision and Order on Remand).

> factor to be considered under the "nominal inquiry," it will not be the sine qua non of responsible connection to a PACA-violating entity.
>
> A petitioner will now rebut the "responsibly connected" presumption by demonstrating, by a preponderance of the evidence, that he or she was an officer, director, or shareholder "in name only."

IDO at 13-14 (footnotes omitted).

a. Petitioner's "Nominal" Status as Director and Officer Was Temporary and Self-Inflicted.

Despite having identified the proper standard, the Chief ALJ fails to properly apply the standard to the facts of this case by failing to address the fact that the very corporate resolutions that Petitioner put in place, which he now claims rendered him powerless, granted Petitioner authorities that he declined to employ.[60] Accordingly, while the Initial Decision cites the various powers that were denied or withheld from Petitioner at some length, it fails to address the fundamental fact that it was Petitioner himself who did the denying or withholding.[61]

The Chief ALJ correctly cites *Tuscany Farms, Inc.*,[62] in which the Judicial Officer stated, as of October 15, 2008:

> I agree with the United States Court of Appeals for the District of Columbia Circuit and hold that under the PACA, absent rare and extraordinary circumstances, ownership of more than 10 percent of the outstanding shares of a licensed entity preclude a finding that the holder of that substantial of an interest in the PACA licensee is a nominal shareholder.

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[60] *See* Appeal Petition at 17-18; Response to Appeal at 25-28.

[61] *See* IDO at 3-4, 27, 30, 32, 35-36.

[62] 67 Agric. Dec. 1428 (U.S.D.A. 2008).

Tuscany Farms, Inc., 67 Agric. Dec. 1428, 1438 (U.S.D.A. 2008). The Chief ALJ also goes on to cite two cases as examples of such rare and extraordinary circumstances. In the first of these instances, the Judicial Officer considered these facts:

> Mr. Herr was not involved in negotiating or drafting the Stock Purchase Agreement, had no intention of performing any duties for Houston's Finest, and, although the Stock Purchase Agreement named him as a director, Mr. Herr never functioned as a director, never attended any board meetings, never received a stock certificate, never signed any document as a corporate officer or director of Houston's Finest, and never received a salary, dividend, K-1, or reimbursement from Houston's Finest (Tr. 160-67). More specifically, Mr. Herr was neither consulted about, nor exercised any power or authority concerning, Houston's Finest's payments to suppliers.

Petro, 71 Agric. Dec. 600, 611 (U.S.D.A. 2012).

Petitioner Nicholas Allen did not share Mr. Herr's extraordinary circumstances. In stark contrast, Petitioner functioned as a director; attended and participated in board meetings; held stock in the LLC that he participated in founding;[63] signed documents as a corporate officer and director of Allens, Inc.;[64] and received an $800,000 annual salary.[65] The *Herr* decision is inapposite to Petitioner's status.

Similarly, in the second-cited case,[66] the Ninth Circuit considered two consolidated responsibly connected cases regarding Donald Beucke. The Court found that Mr. Beucke was responsibly connected with Bayside Produce when it violated the PACA but was not responsibly connected with Garden Fresh Produce when it violated the PACA, despite Mr.

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[63] IDO at 54 (Finding of Fact No. 36).

[64] *Id.* at 58 (Finding of Fact No. 70), 60 (Finding of Fact No. 76).

[65] *Id.* at 64 (Finding of Fact No. 104).

[66] *Beucke v. U.S. Dep't of Agric.*, 314 F. App'x 10 (9th Cir. 2008).

Beucke's stock ownership in Garden Fresh.[67] The Court considered Mr. Beucke's overall role and found that he was nominal; the Court did not separately analyze his roles as officer, director, and shareholder. As noted by the Chief ALJ,[68] the Court found that "Beucke had no duties or responsibilities in his named roles; did not attend the organizational meeting or subsequent formal company meetings; received only nominal pay ($1,500) in the company's first year; and signed no checks within the violations period."[69]

In contrast, Petitioner Nicholas Allen had duties or responsibilities in his named roles; attended the organizational meeting and subsequent formal company meetings (including the meeting that formed the LLC of which he was a shareholder); and received much more than nominal pay ($800,000 annually).[70] The *Beucke*/Garden Fresh decision is also inapposite to Petitioner's status.

b. <u>The Value of Petitioner's Stock Has No Bearing on Whether Petitioner Was a "Nominal" Shareholder.</u>

The Chief ALJ credits Petitioner's argument that he was only nominally a shareholder because the stock Petitioner held eventually became worthless, noting that "he had no equity" and that:

> Although Petitioner held onto [sic] his shares throughout the violations period, the record shows his stock had no real worth. The value of Allens, Inc. as a going concern was zero. Petitioner and Josh Allen testified that neither All Veg, LLC's stock in Allens, Inc. nor Petitioner's interest in All Veg, LLC had any value.

IDO at 46 (footnotes omitted).

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[67] *Id.* at 12.

[68] IDO at 17.

[69] *Beucke*, 314 F. App'x at 12.

[70] IDO at 64 (Finding of Fact No. 104).

The Chief ALJ notes Respondent's citations in this regard to PACA precedent that indicates that the purported or speculated value of stock is irrelevant to the question of whether one is a nominal shareholder:

> AMS argues that "[r]etaining stock, even when it ultimately ended up without value, has been held to prevent a petitioner from establishing it was not responsibly connected to a PACA licensee when it violated the Act." AMS submits:
>
> > The petitioner in that case, Keith Keyeski, had resigned as director and officer of Bayside Produce, Inc., prior to Bayside Produce, Inc.'s violations of the PACA. He retained his stock ownership, however, because of what he believed to be its economic value. *In Re: Donald R. Beucke*, *In Re: Keith K. Keyeski*, PACA-APP Docket No. 04-0014, 2006 WL 3326080, at *12 (U.S.D.A. Nov. 8, 2006). Mr. Keyeski was held to be responsibly connected. *See also In Re: David L. Hawkins*, 52 Agric. Dec. 1555, 1561 (U.S.D.A. Dec. 21, 1993) (Petitioner unsuccessfully argued that his stock did not represent a bona fide stake in the corporation because it had been rendered useless.)

IDO at 46-47 (footnote omitted). The Chief ALJ found that these cases were inapposite and did not support AMS' position, first stating:

> In *Beucke*, the economic value of Keyeski's stock had no bearing in either the Chief Administrative Law Judge's or the Judicial Officer's responsibly connected analysis. The Judicial Officer considered Keyeski's retention of stock to determine whether he was a shareholder at a specific time; it was not what inhibited Keyeski from being found nominal.

IDO at 47.

The Chief ALJ's analysis of this issue is inaccurate. A review of the cited case shows that Keith Keyeski's retention of his stock was pivotal to the finding that he *was* responsibly connected to Bayside Produce.[71] The fact that Mr. Keyeski had retained his stock despite the fact that it became worthless was what prevented him from rebutting the presumption that he was responsibly connected.[72] The Judicial Officer said: "The failure to exercise their oversight obligations owed by them to Bayside Produce, Inc., as shareholders, if not as officers and directors, does not establish that Petitioner Beucke's and Petitioner Keyeski's roles were nominal."[73]

The Chief ALJ also rejects the precedent set in *Hawkins v. Department of Agriculture*,[74] stating:

> Similarly, stock value was not at issue in *Hawkins v. Department of Agriculture*. The case was decided by the Fifth Circuit Court of Appeals prior to 1995, when Congress amended PACA to incorporate the rebuttable-presumption standard. Unlike the D.C. Circuit, the Fifth Circuit had applied the *per se* rule: if a person was an officer, director, or more-than-ten-percent shareholder of a violating entity, he or she "was considered 'responsibly connected' and subject to sanctions under the PACA." Thus, regardless of the value of the petitioner's stock at that time, the Fifth Circuit would not have examined his twenty-two percent interest; it was of no consequence whether he was a nominal shareholder. I also note that AMS's parenthetical is misleading. The Fifth Circuit did not rule upon whether the petitioner's "useless" stock "represent[ed] a bona fide stake in the corporation"; it simply applied the per se rule to its responsible-

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[71] *See Beucke*, 65 Agric. Dec. at 1358 ("Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.").

[72] *See id.* at 1405.

[73] *Beucke*, 65 Agric. Dec. 1341, 1385 (U.S.D.A. 2006), *aff'd*, 314 F. App'x 10 (9th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009).

[74] 10 F.3d 1125 (5th Cir. 1993).

> connection analysis, which did not take factors such as stock value into consideration. Hawkins clearly is not controlling in this case.

IDO at 47-48.

The Fifth Circuit held that stock value was not at issue; the petitioner in that case attempted to introduce it as an issue.[75] In order to apply its *per se* rule, the Fifth Circuit had to identify Mr. Hawkins as a shareholder during the violation period, and it did so.[76] In making that determination, the Court simply found that he held stock and rejected Mr. Hawkins's argument that the value of the stock was relevant.[77] In the present case, the surmised or speculated value of Petitioner Nicholas Allen's stock is not relevant either. At hearing, the Chief ALJ asked what difference it makes that the stock had no value.[78] Respondent is correct in observing that the answer is quite simple; it makes no difference. The speculative market value of stock was rejected as a factor in the cases cited by Respondent, as discussed above, and has never been applied as having any bearing on whether a shareholder was nominal under the PACA.[79]

If value of stock, or the lack thereof, were considered as a factor in a responsibly connected analysis, individuals would rarely – if ever – be held responsibly connected. A large majority of PACA violations involve companies that are failing financially, and for that reason have failed to pay produce creditors.[80] Therefore, stock held in those violating companies is often, if not almost always, worthless. Citing worthless or

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[75] *See Hawkins v. Dep't of Agric.*, 10 F.3d 1125, 1128, 1130-31 (5th Cir. 1993).

[76] *See id.* at 1130.

[77] *See id.*

[78] Tr. 487:8-9.

[79] *See supra* notes 77 to 81 and accompanying text.

[80] *See Havana Potatoes of N.Y. Corp. v. United States*, 163 F.3d 89, 94 (2d Cir. 1997) ("Moreover, financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds.").

useless stock is inappropriate in any PACA analysis of whether a stockholder is nominal, and the Chief ALJ erred in doing so.

c. Petitioner Did Not Act in Good Faith by Continuing to Serve as the Public Face of Allens, Inc. Despite Having Temporarily Delegated His Authority as Officer and Director.

Throughout the violations period, Petitioner remained part of the public face of Allens, Inc., remaining listed on the company's PACA license as an executive vice president, director, and shareholder.[81] Because Petitioner and his family never alerted USDA or the industry of the corporate restructuring, produce suppliers would have seen Petitioner as a public face of the reliable, family-owned, ninety-year-old company they had come to rely on and continued to do business with Allens, Inc. to their detriment.

The Chief ALJ finds that "Petitioner had a legitimate reason for executing the August 5, 2013 resolutions-there was testimony that Allens, Inc.'s secured lenders threatened foreclosure multiple times, which would likely have resulted in produce suppliers going unpaid and 1,500 employees losing their jobs."[82] Whatever beneficial effects Petitioner may have brought about for the Allens, Inc. employees and the Allens, Inc. secured lenders, his actions also accomplished an additional result: they allowed Petitioner (and others) to mislead produce suppliers about the financial health and payment practices of Allens, Inc. The produce suppliers continued to provide Allens, Inc. with produce for which they were never paid; specifically, the forty sellers who were never paid the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of

[81] *See* IDO at 30-31 ("Petitioner asserted that he retained the title during the violations period for purposes of maintaining company morale."); IDO at 38, 50 (Finding of Fact No. 4).

[82] *Id.* at 27.

$9,759,843.86.[83] The financial wellbeing of these produce suppliers, and the jobs of their employees, are also entitled to the protections of PACA.

The Chief ALJ cites relevant precedent,[84] which says in pertinent part:

> While the regulation [7 C.F.R. § 46.13] imposes the burden of notifying the PACA Branch about changes on the licensee, an individual hoping to avoid a responsibly connected determination must ensure the notice of his or her changes reaches the agency, even if that requires the individual to personally notify the PACA Branch. It is reasonable for the PACA Branch to treat each individual who is identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee as responsibly connected until the PACA Branch receives notice otherwise. As a general rule, I find that any individual identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee is, for purposes of the PACA, an officer, director, or shareholder of the licensee until such time that the PACA Branch receives written notice that the person is no longer an officer, director, or holder of more than 10 percent of the outstanding stock of the licensee.

Cerniglia, 66 Agric. Dec. 844, 854 (U.S.D.A. 2007). Petitioner argues now that his status with Allens, Inc. (temporarily) changed.[85] At the time, however, Petitioner never provided notice of any change in his status; he remained an officer, director, and shareholder throughout the violations period.[86]

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[83] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

[84] *Id.* at 3.

[85] *See* Response to Appeal at 54, 56-57.

[86] *See* Appeal Petition at 25; Response to Appeal at 55-57.

Petitioner's attempts to circumvent the PACA here are much more sophisticated than the typical appointment of a relative (*see Midland Banana*, discussed *supra*)[87] or clerk as a figurehead,[88] but they nonetheless constitute an effort by an officer, director, and owner to hide (under cover of state law) as a helpless "mere employee."[89] Petitioner did not notify or warn USDA, Allens, Inc.'s produce suppliers, or the industry as a whole of the financial troubles at Allens, Inc.; on the contrary, Petitioner helped conceal those troubles while continuing to draw his $800,000 salary "for the purposes of maintaining employee morale and preserving the value of Allens, Inc. as a going concern."[90] Petitioner was an officer and director of Allens, Inc. whose actions in restructuring the company in an apparent attempt to contractually shield himself from PACA liability resulted in forty produce sellers going unpaid for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.[91]

Based on the foregoing, I conclude that the record shows that Petitioner was actively involved in the activities that resulted in Allens, Inc.'s violations of the PACA and supports a finding that Petitioner was not a nominal officer, director, or shareholder of Allens, Inc. when it violated the PACA. I agree with Respondent's contention that Petitioner's actions before, during, and after the failure-to-pay transactions of October 3, 2013 through January 6, 2014 "enabled [Allens, Inc.] to violate the PACA" and "are important parts of the entire context on which the determinations must be made."[92]

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[87] *See Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1270-73 (U.S.D.A. 1995).

[88] *See Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (finding that a secretary who was made director of a PACA licensee to ensure that a quorum existed for board meetings was a nominal officer).

[89] Appeal Petition at 24.

[90] IDO at 38.

[91] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

[92] Appeal Petition at 5.

CONCLUSIONS

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

2. Petitioner Nicholas Allen has failed to rebut the presumption that he was "responsibly connected" to Allens, Inc. as an officer, director, and shareholder of the firm when Allens, Inc. committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly for produce purchases.

3. By virtue of being responsibly connected with Allens, Inc. during the period when Allens, Inc. violated section 2(4) of the PACA (7 U.S.C. § 499b), Petitioner Nicholas Allen is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

ORDER

1. Petitioner Nicholas Allen's Request for Oral Argument is DENIED.

2. The Chief ALJ's ruling that Petitioner Nicholas Allen did not participate in any activity resulting in a violation of the PACA is REVERSED.

3. The Chief ALJ's ruling that Petitioner Nicholas Allen was only nominally an officer, director, and holder of more than ten percent of the stock of Allens, Inc. during the period that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA is REVERSED.

4. The January 30, 2015 determination by the Director of the PACA Division that Petitioner Nicholas Allen was "responsibly connected" with Allens, Inc. at the time of its violations is AFFIRMED.

5. Petitioner Nicholas Allen is accordingly subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

RIGHT TO SEEK JUDICIAL REVIEW

Nicholas Allen has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within sixty (60) days after entry of the Order in this Decision and Order.[1] The date of entry of the Order in this Decision and Order is August 1, 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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In re: NICHOLAS ALLEN.
Docket No. 15-0085.
Order Denying Petition for Reconsideration.
Filed September 25, 2019.

PACA-APP – Presumption of responsibly connected status, failure to rebut – Reconsideration, petition for – Responsibly connected – Violation period.

Jeffrey M. Chebot, Esq., and Grant E. Fortson, Esq., for Petitioner.
Charles L. Kendall, Esq., for AMS.
Initial Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER DENYING NICHOLAS ALLEN'S PETITION FOR RECONSIDERATION OF THE JUDICIAL OFFICER'S AUGUST 1, 2019 DECISION AND ORDER

On August 1, 2019, in my capacity as USDA's Judicial Officer ("JO"), I issued a Decision and Order Reversing Initial Decision and Affirming Director's "Responsibly Connected" Determination ("D&O") regarding the Petition for Review of Petitioner Nicholas Allen. In this responsibly

[1] 28 U.S.C. § 2344.

connected proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) ("PACA"), Nicholas Allen's Petition for Review sought to reverse the determination of the Director of the PACA Division, Fair Trade Practices Program, Agricultural Marketing Service ("Respondent") that he was "responsibly connected" with Allens, Inc., during the period of time Allens violated section 2 of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.[1]

My August 1, 2019, D&O affirmed the Director's determination, reversing the [Initial] Decision and Order of the Administrative Law Judge below.

On August 12, 2019, Nicholas Allen, by counsel, filed his Petition for Reconsideration of my August 1, 2019 Decision and Order ("PR"). The PR incorporated earlier filings: Petitioner's Initial Brief; Petitioner's Brief in Reply to Respondent's Brief; Petitioner's Response to Respondent's Appeal Petition and Brief in Support; and in most regards, the [Initial] Decision and Order issued by current Chief Administrative Law Judge Channing D. Strother ("IDO"). Respondent filed its Reply on September 6, 2019 and similarly incorporated the entire file in this matter ("Reply"), all of which is now before me for consideration and adjudication of the PR.

After a full review of the record, the subject filings, and full consideration of the PR and Reply, it is my determination that Petitioner's Petition for Reconsideration must be ***denied***. Accordingly, my August 1, 2019 D&O is hereby ***affirmed*** in its entirety.

While the Petition for Reconsideration is forcefully and persuasively written, upon closer scrutiny it is clear the Petitioner is simply either re-arguing the same points which he has made throughout these proceedings and which have already been fully addressed in my D&O or raising

[1] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

arguments which Respondent's Reply has fully demonstrated are not supported by the authorities cited therein. For example, I have fully addressed Petitioner's argument regarding a limited "Violations Period" inquiry and have rejected it. D&O at 14-19. Nevertheless, in his PR, Petitioner contends that "[h]istorically, the time frame for analysis of determinative responsible connection has been the period defined in the disciplinary complaint when produce vendors were not being paid, with a definitive beginning and end date." PR at 2. Petitioner asserts that the D&O ignores numerous authorities upholding this contention; however, Respondent's Reply addresses each cited "authority" and demonstrates that Petitioner's contention has not been supported:

> In re Finch and Honeycutt, 73 Agric. Dec. 302,318, 2014 WL 4311062 at *10 (U.S.D.A. June 6, 2014) [The holding here rejected the petitioner's argument that a previous arrangement by a third party was relevant to the petitioner's responsibly connected status.]; In re Beucke, In re Keyeski ("Beucke II"), 65 Agric. Dec. 1372, 1380; 2006 WL 3326080 at *6 (U.S.D.A. Nov. 8, 2006) [This citation simply notes that Mr. Keyeski was a shareholder during the specified period of the subject transactions (as Nicholas Allen was with Allens, Inc)]; In re Margiotta, 65 Agric. Dec. 622, 633, 639, 2006 WL 20066164 at *8, *12 (U.S.D.A. June 21, 2006) [Simply finds that the petitioner was responsibly connected to M. Trombetta & Sons at "all times material" and "during the violation period: when Joseph Auricchio bribed a produce inspector.]; In re Mealman, 64 Agric. Dec. 1987, 1991, 2005 WL 2994267 at *3 (U .S.D.A. Oct. 3 2005) [Does not address the time period of violations; it only serves to rebut Nicholas Allen's "selective prosecution" argument in his PR.]; In re [Joel] Taback, 63 Agric. Dec. 434,445, 2004 WL 909530 at *5 (U.S.D.A. Apr. 28, 2004) [Only states that Mark Alfisi bribed a USDA inspector while Joel Taback was responsibly connected-does not address any time limitation on assessing Joel Taback's status.]; In re Farley & Calfee, Inc., 49 Agric. Dec. 576, 584, 1990 WL 320370 at *6 (U.S.D.A. Feb. 21,1990) [Deals only with the effective date of sanctions, not of violations].

Id.

As fully analyzed and discussed in the D&O, Petitioner Allen has failed to rebut the presumption that he was responsibly connected to Allens when it committed willful, repeated and flagrant violations of section 2(4) of the PACA. The record shows that Petitioner was actively involved in the activities that resulted in Allens violations of the PACA. The record also supports a finding that Petitioner was not a nominal officer, director or shareholder of Allens when it violated the PACA. Accordingly, Petitioner Nicholas Allen's Petition for Reconsideration is hereby ***denied***, and the D&O issued on August 1, 2019 is hereby ***affirmed*** in its entirety.

Conclusions

Petitioner Nicholas Allen has failed to rebut the presumption that he was responsibly connected to Allens Produce LLC as an officer, director, and shareholder of the firm when Allens committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.

ORDER

The determination by the Director of the PACA Division that Petitioner Nicholas Allen was responsibly connected with Allens at the time of its violations is ***affirmed***. Consequently, Petitioner Nicholas Allen is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499h(b)).

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

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Errata

The Editor regrets having overlooked the timely inclusion of a Reparation Decision, specifically:

> *Sandhu Bros. Growers v. R & L Sunset Produce Corp.*, PACA-R Docket No. E-R-2018-012 (U.S.D.A. Nov. 7, 2018).[*]

The decision follows this page with special pagination for guidance.

[*] This decision should have appeared in Volume 77 of *Agriculture Decisions*.

ERRATA

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

77 Agric. Dec.
July – December 2018

SANDHU BROS. GROWERS v. R & L SUNSET PRODUCE CORP.
Docket No. E-R-2018-012.
Reparation Decision.
Filed November 7, 2018.

[Cite as: 78 Agric. Dec. A (U.S.D.A. 2018).]

PACA-R.

Jurisdiction – Promises to Pay or Notes
Reparation proceedings exist to resolve disputes between members of the produce industry involving perishable agricultural commodities. Where it is clear that the parties intended that their payment agreement would replace the original debt, thereby settling the matter in dispute in the reparation complaint, the complaint must be dismissed.

Complainant, *pro se.*
Respondent, Attard & Associates.
Leslie S. Wowk, Examiner.
Shelton S. Smallwood, Presiding Officer.
Decision and Order entered by William G. Jenson, Judicial Officer.

ORDER OF DISMISSAL

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 $207,525.00 in connection with ten truckloads of yams 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, admitting liability to Complainant in the amount of $146,751.00.

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. Neither party elected to file any additional evidence or a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 301 W. Fulkerth Road, Crows Landing, CA 95313. At the time of the transactions involved herein, Complainant was licensed under the PACA.

2. Respondent is a corporation whose post office address is 1083 Nelson Avenue #1, Bronx, NY 10452. At the time of the transactions involved herein, Respondent was licensed under the PACA.

3. On January 17, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3545 billing Respondent for 963 cartons of jumbo Oriental yams at $22.00 per carton, or $21,186.00, and 36 cartons of #2 Oriental yams at $12.00 per carton, or $432.00, for a total invoice price of $21,618.00. (ROI Ex. 003, 012.)

4. On January 24, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3556 billing Respondent for 108 cartons of #2 Oriental yams at $12.00 per carton, or $1,296.00, and 918 cartons of jumbo Oriental yams at $23.00 per carton, or $21,114.00, for a total invoice price of $22,410.00. (Compl. Ex. 2, 12.)

ERRATA

5. On February 21, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3601 billing Respondent for 972 cartons of jumbo Oriental yams at $23.00 per carton, or $22,356.00, and 54 cartons of commercial Oriental yams at $12.00 per carton, or $648.00, for a total invoice price of $23,004.00. (ROI Ex. 004, 017.)

6. On February 28, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3611 billing Respondent for 162 cartons of jumbo Oriental yams at $23.00 per carton, for a total invoice price of $3,726.00. (ROI Ex. 005, 013.)

7. On March 4, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3616 billing Respondent for 918 cartons of jumbo Oriental yams at $23.00 per carton, or $21,114.00, and 108 cartons of commercial Oriental yams at $12.00 per carton, or $1,296.00, for a total invoice price of $22,410.00. (ROI Ex. 006, 014.)

8. On March 14, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3636 billing Respondent for 540 cartons of jumbo Oriental yams at $23.00 per carton, for a total invoice price of $12,420.00. (ROI Ex. 007, 015.)

9. On April 15, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3717 billing Respondent for 117 cartons of commercial Oriental yams at $12.00 per carton, or $1,404.00, and 918 cartons of jumbo Oriental yams at $23.50 per carton, or $21,573.00, for a total invoice price of $22,977.00. (ROI Ex. 008, 019.

10. 10. On May 1, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3731 billing Respondent for 1,026 cartons of jumbo Oriental yams at $25.00 per carton, for a total invoice price of $25,650.00. (ROI Ex. 009, 018.)

11. On May 8, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3737

billing Respondent for 1,026 cartons of jumbo Oriental yams at $26.50 per carton, for a total invoice price of $27,189.00. (ROI Ex. 010, 020.)

12. On July 4, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3798 billing Respondent for 1,026 cartons of jumbo Oriental yams at $21.50 per carton, for a total invoice price of $22,059.00. (ROI Ex. 011, 016.)

13. The informal complaint was filed on October 19, 2017 (ROI Ex. 001), which is within nine months from the date the cause of action accrued.

Conclusions

Complainant submitted its Complaint seeking to recover $207,525.00 from Respondent for ten truckloads of Oriental yams. (Compl. ¶ 10.) On June 19, 2018, Respondent submitted a sworn Answer wherein it asserted that the amount due Complainant as of that date was $146,751.00. (Answer ¶ 10.) On September 4, 2018, the Department received notice from Respondent's attorney that the parties entered a settlement agreement. Counsel provided a copy of the settlement agreement, which reads, in pertinent part, as follows:

IT IS HEREBY STIPULATED AND AGREED, by and between the respective parties that the above entitled matter is hereby settled pursuant to the following terms and conditions:

1. Sandhu agrees to settle the matter against R & L for $75,000.00 as a full and final settlement.

2. Based on the terms of the agreement, R & L will deliver to Sandhu at the offices at its offices [sic] at 301 W Fulkerth Rd, Crows Landing, CA 95313 the following checks based upon sufficient funds and payable to "Sandhu Brothers Growers" by the specified dates:

9/1/18-$7,500.00;	10/1/18-$7,500.00;	11/1/18-$7,500.00;
12/1/18-$7,500.00;	1/1/19-$7,500.00;	2/1/19-$7,500.00;
3/1/19-$7,500.00;	4/1/19-$7,500.00;	5/1/19-$7,500.00;
6/1/19-$7,500.00.		

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3. Once all payments required by this Stipulation have ben [sic] timely made. [sic] Sandhu will notify the US Department of Agriculture PACA Branch that the matter has been resolved.

The agreement was signed on August 23, 2018, by Luis Fernandez, President of Respondent, and Gurinda Sandhu, President of Complainant.

Reparation proceedings exist to resolve disputes between members of the produce industry involving perishable agricultural commodities. *Oregon Onions, Inc. v. Paiute Frozen Foods Corp*., 48 Agric. Dec. 1121, 1122 (U.S.D.A. 1989). No dispute exists here. The parties have agreed to extinguish the underlying debt in exchange for Respondent's agreement to pay Complainant the sum of $75,000.00 in ten payments of $7,500.00 each between September 1, 2018, and June 1, 2019. As the referenced agreement was made in settlement of PACA Docket No. E-R-2018-012, the Complaint must be dismissed.[1]

ORDER

The Complaint is dismissed.

Copies of this Order shall be served upon the parties.

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[1] *Compare to Turbana Fruit Co. v. Larry Merrill Produce Co*., 50 Agric. Dec. 1872, 1873 (U.S.D.A. 1991), where it was held that in the absence of any indication that it was the complainant's intent to extinguish the underlying debt, the payment agreement signed by the parties served merely as conditional payment or as collateral security, or as an acknowledgment or memorandum of the amount ascertained to be due, and did not deprive the Department of jurisdiction under PACA. *See also Federal Fruit & Produce Co. v. Sandy's Produce*, 24 Agric. Dec. 1121 (U.S.D.A. 1965); Uniform Commercial Code, section 3-802.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

GREAT WEST PRODUCE, INC. v. ELITE FARMS, INC.
Docket No. E-R-2018-323.
Reparation Decision.
Filed July 29, 2019.

PACA-R.

Notice of Breach
The purpose of the notice required by U.C.C. § 2-607(3)(a) is not simply to make the seller aware of the facts constituting a breach; it is, more importantly, to make the seller aware that the buyer, in consideration of the facts constituting a breach, has the intent to seek recourse from the seller for any damages sustained as a result of the breach. The transmission of the inspection certificate by the USDA to Complainant for the subject load of pineapples did not put Complainant on notice that Respondent considered the results of the inspection as sufficient to establish a breach or that it intended to seek any damages resulting from that breach. USDA's transmission of a USDA inspection certificate, without more from the buyer, does not satisfy the notice requirement set forth in U.C.C. § 2-607(3)(a).

Complainant, *pro se*.
Bruce Levinson, Esq., for Respondent.
Leslie S. Veevers, Examiner.
Shelton S. Smallwood, Presiding Officer.
Decision and Order entered 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 $9,875.00 in connection with one truckload of pineapples 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.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice 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 and a brief. Respondent filed an Answering Statement.

Findings of Fact

1. Complainant is a corporation whose post office address is 2600 S. Eastern Avenue, Commerce, CA 90040. At the time of the transaction involved herein, Complainant was licensed under the PACA.

2. Respondent is a corporation whose post office address is 2896 W. 12th Street, Brooklyn, NY 11224. At the time of the transaction involved herein, Respondent was licensed under the PACA.

3. On or about March 29, 2019, Complainant sold and shipped to Respondent one truckload of pineapples. Complainant issued invoice number 924788 billing Respondent for 1,500 cartons of pineapple 5's at $10.25 per carton, for a total invoice price of $15,375.00. (ROI Ex. 006.)

4. Respondent received the pineapples mentioned in Finding of Fact 3 on March 31, 2018, at which time it stamped the bill of lading "RECEIVED UNDER PROTEST PENDING USDA FEDERAL INSPECTION." (ROI Ex. 010.)

5. On April 2, 2018, at 1:03 p.m., Respondent requested a USDA inspection of the pineapples. The inspection, which was performed at 8:10 a.m. on April 3, 2018, disclosed 23 percent average defects, including 19 percent damage by mold and four percent damage by bruising. Pulp temperatures at the time of the inspection ranged from 44 to 45 degrees Fahrenheit. (ROI Ex. 011.)

6. Respondent prepared an account of sales showing that it resold the pineapples between April 4 and 6, 2018, at prices ranging from $3.00 to $6.00 per carton, for gross sales of $6,612.00. (ROI Ex. 015.) From this amount, Respondent deducted $178.00 for the USDA inspection fee and $200.00 for unloading, leaving a net return of $5,512.50, which amount Respondent paid Complainant with check number 5478, dated April 8, 2018. (ROI Ex. 012.)

7. The informal complaint was filed on September 26, 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 the unpaid balance of the agreed purchase price for one truckload of pineapples purchased from Complainant. Complainant states it shipped the kind, quality, grade and size of pineapples called for in the contract of sale, and that Respondent accepted the pineapples but has since paid only $5,512.50 of the agreed purchase price thereof, leaving a balance due Complainant of $9,862.50. (Compl. ¶¶ 5, 7.)

In response to Complainant's allegations, Respondent states it accepted the pineapples under protest,[1] after which it secured a timely USDA inspection that disclosed serious mold damage and bruising in the pineapples. (Answer ¶¶ 5-6.) Following the inspection, Respondent states it used its best efforts to sell the damaged pineapples between April 4 and 6, 2018, generating a return of $5,512.50. (Answer ¶ 7.) Respondent states it paid this amount to Complainant with a check marked "Accord +

[1] Respondent stamped the bill of lading "RECEIVED UNDER PROTEST PENDING USDA FEDERAL INSPECTION" when the shipment arrived (ROI Ex. 010); however, Respondent has not asserted or submitted any evidence showing that it sent the stamped bill of lading to Complainant. Complainant states it saw the stamped bill of lading for the first time when it received Respondent's response to the informal complaint. (ROI Ex. 017). Respondent's "under protest" stamp, therefore, did not provide Complainant with any notice of problems with the load or of a potential breach.

Satisfaction" which Complainant negotiated without objection, thereby accomplishing an accord and satisfaction. (Answer ¶ 7.)

Accord and satisfaction requires a *bona fide* dispute, plus tender which is clearly made as payment in full.[2] Complainant states it received Respondent's check on April 11, 2018, but that it was not made aware of any issues with the pineapples until April 12, 2018, when it contacted Respondent to find out why the invoice was short paid. (Opening Stmt. at 1.) On this basis, Complainant contends that there was no dispute concerning Respondent's liability for pineapples when it received Respondent's check.

In response to this contention, Respondent asserts that the USDA sent a copy of the inspection certificate to both Respondent's Avi Yusufov and Complainant's Alan Church on April 3, 2018.[3] Complainant's receipt of the inspection certificate from the USDA is, however, of no consequence because it would not put Complainant on notice that Respondent was disputing its liability to Complainant for the pineapples.

Section 2-607(3)(a) of the Uniform Commercial Code states "[w]here a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." U.C.C. § 2-607(3)(a). The purpose of the notice required by U.C.C. § 2-607(3)(a) is not simply to make the seller aware of the facts constituting a breach; it is, more importantly, to make the seller aware that the buyer, in consideration of the facts constituting a breach, has the intent to seek recourse from the

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[2] 1 AM. JUR. ACCORD & SATISFACTION §§ 22 *et. seq*. *See also Louis Caric & Sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486, 1498 (U.S.D.A. 1979); *Mendelson-Zeller Co. v. Michael J. Navilio, Inc.*, 34 Agric. Dec. 903, 907-08 (U.S.D.A. 1975); *Kelman Farms, Inc. v. Bushman Brokerage, Inc.*, 34 Agric. Dec. 1146, 1152-53 (U.S.D.A. 1975); *Mendelson-Zeller Co. v. Season Produce Co.*, 31 Agric. Dec. 1288, 1290-92 (U.S.D.A. 1972).

[3] Respondent submitted a screenshot from Mr. Yusufov's phone apparently showing that the inspection certificate for the pineapples was sent by USDA inspector Jagarnauth Persaud to Respondent's Avi Yusufov and Complainant's Alan Church (ROI Ex. 013); however, the date and time the message was sent cannot be ascertained from the screenshot.

seller for any damages sustained as a result of the breach. *American Mfg. Co. v. United States Shipping Board Emergency Fleet Corp*., 7 F.2d 565 (2d Cir. 1925). The transmission of the inspection certificate from the USDA to Complainant did not put Complainant on notice that Respondent considered the results of the inspection as sufficient to establish a breach by Complainant, or that it intended to seek any damages resulting from that breach.

Respondent also asserts that timely notice is established by the following text messages exchanged between Respondent's Avi Yusufov (AY) and Complainant's Alan Church (AC):

> AY: "Look into your email it was sent"
>
> AC: "I just recieved [sic] your email, but the shipper may not accept an inspection this late after delivery."
>
> AY: "Look at it the date it was sent"
>
> AY: "It was a long weekend due to the holiday Monday was closed"
>
> AC: "I didn't receive anything until today. This is the first I'm hearing about any problems."
>
> AY: "I just sent u a screenshot shot that you received"
>
> AC: "I see a screenshot with email addresses on it, but I did not receive ANYTHING until today."

(ROI Ex. 14; Opening Stmt. at 2.) Complainant's Alan Church asserts in a sworn statement submitted as Complainant's Opening Statement that this text message exchange did not occur until April 12, 2018, the day after Complainant received Respondent's check. (Opening Stmt. at 1.) Respondent subsequently submitted a sworn statement from Avi Yusufov for its Answering Statement. In that statement, Mr. Yusufov fails to address Mr. Church's sworn contention that the text conversation took place on April 12, 2018. Negative inferences may be taken when a party fails to provide obviously necessary documents or testimony. *Mattes*

Livestock Co., 42 Agric. Dec. 81, 96 (U.S.D.A. 1982); *Speight*, 33 Agric. Dec. 280, 300-01 (U.S.D.A. 1974); *Sec. & Exch. Comm'n v. Scott*, 565 F. Supp. 1513 (S.D.N.Y. 1983). Therefore, in the absence of any evidence refuting Mr. Church's testimony that the text conversation took place on April 12, 2018, we find that Respondent has failed to establish that it notified Complainant of any dispute with respect to its liability for the pineapples prior to Complainant's receipt of the accord and satisfaction check.[4] Since the existence of a bona fide dispute is an essential element of accord and satisfaction, we find that Respondent has failed to establish that the subject transaction was settled through accord and satisfaction.

Based on the preceding discussion, it is unnecessary to consider whether the evidence establishes a breach of contract by Complainant, as we have already determined that Respondent failed to sustain its burden to prove that it provided Complainant with timely notice of the breach.[5] As a result, Respondent is barred from recovering any damages resulting the breach. Respondent is, therefore, liable to Complainant for the pineapples it accepted at the agreed purchase price of $15,375.00, less the $5,512.50 already paid, or a balance of $9,862.50.

Respondent's failure to pay Complainant $9,862.50 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be 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*

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[4] A sworn statement that has not been controverted must be taken as true in the absence of other persuasive evidence. *Sun World Int'l v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (U.S.D.A. 1983); *see also Apple Jack Orchards v. M. Offutt Brokerage Co.,* 41 Agric. Dec. 2265, 2267 (U.S.D.A. 1982).

[5] Burden to prove that prompt notice of a breach was given rests on the buyer who claims a breach by the seller. *Hunts Point Tomato Co. v. Md. Fresh Tomato Co.*, 47 Agric. Dec. 773, 778 (U.S.D.A. 1988).

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 shipment listed in the Complaint at a rate of 18 percent per annum. (Compl. ¶¶ 4, 9.) Complainant's claim is based on its invoice to Respondent which expressly states: "A FINANCE CHARGE calculated at the rate of 1 1/2% PER MONTH (18% ANNUALLY) will be applied to all PAST DUE ACCOUNTS." (Compl. Ex. 1.) There is nothing to indicate that Respondent objected to the interest charge provision stated on Complainant's invoice. In the absence of a timely objection by Respondent, the interest charge provision stated on Complainant's invoice was incorporated into the 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 $9,862.50, with interest thereon at the rate of 18 percent per annum from May 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 $9,862.50 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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PACKMAN1, INC. v. AYCO FARMS, INC.
Docket No. S-R-2018-432.
Reparation Decision.
Filed November 18, 2019.

PACA-R.

Interest awarded
When contracts between the parties included an interest term that requires Respondent to pay interest of a specified amount on any past due balance, such interest accrues from the due date of the invoice. If Respondent pays an undisputed amount, interest accrues from the due date of the invoice until such payment is made. We find that this award of interest will provide an additional incentive for licensees to avoid slow payment, and it will not remove the motive to admit and pay any amount known by the Respondent to be due, because by so paying a Respondent will avoid interest for the balance of the period before the final order is issued.

Steven M. De Falco, Esq., for Complainant.
Respondent, *pro se*.
Corey Elliott, 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 $885.00 in connection with four truckloads of watermelons shipped in the course of interstate commerce.

Copies of the Report of Investigation ("ROI") prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice 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 and a brief. Respondent did not elect to file any additional evidence.

Findings of Fact

1. Complainant is a corporation whose post office address is 8507 US Highway 17 S., Zolfo Springs, FL 33890. At the time of the transactions involved herein, Complainant was licensed under the PACA.

2. Respondent is a corporation whose post office address is 1501 NW 12th Ave., Pompano Beach, FL 33069. At the time of the transactions involved herein, Respondent was licensed under the PACA.

3. On or about May 24, 2018, Complainant, by oral contract, sold to Respondent one truckload of watermelons. (Compl. Ex. 2.) The watermelons were shipped from loading point in the state of Florida, to Respondent's customer in the state of South Carolina. (Compl. Ex. 3.) On May 24, 2018, Complainant issued Respondent invoice number 4256 for 6 bins of 45ct Seedless Watermelons at $154.00 per bin, or $924.00; and 52 bins of 60ct Seedless Watermelons at $154.00

per bin, or $8,008.00, for a total invoice price of $8,932.00. (Compl. Ex. 2.)

4. On or about May 28, 2018, Complainant, by oral contract, sold to Respondent one truckload of watermelons. (Compl. Ex. 4.) The watermelons were shipped from loading point in the state of Florida, to Respondent's customer in the state of South Carolina. (Compl. Ex. 5.) On May 28, 2018, Complainant issued Respondent invoice number 6301 for 22 bins of 45ct Seedless Watermelons at $142.00 per bin, or $3,124.00; and 36 bins of 60ct Seedless Watermelons at $142.00 per bin, or $5,112.00, for a total invoice price of $8,236.00. (Compl. Ex. 4.)

5. On or about June 1, 2018, Complainant, by oral contract, sold to Respondent one truckload of watermelons. (Compl. Ex. 6.) The watermelons were shipped from loading point in the state of Florida, to Respondent's customer in the state of Illinois. (Compl. Ex. 7.) On June 1, 2018, Complainant issued Respondent invoice number 6302 for 28 bins of 36ct Seedless Watermelons at $154.00 per bin, or $4,312.00; and 28 bins of 45ct Seedless Watermelons at $154.00 per bin, or $4,312.00, for a total invoice price of $8,624.00. (Compl. Ex. 6.)

6. On or about June 5, 2018, Complainant, by oral contract, sold to Respondent one truckload of watermelons. (Compl. Ex. 8.) The watermelons were shipped from loading point in the state of Florida, to Respondent's customer in the state of Illinois. (Compl. Ex. 9; Answer Ex. pg. 25.) On June 5, 2018, Complainant issued Respondent invoice number 6303 for 3 bins of 36ct Seedless Watermelons at $121.00 per bin, or $363.00; and 53 bins of 45ct Seedless Watermelons at $121.00 per bin, or $6,413.00, for a total invoice price of 6,776.00. (Compl. Ex. 8.)

7. On October 23, 2018, Respondent issued check number 093176 in the amount of $31,683.00, payable to Complainant. (Compl. Ex. 11.)

8. The informal complaint was filed on September 14, 2018 (ROI Ex. 001), which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for four truckloads of watermelons sold and shipped to Respondent. Complainant states it invoiced Respondent based on prices agreed upon by Respondent's salesman Ken Kodish in the amount of $32,568.00 recorded as follows:

Ayco Purchase Order No.	Packman Invoice No.	FOB Price	Invoice Amount
191313	4256	$154.00	$8,932.00
191314	6301	$142.00	$8,236.00
191316	8624	$154.00	$8,624.00
191627	6303	$121.00	$6,776.00

[1]

(Compl. ¶ 7.) Complainant states that Respondent on October 25, 2018 paid $31,683.00 of the $32,568.00 as the undisputed amount on the file, leaving an unpaid balance of $885.00. (Compl. ¶¶ 8 and 9.) Complainant also asserts that Respondent owes it interest of 1.5% per month (18% per annum) on both the undisputed and disputed amount from the dates of the invoices. (Compl. ¶ 9.)

In response to Complainant's allegations, Respondent asserts in its sworn Answer that on invoice numbers 191313, 191314, and 191316, it paid the amounts based on internal sales orders created by its salesman, Ken Kodish. (Answer ¶¶ 1, 2, and 3.) Respondent also asserts that it paid the settlement amount of $121.00 per bin on invoice number 191627 after deducting 3 bins that were lost in repacking. (Answer ¶ 4.) Respondent denies owing any additional monies to the Complainant, as it paid based on internal sales orders and remitted funds based on accountings provided for the one "price after sale" transaction. (Answer ¶ 6.)

Respondent admittedly resold and collected sales proceeds for the subject watermelons. We find that such action on the part of Respondent is an act of dominion constituting acceptance. *See* 7 C.F.R. § 46.2(dd)(2). 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,*

[1] The referenced table is screen shot from Complainant's Complaint. The invoice number for Respondent's purchase order number 191316 should read 6302.

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). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4). *See also W.T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1705, 1710 (U.S.D.A. 1993); *Salinas Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987). Respondent did not provide any evidence, such as a USDA inspection, to establish a breach of contract.

Each of the parties is basing its invoice price or amount owed on documents created by Ken Kodish. Complainant is basing its claim on an email with Mr. Kodish, whereas Respondent is basing its claim on the sales orders created by Mr. Kodish. "Where parties put forth affirmative but conflicting allegations with respect to the terms of a contract, the burden rests upon each party to establish its respective allegation by a preponderance of the evidence." *Stake Tomatoes of Ruskin, Inc. v. World Wide Consultants, Inc.*, 52 Agric. Dec. 770, 771-72 (U.S.D.A. 1993); *Lookout Mountain Tomato & Banana Co. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1475 (U.S.D.A. 1992).

In Complainant's Opening Statement its President, Efren Hinojosa, states that he communicated with Mr. Kodish by email with FOB settlement prices for the four loads all of which totaled $32,568.00. As evidence, Mr. Hinojosa provides the email between Mr. Kodish and himself that reads as follows:

Ken Kodish <ken.kodish@aycofarms.com> Mon, Jun 25, 2018 at 8:24 AM
To: Efren Hinojosa <efrenhinojosa65@gmail.com>

Efren,

Please invoice us the as follows and i'll get them to wire the funds today.

Ayco #	FOB Price
191313 -	$154 ✓
191314 -	$142 ✓
191316 -	$154 ✓
191627 -	$121 - this load was reported ***trouble*** and rejected from the retailer.. this is the final return after regrade and resale.

thanks

Ken

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(Compl. Ex. 001.) Respondent did not submit a sworn statement from Mr. Kodish to rebut the sworn testimony of Mr. Hinojosa. Negative inferences may be taken when a party fails to provide obviously necessary documents

or testimony. *In re: Mattes Livestock Co.*, 42 Agric. Dec. 81, 96 (1982); *In re: Speight*, 33 Agric. Dec. 280, 300 (1974); *SEC v. Scott*, 565 F. Supp. 1513 (S.D.N.Y. 1983). This omission leads us to conclude that the preponderance of the evidence supports Complainant's contention that the invoiced prices were agreed upon as stated. Accordingly, Respondent is liable to Complainant for the watermelons it accepted at the negotiated prices, $32,568.00, minus its payment of $31,683.00, or $885.00.

Respondent's failure to pay Complainant $885.00 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be 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 Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963).

Complainant requests pre-judgement interest of 1.5% per month (18% per annum) on both the undisputed and disputed amounts. (Answer ¶¶ 9, 10, and 11.) This request is based on a statement on Complainant's invoices to Respondent that reads: "Finance charges will accrue on any past-due balance at the rate 1 1/2 % per month (18% per annum) from the date each invoice becomes past due or the maximum rate of interest allowable by law, and will be computed daily and compounded annually." (Compl. Ex. 002, 004, 006, and 008.) 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*).*

As we mentioned, Complainant requests pre-judgment interest on both the disputed amount of $885.00, and the undisputed amount of $31,683.00. (Compl. ¶ 9.) In *Peak Vegetable Sales v. Northwest Choice,*

Inc.,[2] the Department determined that the Complainant was entitled to recover interest not just on the amount that was found due, but also on the amount that the Respondent paid with its answer. In making this finding, the Department likened the situation to one in which the Respondent admitted partial liability in its answer but failed to tender payment of the amount admittedly due. In that instance, the Department would issue an award in the Complainant's favor for the undisputed amount, *plus interest*. The *Peak* decision held that the interest requested by the Complainant did not differ greatly from the award of interest in an undisputed amount order.

In the instant case, similarly, each of the contracts between the parties included an interest term that required Respondent to pay interest of 1.5% per month (18% per annum) on any past due balance, and such interest accrued from the due date of the invoice until Respondent paid the undisputed amount. In keeping with the rationale of the *Peak Vegetable Sales v. Northwest Choice, Inc.* decision, we find that the award of interest in this situation "will provide an additional motive for licensees to avoid slow payment, and it will not remove the motive to admit and pay any amount known by the Respondent to be due, because by so paying a Respondent will avoid interest for the balance of the period before the final order is issued."[3]

Respondent attempted to provide payment of invoices 6301 and 6303 in the amount of $13,376.38 on August 9, 2018. (ROI Ex. 042.) Complainant refused to accept this amount as payment in full and there is no evidence in the file showing that Complainant attempted to get this amount released as the undisputed amount due. Respondent's check had the restrictive language: "Paid in Full" affixed as an obvious attempt to fully satisfy the claim with Complainant through an accord and satisfaction if endorsed. On October 23, 2018, Respondent issued a new check in the amount of $31,683.00 and voided the previous check. (ROI Ex. 041-42.) Complainant obtained a check release and was able to accept the unrestricted check as payment of the undisputed amount. (ROI Ex. 050.) Accordingly, pre-judgment interest will be awarded to Complainant at 18% per annum on $31,683.00 from July 1, 2018 to October 23, 2018. Complainant is also entitled to pre-judgment interest on the disputed

[2] 58 Agric. Dec. 646 (U.S.D.A. 1999).

[3] *Id.* at 657.

amount of $885.00 at the rate of 18% per annum (1.5% per month). 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 $885.00, with interest at the rate of 18% per annum (1.5% per month) from July 1, 2018, until the date of this Order, plus interest at the rate of _____ % per annum on the amount of $885.00, from the date of this Order, until paid, plus the amount of $500.00.

As additional reparation, Respondent shall also pay Complainant for unpaid interest on the undisputed amount of $31,683.00 at the rate of 18% per annum (1.5% per month) which accrued from July 1, 2018 to October 23, 2018.

Copies of this Order shall be served on 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: NICHOLAS ALLEN.
Docket No. 15-0085.
Miscellaneous Order.
Filed November 19, 2019.

PACA-APP – Stay.

Jeffrey M. Chebot, Esq., and Grant E. Fortson, Esq., for Petitioner.
Charles L. Kendall, Esq., for AMS.
Initial Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING STAY

On November 15, 2019, Nicholas Allen filed a Motion for Stay Order seeking a stay of the Order in *Allen*, 78 Agric. Dec. ___ (U.S.D.A. Aug. 1, 2019), confirmed by September 25, 2019 denial of the Petition for Reconsideration, pending the outcome of proceedings for judicial review. Petitioner has represented that Respondent Specialty Crops Program (now known as the Fair Trade Practices Program), Agricultural Marketing Service, has no objection to the requested stay.

In accordance with 5 U.S.C. § 705, Mr. Allen's Motion for Stay Order is granted. For the foregoing reasons, and the reasons set forth in the Motion for Stay, the following Order is issued.

ORDER

The Order *Allen*, 78 Agric. Dec. ___, (U.S.D.A. Aug. 1, 2019), Petition for Reconsideration denied on September 25, 2019, is stayed pending the outcome of proceedings for judicial review. This Stay order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

Further Ordered, 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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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

In re: BUCKS FRESH PRODUCE LLC.
Docket No. 19-J-0076.
Default Decision and Order.
Filed August 28, 2019.

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CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

The Fruit Club.
Docket No. 19-J-0104.
Consent Decision and Order.
Filed August 16, 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

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