AGRICULTURE DECISIONS

Volume 57

January – June 1998

UNITED STATES DEPARTMENT
OF AGRICULTURE

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AGRICULTURE DECISIONS

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COURT DECISION

GORE, INC. d/b/a PURE MILK CO. v. GLICKMAN.
No. 97-50047.
Decision filed April 2, 1998.

(Cite as: 137 F.3d 863)

Prejudgment interest - Milk producer-settlement fund.

The sole issue before the Fifth Circuit was whether Gore was entitled to prejudgment interest on funds the court previously ordered to be refunded from the producer-settlement fund. The court reviewed the question de novo. The AAA and the Department's regulations are silent as to the issue of prejudgment interest, so the court looked to whether the award of interest would further congressional policy under the AAA and considered legal precedent of other courts, as well as the implications of sovereign immunity. In so doing, the court concluded that awarding prejudgment interest was warranted.

United States Court of Appeals,
Fifth Circuit.

Before KING and JONES, Circuit Judges, and WERLEIN,* District Judge.

WERLEIN, District Judge:

The sole issue in this appeal is whether Plaintiff-Appellant Gore, Inc. is entitled to prejudgment interest on a refund it recovered in *Gore, Inc. v. Espy*, 87 F.3d 767 (5th Cir.1996) ("Gore I"). In "Gore I" this Court held that Gore was entitled to recover from the milk producer-settlement fund the sum of $366,772.28 in payments that Gore had made into that fund pursuant to an erroneous determination made by the Secretary of Agriculture. We now hold that Gore is also entitled to recover from the producer-settlement fund prejudgment interest on those payments, and we therefore REVERSE the judgment of the district court that denied prejudgment interest.

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*District Judge of the Southern District of Texas, sitting by designation.

Background

The background of this lawsuit, and various policies underlying the Agriculture Marketing Agreement Act of 1937[1] ("AAA"), are set forth in "Gore I." The details may be found there of how Gore paid $366,772.38 into the producer-settlement fund in 1990-91, and then successively sought–as required by law–administrative review by the Secretary of Agriculture, which review was conducted and decided by an administrative law judge, further review and decision by the Secretary's chief judicial officer, and finally judicial review in the courts. Not until this Court's decision in July, 1996, which held that the Secretary's determination under 7 C.F.R. § 1126.4 was arbitrary, capricious, and plainly inconsistent with the text of the regulation, was Gore's position finally vindicated. Thereupon, this Court rendered judgment that Gore recover from the producer-settlement fund a refund of the full sum, and remanded the case for appropriate disposition.

The district court appropriately entered judgment in Gore's favor for the principal sum of $366,772.38, on November 7, 1996, but later denied Gore's motion to amend the judgment to add prejudgment interest on the refund, which by then had been withheld by the producer-settlement fund for approximately six years. Gore now appeals from the judgment of the district court that denied prejudgment interest.

Analysis

The availability of prejudgment interest under the AAA is a question of law, which is reviewed de novo. *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores*, 15 F.3d 1275, 1281 (5th Cir.1994), *cert. denied*, 513 U.S. 1126, 115 S.Ct. 933, 130 L.Ed.2d 879 (1995) ("Questions of law are subject to de novo review while findings of fact will be disturbed only if we find that they are clearly erroneous.").

The AAA does not expressly provide for or prohibit an award of prejudgment interest in a refund case. Likewise, the regulations of the Department of Agriculture promulgated under the AAA also are silent on the subject. It is provided, however, that "[a]ny monies found to be due a handler from the market administrator shall be paid promptly to such handler. . . ." 7 C.F.R. § 1126.77

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[1] 7 U.S.C. § 601 *et seq.* (1980 & Supp. 1997).

(1997).[2]

In a variety of situations the United States Supreme Court has provided the principles for determining whether prejudgment interest should be awarded when a specific statute is silent on the subject. In *Rodgers v. United States*, 332 U.S. 371, 373, 68 S.Ct. 5, 7, 92 L.Ed. 3 (1947), the Court put it this way:

> [T]he failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. *Billings v. United States*, 232 U.S. 261, 284-288, 34 S.Ct. 421, 425-427, 58 L.Ed. 596. For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court.

In *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 194, 115 S.Ct. 2091, 2095, 132 L.Ed.2d 148 (1995), a unanimous Court (J. Breyer not participating) stated:

> Although Congress has enacted a statute governing the award of post-judgment interest in federal court litigation, *see* 28 U.S.C. § 1961, there is no comparable legislation regarding prejudgment interest. Far from indicating a legislative determination that prejudgment interest should not be awarded, however, the absence of a statute merely indicates that the question is governed by traditional judge-made principles.

See also Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 336-337, 108 S.Ct. 1837, 1842-43, 100 L.Ed.2d 349 (1988); *West Virginia v. United States*, 479

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[2]The "market administrator" is selected by the Secretary, and heads the agency for the administration of a federal milk marketing order. 7 C.F.R. § 1000.3 (1997). The nation is divided into more than 40 marketing areas, and the Secretary issues numerous marketing orders (a few of which apply to more than one marketing area). 7 U.S.C. § 608c(5) (Supp. 1997). This case arises from events in the Texas marketing area, which geographically consists of most of the State of Texas. *See* 7 C.F.R. § 1126.2 (1997).

The market administrator for the Texas marketing area is required to establish and maintain "a separate fund known as the 'producer-settlement fund,' into which he shall deposit the payments made by handlers. . . ." 7 C.F.R. § 1126.70 (1997). It is into this specific producer-settlement fund for the Texas marketing area that the market administrator was required to deposit the payments erroneously ordered to be paid during 1990-91.

U.S. 305, 308-313, 107 S.Ct. 702, 705-707, 93 L.Ed.2d 639 (1987).

This Court also has held that in the absence of a specific statute authorizing prejudgment interest, the courts look to whether "an award of such interest would further the congressional policies" of the specific statute at issue. *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 488 (5th Cir.1990); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 984 n. 11 (5th Cir.1991) ("[A]n award of prejudgment interest under ERISA furthers the purposes of that statute by encouraging plan providers to settle disputes quickly and fairly, thereby avoiding the expense and difficulty of federal litigation."); *see also, e.g.*, *West Virginia v. United States*, 479 U.S. at 310-11, 107 S.Ct. at 706 (looking to the purpose behind the Disaster Relief Act to determine if prejudgment interest is recoverable); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274-75 (3d Cir.1987) (looking to purpose of FELA and history of cases interpreting it to determine whether prejudgment interest is available).

In examining the purpose of a statute and applying "traditional judge made principles," the case law reflects that those principles include "the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed", *Rodgers*, 332 U.S. at 373, 68 S.Ct. at 7; fairness, *Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403 (1962); *Hansen*, 940 F.2d at 984 n. 11; *McLaughlin v. Lindemann*, 853 F.2d 1307, 1308 (5th Cir.1988); ensuring full compensation, *City of Milwaukee*, 515 U.S. at 194, 115 S.Ct. at 2095; *West Virginia v. United States*, 479 U.S. at 310 n. 2, 107 S.Ct. at 706 n. 2; expeditious settlement, *Hansen*, 940 F.2d at 984 n. 11; and the need to conform to historical legislative and judicial precedent. *Monessen*, 486 U.S. at 338-339, 108 S.Ct. at 1844.

Turning to the instant legislation, it is well recognized that Congress enacted the AAA to regulate the milk industry in response to "intense competition in the production of fluid milk products." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 341, 104 S.Ct. 2450, 2452, 81 L.Ed.2d 270 (1984). To curb destabilizing competition in the industry, Congress gave to the Secretary of Agriculture the authority to issue milk market orders that established "minimum prices that handlers (those who process dairy products) must pay to producers (dairy farmers) for their milk products." *Id.*

> The "essential purpose [of this milk market order scheme is] to raise producer prices," S.Rep. No. 1011, 74th Cong., 1st Sess., 3 (1935), and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers.

Id.

In achieving that overarching purpose of the AAA, at least two related objectives--pertinent to this case--are evident from the legislative scheme. First, and of paramount importance, is the requirement that handlers purchasing milk products promptly remit to the producer-settlement fund the amounts assessed by the Secretary in order that the producers can be promptly paid for their milk products. Second, and as something of a corollary to the first objective, the Act reflects a scheme intended to achieve fairness also for the handlers.

Several provisions in the AAA serve to compel prompt payments by handlers. To begin with, federal district courts are given jurisdiction

> specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter . . . .

7 U.S.C. § 608a(6) (1980). In a landmark case, the Supreme Court held that the Secretary of Agriculture was entitled under § 608a(6) to obtain a mandatory injunction commanding a handler to comply with a milk order by paying into the producer-settlement fund the sums alleged by the Secretary to be due to the fund notwithstanding the handler's contention that the sum demanded had been based upon faulty inspection of the handler's accounts and improper tests of the handler's milk and milk products. *United States v. Ruzicka*, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946). The Supreme Court in *Ruzicka* acknowledged that even though errors are inevitable, which may call for payments by handlers into the producer-settlement fund, "[t]he reliance of the industry upon that Fund makes prompt payments into it imperative." *Id.* at 289, 67 S.Ct. at 208. Moreover, because the handler in *Ruzicka* had not availed himself of the administrative review process provided by § 608c(15)(A), he was precluded from seeking judicial relief from the Secretary's order in defending the case that had been filed by the Secretary to enforce the order. The Court emphasized the congressional purpose underlying the disparate authority conferred upon the Secretary to obtain judicial enforcement of his possibly erroneous order, while denying to the handler the right to seek judicial protection from an invalid order until he had first exhausted his administrative remedies:

> In large measure, the success of this scheme revolves around a "producers" fund which is solvent and to which all contribute in accordance with a formula equitably determined and of uniform applicability. Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness

> to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements. To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find. That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance. It thereby safeguarded individual as well as collective interests.

Id. at 293, 67 S.Ct. at 210.

In addition to providing the Secretary with preferred access to the courts for enforcement of his orders, the statute includes other incentives, both criminal and civil, to assure prompt payments by handlers into the producer-settlement fund. Title 7 U.S.C. § 608c(14)(A) provides that any handler who violates any provision of a milk order issued under § 608c shall, on conviction, be fined not less than $50 or more than $5,000 for each violation, and each day during which such violation continues is deemed a separate violation. Similarly, § 608c(14)(B) imposes civil penalties not exceeding $1,000 for each such violation, and each day the violation continues is deemed a separate violation.[3] The Secretary also has adopted a regulation to require a handler to pay interest at the rate of three-fourths of one percent per month on unpaid obligations to the Texas area producer-settlement fund. 7 C.F.R. § 1126.78 (1997). Again, the economic compulsion reflected in the statutory and regulatory scheme serves that important policy of the Act to make certain that milk payments are promptly made in order that the producers may be regularly paid in accordance with the overriding statutory purpose.

Another objective of the AAA, however, is that handlers be treated with fairness. Thus, 7 U.S.C. § 608c(15) provides that handlers have a right to administrative review of orders that they challenge and, after exhausting administrative review, they may have access to the federal judiciary to determine whether the Secretary's ruling was made in accordance with law.[4] It is clear that

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[3]There are exceptions in both subsections (A) and (B) for administrative review petitions filed with the Secretary in good faith and not for delay to challenge the Secretary's orders.

[4] To challenge an order of the Secretary, a handler must file a verified petition with the Secretary. 7 C.F.R. § 900.52 (1997). A hearing is then held before an administrative law judge, who issues a written decision. 7 C.F.R. §§ 900.60, 900.64 (1997). Thereafter, the administrative law judge's decision can be appealed to the chief judicial officer, who issues the Secretary's final decision on the issue. 7 C.F.R. §§

(continued...)

a handler who desires to challenge a payment order must first exhaust his administrative remedies. *Id.; Alabama Dairy Products Ass'n, Inc. v. Yeutter*, 980 F.2d 1421, 1423-24 (11th Cir.1993). In *Ruzicka* the Supreme Court viewed this procedure as providing to

> an aggrieved handler an appropriate opportunity for the correction of errors or abuses by the agency charged with the intricate business of milk control. In addition, if the Secretary fails to make amends called for by law the handler may challenge the legality of the Secretary's ruling in court. Handlers are thus assured opportunity to establish claims of grievances while steps for the protection of the industry as a whole may go forward.

Id. at 292, 67 S.Ct. at 209. The Court specifically found that the provisions of the AAA "taken in their entirety" constitute "a means for attaining the purposes of the Act while at the same time protecting adequately the interests of individual handlers." *Id.*

With these well-recognized policies and objectives of the AAA in mind, we turn to the specific question of whether an award of prejudgment interest on a refund to a handler would "further the congressional policies" of the Act. We conclude that it would. Prejudgment interest, like any other interest, is to compensate one for the time value of money. *Brabson v. United States*, 73 F.3d 1040, 1044 (10th Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 607, 136 L.Ed.2d 533 (1996) (prejudgment interest is designed to "compensate the injured victim for the lost time value of money"); *Motion Picture Ass'n of Am., Inc. v. Oman*, 969 F.2d 01154, 1157 (D.C.Cir.1992) ("[I]nterest compensates for the time value of money, and thus is often necessary for full compensation."); *In the Matter of Continental Ill. Secs. Litigation*, 962 F.2d 566, 571 (7th Cir.1992)("The cost of delay in receiving money to which one is entitled is the loss of the time value of money, and interest is the standard form of compensation for that loss.").

It plainly is not an objective of the Act to require handlers to pay into the fund monies that they do not actually owe, nor to provide to producers windfalls to which they are not entitled. To deny to handlers the time value of money that the Secretary has wrongfully ordered them to pay, and from which the producer-settlement fund has benefitted during the time that the funds were withheld, would exacerbate the wrong and subvert the companion objectives described above,

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[4](...continued)
900.65, 900.66 (1997). Only after those steps are taken may a handler seek judicial review of the Secretary's decision in federal district court. 7 U.S.C. § 608(c)(15)(B) (1980).

namely, to assure prompt compliance by handlers with the Secretary's payment orders, even before administrative and judicial review, while at the same time treating the handlers with fairness.

As for the first of these objectives, if a handler may recover prejudgment interest on a payment that he is wrongfully ordered to pay, then the economic incentive upon the handler promptly to make that payment is materially increased. In other words, the handler's alternatives of withholding the contested payment and risking liability for substantial interest and penalties if the contest fails, or paying the contested amount in confidence of receiving prejudgment interest on the refund if the contest succeeds--coupled with no additional liability if the contest fails--additionally discourages a handler from choosing not to comply even with contested orders to make payments into the fund. This incremental financial pressure upon the handler to pay into the fund an amount that he contests thereby furthers the congressional policies of the Act and is in full harmony with the legislative scheme.

As for the corollary objective to treat with fairness the handlers, the statute's administrative review procedure, 7 U.S.C. § 608c(15), authorizes handlers to petition the Secretary for agency review of the Secretary's orders and thereby obtain relief from obligations that are not in accordance with law. The right of the handler ultimately to obtain judicial review is a reinforcement of this statutory policy of fairness toward the handlers. Administrative review of agency orders, moreover, is generally intended to resolve disputes more quickly than may be possible through judicial proceedings. The principle favoring expeditious resolution of handler disputes is reflected in the regulation that "[a]ny monies found to be due to a handler from the market administrator shall be paid promptly to such handler . . . ." 7 C.F.R. § 1126.77 (1997). Potential liability for prejudgment interest would further encourage expeditious and careful administrative review of contested orders and prompt payments of refunds that are due. The free use of money, that is, the right to order that payments be made into the fund without risk of consequences, even including, as here, from an order adjudged to have been based on an interpretation that was "arbitrary, capricious, and plainly inconsistent with the text of the regulation," "Gore I" at 769, is a disincentive to prompt and efficient administrative review. Conversely, the fund's potential liability for prejudgment interest would tend to impel the Secretary to conduct timely and objective reviews of his contested orders. This also advances the congressional purpose that handlers be treated with fairness.

In the instant case years elapsed between Gore's making of the required payments into the fund in 1990-91 and the conclusion of the administrative and judicial proceedings in Gore's favor in late 1996. To deny a handler prejudgment

interest on money that he did not owe in accordance with law but was required to pay by reason of an arbitrary, capricious, and erroneous order of the Secretary, which Order deprived the handler of his money for a number of years, would mock the statutory objective of treating handlers with fairness.

Interestingly, the Secretary has adopted a regulation to collect interest on delinquent amounts not paid into the producer-settlement fund by the handler. 7 C.F.R. § 1126.78 (1997). This, in effect, is prejudgment interest. The Secretary's implicit recognition of the time value of money if the money is owed to the fund, but disregard of that principle if the fund is obligated to refund the money to the handler, reflects a serious inequity.[5] Equitable considerations are also considered in determining whether prejudgment interest should be awarded. *Rodgers*, 332 U.S. at 373, 68 S.Ct. at 7.

We are also guided by the precedents of other courts. In *Abbotts Dairies v. Butz*, 584 F.2d 12, 21 & n. 18 (3d Cir.1978), a milk handler's appeal was reversed in his favor with instructions that the producer-settlement fund would "serve as the source for the refund" and that the "district judge must also consider the issue whether interest is recoverable and, if so, its amount." Other reported decisions have almost uniformly awarded prejudgment interest to milk handlers on amounts ordered to be refunded from producer- settlement funds. *See Sani-Dairy v. Yeutter*, 935 F.Supp. 608, 610 (W.D.Pa.1995), *aff'd*, 91 F.3d 15 (3d Cir.1996); *Kinnett Dairies, Inc. v. Madigan*, 796 F.Supp. 515, 516 (M.D.Ga.1992); *Kreider Dairy Farms, Inc. v. Glickman*, 1996 WL 472414, at *10 (E.D.Pa. Aug.15, 1996); *Cumberland Farms, Inc. v. Lyng*, 1989 WL 85062, at *3 (D.N.J. July 18, 1989).[6] Moreover, notwithstanding the uniform precedents awarding payments of prejudgment interest to milk handlers receiving refunds from producer- settlement

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[5]This should not be taken to imply that the rate of prejudgment interest for which the producer-settlement fund is held liable must be equal to the rate that the Secretary imposes upon handlers for delinquent accounts. The latter rate under the Texas order is presently three-fourths of one percent per month. It is unlikely that prejudgment interest on a refund owed to the handler would exceed the postjudgment interest rate under 28 U.S.C. § 1961, which, for example, is currently only 5.407% per annum. In any event, when prejudgment interest is due, it is left to the sound discretion of the district court to set the amount. *United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 630-31 (5th Cir.1992), *cert. denied*, 507 U.S. 917, 113 S.Ct. 1274, 122 L.Ed.2d 669 (1993); *Hansen*, 940 F.2d at 984-985.

[6]The only arguable exception to this line of cases is *Lawson Milk Co. v. Freeman*, 358 F.2d 647 (6th Cir.1966), in which the court applied a specific regulation contained in the milk marketing order for the Cleveland marketing area, and held that the refund paid to the handler was not an "overdue account" and did not have a "due date" when the Secretary paid the refund, and therefore interest was not owed on the account under the specific language of the regulation. The Texas marketing area order does not contain such a provision applicable to refunds paid by the Secretary.

funds, Congress has taken no action to bar this result. Congress's "failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'" *Monessen*, 486 U.S. at 338, 108 S.Ct. at 1844 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)).

Finally, the Secretary argues that an award of prejudgment interest, in the absence of specific statutory authority, would infringe on the sovereignty of the United States. In oral arguments the Secretary relied on *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1385 (9th Cir.1995), *rev'd sub nom on other grounds Glickman v. Wileman Bros. & Elliott*, --- U.S. ----, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). In *Wileman Bros.*, the Ninth Circuit had held that the Secretary's nectarine and peach marketing orders imposing upon handlers assessments to be used for generic advertising violated the handlers' First Amendment rights. The court of appeals held that the handlers' refund claims for the dollars spent on generic advertising were not barred by sovereign immunity because they were equitable claims for the return of improper assessments. The court of appeals also held that the handlers' additional claims for money damages from the United States based upon the alleged violation of their First Amendment rights, distinct from the refund claims, were barred unless the United States waived its sovereign immunity. Applying that holding to the instant case, the Secretary argues that an award of prejudgment interest would be tantamount to a judgment for money damages against the United States in violation of sovereign immunity.

The Supreme Court reversed the Ninth Circuit's decision in *Wileman Bros.* on the First Amendment liability question, and thus the circuit court's discussion of the relief to which the handlers were or were not entitled was rendered moot. Nonetheless, a reading of the Ninth Circuit's opinion reflects no consideration, no discussion, and no holding on whether the handlers were entitled to recover from the fund prejudgment interest on a properly awarded refund. It is true, of course, that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S.Ct. 2957, 2961, 92 L.Ed.2d 250 (1986). This proposition of law would govern the parties' dispute over prejudgment interest if the case were indeed a claim against the United States, and if an award of prejudgment interest were to be paid from the "public treasury or domain, or interfere with public administration." *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 33 (5th Cir.1992), *cert. denied*, 508 U.S. 906, 113 S.Ct. 2331, 124 L.Ed.2d 243 (1993) (citations omitted). But unlike *Wileman Bros.*, Gore sought no money damages against the United States. The parties agree, in fact, that the producer-settlement fund for the Texas marketing

area, from which an award of prejudgment interest would be paid, contains no federal funds.[7] The fund contains only payments made by milk handlers together with whatever earnings the fund receives from the market administrator's prudent management. 7 C.F.R. § 1126.70 (1997). Moreover, the Secretary of Agriculture, to whom Congress has delegated responsibility for administration of the Act, and the market administrator, who is selected by the Secretary, 7 C.F.R. § 1000.3 (1997), are acting here simply as administrators of the Act and as managers of the producer-settlement fund. A judgment for prejudgment interest in this case, therefore, will impact only the milk producer-settlement fund into which Gore's payments were deposited in 1990-91 pursuant to the Secretary's erroneous order. The judgment will not operate against the Treasury of the United States, and will not infringe on the sovereign immunity of the United States.

The judgment appealed is therefore REVERSED, and the matter is REMANDED to the district court to amend the judgment by adding an appropriate award of prejudgment interest.

DONALD B. MILLS, INC., a CALIFORNIA CORPORATION DOING BUSINESS AS DBM MUSHROOMS v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CV-F-97-5890 OWW SMS.
Decided March 26, 1998.

Mushrooms - Generic advertising - Assessments constitutional - First Amendment - Freedom of speech - Freedom of association - Equal protection.

The United States District Court for the Eastern District of California affirmed the decision of the Secretary that requiring producers to finance a generic advertising program to maintain and expand markets for mushrooms, pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990 (MPRCIA), does not infringe upon a producer's constitutional rights under the First Amendment to freedom of speech and freedom of association. The court held that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of the producer's First Amendment challenges. The court also held that the fact that the MPRCIA exempts from assessments certain classes of producers does not violate the equal protection clause of the Fifth Amendment because the MPRCIA serves a legitimate government interest and the classifications are rationally related to the legitimate government purpose.

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[7]Appellee's counsel at oral argument conceded that he had no reason to dispute that an award of prejudgment interest would be paid from the producer-settlement fund.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56

I. INTRODUCTION

Plaintiff Donald B. Mills, Inc. instituted this action against Defendant United States Department of Agriculture ("USDA"), arguing that the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101-6112, and the applicable implementing regulations, 7 C.F.R. §§ 1209 *et seq.*, impinge Plaintiff's constitutional rights under the First and Fifth amendments.

Defendant USDA moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiff opposes the pending motion. For the reasons set forth below, USDA's motion for summary judgment is GRANTED.

II. BACKGROUND

A. Parties

Plaintiff Donald B. Mills, Inc. ("DBM"), a California corporation doing business as DBM Mushrooms, is a "producer" and "first handler" subject to the disputed statutory and regulatory provisions. Plaintiff grows approximately 3 million pounds of mushrooms per year, 75% of which goes to the fresh market. Defendant USDA administers the Mushroom Promotion, Research, and Consumer Information Act of 1990 (the "Mushroom Promotion Act"), 7 U.S.C. §§ 6101-6112, and implements the regulations thereunder.

B. Statutory Overview

In promulgating the Mushroom Promotion Act, Congress recognized that "the production of mushrooms plays a significant role in the Nation's economy," and "the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation." 7 U.S.C. § 6101(a)(2), (5).

Congress concluded that "the *cooperative* development, financing, and

implemenation of a *coordinated* program of mushroom promotion, research, and consumer information are *necessary to maintain and expand existing markets for mushrooms*." 7 U.S.C. § 6101(a)(6) (emphasis added).

The overarching purpose of this coordinated promotion, research and consumer and industry information[1] program is to:

(1) strengthen the mushroom industry's position in the marketplace;

(2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b).

The activities of the Mushroom Promotion Act are internally funded by an assessment of not more than a penny per pound to be paid by producers and importers and collected by all first handlers of mushrooms produced in or imported into the United States for the domestic market. *Id.* § 6104(g). Importers and producers who import and/or produce less than 500,000 pounds of mushrooms per year, sellers of U.S. mushrooms to the export markets, and sellers to the domestic processed, as opposed to fresh, mushroom market are exempted from the obligation to pay assessments. 7 U.S.C. §§ 6102(6), (9), (11) and 6104(g)(4).

Section 6104(c) of the Act authorizes the establishment of the "Mushroom Council" to, among other things, administer the order and "propose receive, evaluate, approve and submit to the Secretary for approval . . . budgets, plans, and projects of mushroom promotion, research, consumer information, and industry information . . . ."

C. Administrative Procedures

Plaintiff filed a petition with the USDA on March 14, 1995, alleging the Mushroom Promotion Act violated its rights under the First and Fifth Amendments to the United States Constitution. On April 26, 1996, the Administrative Law Judge issued an initial decision and order concluding that the Mushroom Promotion Program contravened Plaintiff's First Amendment rights, but did not infringe the Equal Protection clause of the Fifth Amendment. The

[1]"Industry information" is defined by the statute as "information and programs that are designed to lead to the development of new markets and marketing strategies, increased efficiency, and activities to enhance the image of the mushroom industry." 7 U.S.C. § 6102(7).

ALJ's decision was subsequently appealed to the USDA Judicial Officer.

On August 27, 1997, the Judicial Officer issued a decision holding that *Glickman v. Wileman*, 117 S.Ct. 2130 (1997) disposed of Plaintiff's First Amendment claim and upheld the ALJ's decision that the Mushroom Promotion Act was not violative of the Equal Protection provisions of the Fifth Amendment.

D. Plaintiff's Complaint

DBM initiated this suit on September 17, 1997 seeking review of, pursuant to 7 U.S.C. § 6106(b) and 5 U.S.C. §§ 702-706, the USDA Judicial Officer's rejection of Plaintiff's constitutional challenges to the Mushroom Promotion Act.

Plaintiff "vehemently" disagrees with the use of assessments to fund generic advertising and believes it receives no benefit from the promotional messages and generic advertising strategies formulated by the Mushroom Council. Plaintiff alleges that the Mushroom Promotion Act encroaches on its First Amendment right to freedom of speech and association and its Fifth Amendment right to equal protection of the laws.

Plaintiff seeks a declaratory judgment that the Mushroom Promotion Act violates Plaintiff's constitutional rights, an exemption from the payment of assessments and attorneys' fees and costs.

III. LEGAL STANDARD

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252-56 (1986). The non-moving party cannot simply rest on its allegation without any significant probative evidence tending to support the complaint. *Id.* at 249.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning

an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-23.

Nevertheless, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor." *Liberty Lobby*, 477 U.S. at 255. Even where the basic facts are undisputed, if reasonable minds could differ as to the inferences to be drawn from those facts, summary judgment should be denied. *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992).

Evidence submitted in support of or in opposition to a motion for summary judgment must be admissible under the standard articulated in Rule 56(e). *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Documents, including discovery documents, can be used on a motion for a summary judgment if appropriately authenticated by affidavit or declaration although such documents are not admissible in that form at trial. *United States v. One Parcel of Real Property*, 904 F.2d 487, 491-492 (9th Cir. 1990); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983). Supporting and opposing affidavits must be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Fed. R. Civ. P. 56(e); *see also Taylor v. List*, 880 F.2d 1040, 1045 n.3 (9th Cir. 1989).

"Questions of statutory construction and legislative history present legal questions which are properly resolved by summary judgment." *Coyote Valley Band of Pomo Indians v. United States*, 639 F. Supp. 165, 167 (E.D. Cal. 1986); *see also Asuncion v. District Director*, 427 F.2d 523, 524 (9th Cir. 1970).

IV. DISCUSSION

A. Glickman v. Wileman is Dispositive of Plaintiff's First Amendment Challenges

In *Glickman v. Wileman*, 117 S. Ct. 2130 (1997), the Supreme Court held that requiring "handlers" to finance a generic advertising program did not offend or infringe upon the handlers' constitutional rights under the First Amendment. *Id.* at 2137-2142 (there exists "no First Amendment right to be free of coerced subsidization of commercial speech"). This unambiguous principle governs and disposes of Plaintiff's First Amendment challenge to the Mushroom Promotion Act.

Plaintiff nonetheless argues that *Glickman* is factually distinguishable from

this case. Plaintiff observes *Glickman* is an advertising case decided under the comprehensive scheme of the federal Agricultural Marketing Agreement Act, whereas the Mushroom Promotion Act does not regulate supply or otherwise fetter Plaintiff's ability to act "independently" and exists only to collect funds for "purely collective expressive activity." Specifically, Plaintiff refers to the following language from the *Glickman* opinion:

> In [determining whether coerced subsidization of the advertising program raises a First Amendment issue or is simply a question of economic policy] we stress the importance of the statutory context in which [this question] arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent activity that characterize other portions of the economy in which competition is fully protected by the anti-trust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 2138.

Plaintiff suggests that the *Glickman* holding governs only if it is factually *identical* to the case to which it is to be applied. Plaintiff's narrow, restrictive interpretation and application of the *Glickman* opinion is wholly unconvincing and contravenes the foundational principles of common law and *stare decisis*.

Contrary to Plaintiff's suggestion, it is the underlying *reasoning and principles* announced in *Glickman* that govern the issues before the court. Nothing in *Glickman* dictates that a contrary outcome is mandated for a "stand-alone" advertising program. *Cf. Glickman*, 117 S.Ct. at 2138 ("Thus, none of our First Amendment jurisprudence provides any support for the suggestion that the *promotional regulations should be scrutinized under a different standard* than that applicable to the other anticompetitive features of the marketing orders" (emphasis added).).

At issue in *Glickman*, was a "species of economic regulation" promulgated by Congress designed to "stimulate" consumer demand for an agricultural product through generic advertising. *Id.* at 2143. The Supreme Court stated that it would not override "the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial."

Similarly here, Congress has concluded that the Mushroom Promotion Program would "strengthen the mushroom industry's position in the marketplace" by maintaining and expanding existing markets for mushrooms, while

endeavoring to establish new markets and uses for mushrooms. 7 U.S.C. § 6101(b). Expansion of consumer demand and the development of new markets for mushrooms is itself a "regulatory" objective and generic advertising is a rational means to fulfilling that objective. *See United States v. Frame*, 885 F.2d 1119, 1126-27 (3d Cir. 1989); *see also* 7 U.S.C. § 6102(7) (the purpose of "industry information" is "to lead to the development of new markets and marketing strategies, increased efficiency, and activities to enhance the image of the mushroom industry."); *In re Donald B. Mills, Inc.*, 1997 WL 577545, at *13 (USDA Aug. 27, 1997) ("Generic promotion is a cooperative effort by sellers of a relatively homogenous commodity" designed to increase the overall demand for that commodity.). The fact that supply is not regulated does not diminish from the demand management aspects of the regulation. The court is not authorized to evaluate the wisdom, or lack thereof, of the economic philosophies underlying this legislation or to substitute judicial judgment for that of Congress.

In its complaint, Plaintiff asserts it "vehemently disagrees" with the promotional messages issued under the Mushroom Promotion Act. For example, during the administrative proceedings, Plaintiff criticized the Mushroom Council's Valentine's Day promotion of mushrooms as an aphrodisiac because the Plaintiff had unsuccessfully promoted mushrooms as aphrodisiacs. Plaintiff also criticized the Mushroom Council's "Blueprint for Profit" promotion, primarily because the Plaintiff believed that the advertisement spelled the word "portobello" incorrectly. Plaintiff's objection to the wisdom or efficacy of the advertising strategies implemented does not raise a cognizable claim under the First Amendment. *Glickman*, 117 S.Ct. at 2140 (citing *Ellis v. Railway Clerks*, 466 U.S. 435, 456, 104 S.Ct. 1883, 1896, 90 L.Ed.2d 428 (1984) ("The mere fact that objectors believe their money is not being well spent `does not mean [that] they have a First Amendment complaint.'")). "These complaints, if they have any merit, are all challenges to the administration of the program that are more properly addressed to the Secretary." *Id.* at 2137 n.11.

Nor has Plaintiff presented any evidence that the promotional messages approved by the Mushroom Council engender a "crisis of conscience" that offends the First Amendment. That is, Plaintiff has not shown that the advertising programs:

1) Restrain the freedom of speech of any producer to communicate any message to any audience.

2) Compel any person to engage in any actual or symbolic speech.

3) Compel the producer to endorse or to finance any political or ideological views.

Id. at 2138.

Absent such a showing, Plaintiff has not demonstrated that the generic advertising programs at issue run afoul of the First Amendment.

Plaintiff also argues its claim is grounded on a violation of associational rights. While the First Amendment does not expressly protect a right of association, the Supreme Court has recognized such a right in "certain circumstances." *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989). Those circumstances include the freedom to "enter into and maintain certain intimate human relationships" and "to associate for the purpose of engaging in those activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* (*citing Roberts v. United States Jaycees*, 468 U.S. 609 (1984)).

This case involves no intimate human relationships, but rather, is a legislative effort to strengthen and increase the fresh mushroom domestic market through a collective research, promotion and marketing program. Nor does this case involve Plaintiff's own attempts to associate for First Amendment purposes. *Cf. Frame*, 885 F.2d at 1131.

Glickman held that using assessments to fund collective advertising programs, "do not, as a general matter, impinge on speech or *association* rights." 117 S. Ct. at 2140 n.16 (emphasis added) (*citing Roberts v. United States Jaycees*, 468 U.S. 609, 643, 635, 104 S. Ct. 3244, 3256, 82 L. Ed. 2d 462 (1984) (O'Connor, J., concurring) (Finding "only minimal constitutional protection of the freedom of commercial association" and that an association whose "activities are not predominantly of the type protected by the First Amendment" is subject to "rationally related state regulation of its membership")). Indeed, the *Glickman* court noted that the handlers "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 2139. Also, "the advertising is attributed not to them, but to the California Tree Fruit Agreement or "California Summer Fruits." Similarly here, Plaintiff merely finances the generic advertising program. It does not personally disseminate the advertising programs it so "vehemently" opposes nor is there evidence that the advertisement is directly attributed to Plaintiff.

Plaintiff suggests that little weight should be accorded this language from *Glickman* because the proposition is bolstered only by Justice O'Connor's

concurring opinion in *Roberts*.[2]

The Supreme Court's reliance on a concurring opinion does not in any way diminish its value as precedent nor does it relieve the district court from following and effectuating the Supreme Court's rulings. *Alston v. Redman*, 34 F.3d 1237, 1246 (3d Cir. 1994) (although language in Supreme Court's opinion is dicta, "we must consider it with deference, given the High Court's paramount position in our `three-tier system of federal courts,' . . . and its limited docket"), *cert. denied*, 513 U.S. 1160, 115 S. Ct. 1122, 130 L. Ed. 2d 1085 (1995); *Hendricks County Rural Elec. Membership Corp. v. N.L.R.B.*, 627 F.2d 766, 768 n. 1 (7th Cir. 1980) ("A dictum in a Supreme Court opinion may be brushed aside by the Supreme Court as dictum when the exact question is later presented, but it cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court."), *rev'd on other grounds*, 454 U.S. 170, 102 S. Ct. 216, 70 L. Ed. 2d 323 (1981). Contrary to plaintiff's arguments, *Glickman* was squarely decided on "First Amendment grounds" and it made no distinction between speech and association in the "ideologically neutral" context of a generic advertising program. Further, Plaintiff has made no argument that assessments have been used for nongermane ideological or political purposes. USDA's motion for summary judgment is GRANTED as to all of Plaintiff's First Amendment challenges to the Mushroom Promotion Act.

B. The Mushroom Promotion Act Does Not Contravene the Equal Protection Clause of the Fifth Amendment

Plaintiff argues that the Mushroom Promotion Act violates the Equal Protection clause of the Fifth Amendment because it allows "free riders" to benefit from the generic advertising, promotion, and research without being required to contribute towards the costs of administering the Mushroom Promotion program. Specifically, Plaintiff objects to the fact that the Mushroom Promotion Act exempts from assessment producers who: (1) produce 500,000 pounds of mushrooms or less a year; (2) sell mushrooms to the processing market; and (3) export mushrooms. 7 C.F.R. § 1209.52.

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[2]Any statement in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), indicating Plaintiffs have a right not to associate with a program such as the one at issue is dicta. No such question was addressed in *Roberts*, and *Roberts* was subsequently limited by *City of Dallas v. Stanglin*, 490 U.S. 19 (1989). Moreover, as *Glickman* indicates, *Roberts* does not unambiguously hold a compelling interest is needed before association can be compelled. *Roberts* merely held the well-established compelling state interest in eradicating facial discrimination justified intrusion on the associational freedoms of the male members of the Jaycees. *Roberts*, 468 U.S. at 623.

Equal protection requires that all persons similarly situated be treated alike. The equal protection clause, however, does not prohibit legislative classifications, as virtually all statutes and regulations classify people. Rather, the general rule is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute are rationally related to a legitimate state interest," unless the statute creates a suspect classification that impinges upon a constitutionally protected right. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (rational test); *Pyler v. Doe*, 457 U.S. 202, 216-17; *Cecilia Packing Corp. v. USDA*, 10 F.3d 616, 624 (9th Cir. 1993) (rational test). As a mushroom grower, Plaintiff is not a member of a suspect class (i.e., one based on race, alienage or national origin) that is accorded greater protection by the constitution. Accordingly, the Mushroom Promotion Act is analyzed under a "rational" basis test.

Rational basis analysis consists of a two prong inquiry: (1) whether the challenged legislation has a "legitimate government purpose"; and (2) whether the challenged classification in the legislation is rationally related to the legitimate government purpose. *Cecilia Packing*, 10 F.3d at 625. Rational basis scrutiny "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). The legislation's classification will be upheld if there is a "plausible," "arguable," or even "conceivable" reason for the distinction made in the legislation. *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993); *Federal Communication Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993); *Vance v. Bradley*, 440 U.S. 93, 112 (1979). The court may look beyond the actual basis on which Congress acted and consider "any hypothetical basis on which it might have acted." *Roley v. Pierce City Fire Protection Dist. No. 4*, 869 F.2d 491, 493 (9th Cir. 1989).

Congress has expressly made findings concerning the Mushroom Promotion Act to easily satisfy the "legitimate government purpose" inquiry. Specifically, Congress concluded that the "production of mushrooms plays a significant role in the Nation's economy" and that "the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation." 7 U.S.C. § 6101(2), (5). Congress concluded that mushroom markets could be maintained, expanded, and developed through "the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information." These legislative findings sufficiently establish that the Mushroom Promotion Act serves a legitimate government interest. *See Block v. Community Nutrition Institution*, 467 U.S. 340, 342 (1984) (advancing the

interests of producers and raising producer prices is a legitimate government interest).

1. Classifications Under the Act are Rationally Related to the Legitimate Government Purpose

The activities of the Mushroom Promotion Act are funded by an assessment of not more than a penny per pound to be paid by all first handlers of mushrooms produced in or imported into the United States for the domestic market. 7 U.S.C. § 6104(g). Exempted from the obligation to pay assessments are importers and producers who import and/or produce less than 500,000 pounds of mushrooms per year, sellers of U.S. mushrooms to the export market, and sellers to the domestic processed, as opposed to fresh, mushroom market. 7 U.S.C. §§ 6102(6), (9), (11) and 6104 (g) (4).

Regarding the exclusion of exported mushrooms, the Judicial Officer determined that the value of exports of fresh mushrooms constitutes approximately 4% of the total value of United States mushrooms marketed in the domestic market. The USDA also argues that foreign mushroom markets are well served by foreign suppliers, and there is only a limited potential for an increase of the export market. In light of the minimal role played by mushroom exporters in comparison to the domestic market, "it is rational that Congress would choose to focus on the domestic market, thereby avoiding the administrative expense of worldwide marketing and distribution of promotional materials by the Mushroom Council." *In re Donald B. Mills, Inc.*, 1997 WL 577545, at *25 (USDA Aug. 27, 1997).

There is also a rational basis to justify the exclusion of processed mushroom handlers from paying assessments. The Judicial Officer observed that mushroom producers receive an average price of $1.03 per pound for mushrooms sold in the fresh market, compared to mushrooms sold for processing, which yield only $0.662 per pound. Most of the mushrooms produced in the United States are sold in the fresh market. Because anticipated increased sales will occur in the fresh mushroom market, charging those who principally supply the fresh market is reasonable and Congress rationally could conclude that fresh market producers should shoulder the cost of administering the Mushroom Promotion Act.

The final exemption applies to those individuals producing less than 500,000 pounds of mushrooms per year for the fresh mushroom market. In 1993-94, 529 million pounds of mushrooms were produced for the fresh market by approximately 355 producers. In 1995, the Mushroom Council collected assessments from 152 producers for approximately 515 to 518 million pounds of

fresh mushrooms. This represents 97.3% to 97.9% of total mushroom output. A reasonable extrapolation of these statistics is that approximately 203 producers who produce a total of 11 million to 14 million pounds of mushrooms annually for the fresh mushroom market are not assessed. If these 203 producers were assessed at a rate of $.0025 per pound, then the Mushroom Council would receive an additional $35,000 per year, based on the assumption that these small volume producers produce 14 million pounds annually. Congress could rationally conclude that the income gained from assessing small volume producers is so nominal that it would be offset by the costs of administering the program to such producers.

Though Plaintiff finds it objectionable that an individual who produces 550,000 pounds must pay assessments, while an individual who produces 450,000 pounds of mushrooms is exempted, this argument raises no cognizable equal protection claim. Equal Protection jurisprudence recognizes that classifications are "`not made with mathematical nicety'" and may "result[] in some inequality," but the "`problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.'" *Beach Communications*, 508 U.S. at 316 n.7 (citations omitted).

At oral argument, Plaintiff suggested that small producers "vote against" industry marketing assessment programs and that the exclusion of a large number of small producers has the opposite effect of deterring "free-riders." None of this evidence is in the Administrative Record ("AR"), nor has a request to supplement the AR been made.

Defendant's motion for summary judgment concerning Plaintiff's equal protection claim is GRANTED.

V. CONCLUSION

For the foregoing reasons, Defendant USDA's motion for summary judgement is GRANTED.

Counsel for Defendant USDA shall prepare an order in conformity with this memorandum opinion and lodge it with the Court within five (5) days following the date of service of this opinion.

IT IS SO ORDERED.

ORDER OF JUDGMENT

This matter was before the Court on March 2, 1998 for a hearing on defendant United States Department of Agriculture's Fed. R. Civ. P. 56 motion for summary

judgment. After considering the parties' written and oral arguments, and for the reasons stated in the Court's Memorandum Opinion and Order Re: Defendant's Motion For Summary Judgment Pursuant To Fed. R. Civ. P. 56, the Court grants defendant's motion for summary judgment. Judgment is hereby entered for defendant.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: CAL-ALMOND, A DIVISION OF MORVEN PARTNERS L.P., A DELAWARE LIMITED PARTNERSHIP.
97 AMA Docket No. F&V 97-0001.
Decision and Order filed March 6, 1998.

Dismissal of petition — First amendment — Almonds — Motion to dismiss — Motion to amend petition.

The Judicial Officer affirmed Chief Judge Palmer's (ALJ) Initial Decision and Order dismissing a Petition filed by an almond handler under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) (AAA), seeking relief from the requirement that handlers pay assessments for advertising under the Almond Order (7 C.F.R. pt. 981) on the ground that compelled assessments under the Almond Order violate Petitioner's First Amendment right to freedom of speech. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising does not implicate the First Amendment, is dispositive of the First Amendment issue in the proceeding. Any doubt that *Wileman* has equal application to the Almond Order was overcome in *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). Petitioner is not prohibited or restrained by the AAA or the Almond Order from communicating any message to any audience; Petitioner is not compelled to speak by the AAA or the Almond Order; the promotion program under the AAA and the Almond Order has no political or ideological content; and Petitioner is not compelled by the AAA or the Almond Order to endorse or finance any political or ideological views. Thus, the requirement under the AAA and the Almond Order that Petitioner fund the promotion of almonds does not implicate Petitioner's rights to freedom of speech or association. Further, the use of assessments to defray the costs of litigation to defend a marketing order from a legal challenge against the use of assessments for generic advertising is germane to the purposes of the marketing order and satisfies the test in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). The Rules of Practice (7 C.F.R. § 900.52(c)) provide that an administrative law judge's decision upon a motion to dismiss must be made after due consideration of the motion and any opposition to the motion but, otherwise, leave the timing of a decision on a motion to dismiss to the discretion of the administrative law judge. When considering a motion to dismiss filed in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71), allegations of material fact in a petition must be construed in the light most favorable to a petitioner. However, even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, *Wileman* is dispositive of Petitioner's First Amendment claims and the Petition fails to state a claim upon which relief can be granted. The formalities of court practice do not apply to motions filed in administrative proceedings, and, where Respondent is not prejudiced, the Chief ALJ did not err by treating Petitioner's statements as a motion to amend the Petition and exercising authority under 7 C.F.R. § 900.59(a)(2) to rule on Petitioner's "motion" to amend its Petition. The Chief ALJ correctly denied Petitioner's motion to amend the Petition based on the fact that the amendment requested by Petitioner would be a challenge to a "speech related" action of the Almond Board which, according to *Wileman*, is not subject to scrutiny under the standards of First Amendment jurisprudence.

Gregory Cooper, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Cal-Almond, a Division of Morven Partners L.P., a Delaware Limited Partnership [hereinafter Petitioner], instituted this proceeding by filing a Petition on November 26, 1996, pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) [hereinafter the AAA]; the marketing order regulating Almonds Grown in California (7 C.F.R. §§ 981.1-.474) [hereinafter the Almond Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

The Petition alleges that the Almond Board improperly assessed Petitioner for "speech related" activities, in violation of Petitioner's rights under the First Amendment of the United States Constitution. The Petition seeks a declaration that the speech-related activities and assessments for those speech-related activities and the advertising and assessment regulations for "speech-related" activities in the Almond Order violate Petitioner's rights guaranteed under the First Amendment of the United States Constitution; a refund of all "speech-related" assessments paid by Petitioner for the 1995-96 and the 1996-97 crop years; a refund of the portion of Petitioner's paid 1994-95 assessments that were used by the Almond Board for the preparation, appearance, and testimony of the Almond Board's experts in *In re Cal-Almond*, 56 Agric. Dec. ___ (Dec. 24, 1997); reasonable attorney's fees; and an injunction to preclude the Almond Board and the United States Department of Agriculture [hereinafter USDA] from imposing "speech-related" assessments on Petitioner (Pet. ¶ VI).

On December 24, 1996, the Administrator of the Agricultural Marketing Service, USDA [hereinafter Respondent], filed Answer of Respondent: (1) stating that the Petition fails to state a claim upon which relief can be granted and the AAA and the Almond Order, as interpreted by Respondent and the Almond Board of California, were, and are, in accordance with law; and (2) requesting that the relief prayed for in the Petition be denied and the Petition be dismissed (Answer of Respondent at 3-4).

On February 21, 1997, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] held a telephone conference with counsel for Petitioner, Mr. Brian C. Leighton, Esq., of the Law Offices of Brian C. Leighton, Clovis, California, and counsel for Respondent, Mr. Gregory Cooper, Esq., Office of the General Counsel, USDA, Washington, D.C. The parties advised the Chief ALJ that "in light of the pending case before the Supreme Court [of the United States]

on the subject matter of the [P]etition, all action should temporarily be stayed."[1] (Summary of Teleconference, filed February 24, 1997.)

On June 25, 1997, the Supreme Court of the United States entered its decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), holding that compelled funding of generic advertising of California nectarines, plums, and peaches, in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the AAA, neither abridges First Amendment rights nor implicates the First Amendment. Moreover, on June 27, 1997, the Supreme Court of the United States granted the petition for a writ of certiorari in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879), vacated the judgment of the United States Court of Appeals for the Ninth Circuit, and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997).[2]

On July 2, 1997, the Chief ALJ held a telephone conference with counsel for Petitioner and counsel for Respondent during which Respondent contended that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of this proceeding. The Chief ALJ scheduled times within which Respondent could file a motion to dismiss, Petitioner could respond to Respondent's motion to dismiss, and Respondent could rebut Petitioner's response to Respondent's motion to dismiss.[3] On August 1, 1997, Respondent, relying on, *inter alia*, *Wileman Bros.*, filed a motion to dismiss Petitioner's Petition (Respondent's Motion to Dismiss;

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[1]At the time of the February 21, 1997, telephone conference, two cases were pending before the Supreme Court of the United States concerning First Amendment challenges to compelled assessments to pay for generic advertising under marketing orders promulgated pursuant to the AAA. *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S. Ct. 1875 (1996), concerned a First Amendment challenge by growers, handlers, and processors of California tree fruits to assessments imposed pursuant to the AAA, Marketing Order 916 (7 C.F.R. pt. 916), and Marketing Order 917 (7 C.F.R. pt. 917) to finance generic advertising of California nectarines, plums, and peaches. *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879), concerned a First Amendment challenge by almond handlers to assessments imposed pursuant to the AAA and the Almond Order (7 C.F.R. pt. 981) to finance generic advertising of almonds.

[2]On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim."

[3]Summary of Teleconference, filed July 3, 1997.

Respondent's Opening Memorandum in Support of Motion to Dismiss). On September 3, 1997, Petitioner filed Petitioner's Response to Respondent's Motion to Dismiss, and on October 10, 1997, Respondent filed Respondent's Rebuttal Memorandum.

On October 21, 1997, the Chief ALJ issued a Decision and Order of Dismissal [hereinafter Initial Decision and Order] in which the Chief ALJ concluded that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of the issues in this proceeding and dismissed the Petition with prejudice.

On November 4, 1997, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35);[4] on January 7, 1998, Respondent filed Respondent's Response to Petitioner's Appeal to the Judicial Officer; and on January 12, 1998, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the Chief ALJ's conclusion that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the First Amendment issue in this proceeding and that Petitioner's Petition should be dismissed with prejudice. Therefore, I have adopted the Chief ALJ's Initial Decision and Order as the final decision and order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's Initial Decision and Order.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[4]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

U.S. Const. amend. I.

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

. . . .

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds . . . such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds . . . may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid

advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(6)(I), (15)(A).

110 Stat.:

TITLE V—AGRICULTURAL PROMOTION

Subtitle A—Commodity Promotion and Evaluation

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.—In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to

maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

(1) the marketing promotion provisions under section 8c(6)(I) of the Agricultural Adjustment Act (7 U.S.C. 608c(6)(I)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937[.]

. . . .

(b) FINDINGS.—Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of

the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture—

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501(a)(1), (b)(1)-(9), 110 Stat. 888, 1029-31 (1996).

CHIEF ALJ'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . .

Upon consideration of [Respondent's] Motion to Dismiss, Petitioner's Response [to Respondent's Motion to Dismiss], and Respondent's Rebuttal Memorandum, I agree with Respondent that the Petition does not present a legally cognizable claim and should therefore be dismissed with prejudice.

The [Supreme Court in] *Glickman v. Wileman Bros. & Elliott, Inc., supra*, [117 S. Ct. at 2138] held:

Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience.[12] Second, they do not compel any person to engage in any actual or symbolic speech.[13] Third, they do not compel the producers to endorse or to finance any political or ideological views.[14] Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program. Thus, none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing orders.

12. This fact distinguishes the limits on commercial speech at issue in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), and 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. ___, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).

13. This fact distinguishes the compelled speech in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), and the compelled association in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

14. This fact distinguishes cases like *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) and *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).

In conclusion, the majority opinion stated in *Glickman v. Wileman Bros. & Elliott, Inc., supra*, [117 S. Ct. at 2142]:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Any doubt that the Supreme Court's holding [in *Wileman Bros.*] as to the constitutionality of [Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917) relating to] California tree fruit . . . has equal application to the Almond . . . Order was expressly overcome when, two days later, [in *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997),] the Supreme Court granted certiorari, vacated the judgment [of the United States Court of Appeals for the Ninth Circuit], and remanded [the case] to the Ninth Circuit [for further consideration in light of *Wileman Bros.*]

In its response to Respondent's Motion to Dismiss, Petitioner argues that the Supreme Court had not reversed the Ninth Circuit's decision that was in Cal-Almond's favor, but merely remanded it back to apply *Wileman Bros.* However, on September 4, 1997, the United States Court of Appeals for the Ninth Circuit, citing *Wileman Bros.*, remanded *Cal-Almond, Inc.*, "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (*See* Respondent's Rebuttal Memorandum, Attach. 2.)

Just as the United States Court of Appeals for the Ninth Circuit found no real distinction between the First Amendment arguments advanced in *Cal-Almond* from those in *Wileman Bros.*, I find no real distinction between the arguments Petitioner would advance in this proceeding against the "speech related" activities of the Almond Board for the 1995-96 and 1996-97 crop years, from those advanced and rejected in *Cal-Almond.* As I read *Wileman Bros.*, it is of no constitutional consequence that Petitioner "abhors being associated with the Almond Board as the `messenger' of the speech related activities" or that Petitioner may be able to demonstrate that the Almond Board's generic advertising program failed to increase sales. (Petitioner's Response to Respondent's Motion to Dismiss at 4.)

As a variation of its "speech" contentions, Petitioner cites . . . *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), to argue that it was unlawful for the Almond Board to apply part of Petitioner's 1994-95 assessments to defray litigation costs expended to defend against another administrative proceeding [challenging compelled assessments to fund generic advertising of almonds under the Almond

Order, *In re Cal-Almond*, 56 Agric. Dec. ___ (Dec. 24, 1997)]. Petitioner contends that *Lehnert* holds that when funds are collected from unwilling participants pursuant to a legislatively mandated arrangement, [the funds] may not be used for litigation because litigation is clearly protected political speech. But this was not the holding in *Lehnert*. As the Supreme Court . . . stated in *Glickman v. Wileman Bros. & Elliott, Inc., supra*, [117 S. Ct. at 2140]:

> . . . Thus, in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), while we held that the cost of certain publications that were not germane to collective-bargaining activities could not be assessed against dissenting union members, *id.*, at 527-528, 111 S.Ct., at 1963-1964, we squarely held that it was permissible to charge them for those portions of "the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs ..., and other miscellaneous matters." *Id.*, at 529, 111 S.Ct., at 1964. That holding was an application of the rule announced in *Abood* and further refined in *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), a case involving bar association activities.
>
> As we pointed out in *Keller*, "*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not `germane' to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.*, at 13-14, 110 S.Ct., at 2236. This test is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities.

It follows that, inasmuch as the use of assessments for generic advertising is germane to the purposes of a marketing order and thus meets the *Lehnert* test, the use of assessments to defray the costs of litigation to defend a marketing order from a legal challenge leveled against the use of assessments for generic advertising is likewise germane and equally satisfies the *Lehnert* test. . . .

Petitioner also asserts that it should be allowed to amend its Petition to assert a challenge to the credit-back advertising regulations that came into effect for the 1997-98 crop year. But again, this challenge would be a challenge to a "speech related" action of the Almond Board which, according to *Wileman Bros.*, is not subject to scrutiny under the standards of First Amendment jurisprudence. For that reason, a Petition amended as Petitioner proposes would also necessarily be dismissed and therefore shall not be permitted.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises three issues in Petitioner's Appeal to the Judicial Officer [hereinafter Petitioner's Appeal Petition] which were not addressed by the Chief ALJ.

First, Petitioner contends that:

> . . . [T]he Judicial Officer currently has before it an appeal by USDA from Chief ALJ Palmer's decision in *Cal-Almond*, 94 AMA Docket No. F&V 981-1, wherein the ALJ found that the Almond Board's advertising program violated *Cal-Almond* (and the other joined Petitioners[']) First Amendment rights, and that the Almond Board's credit-back advertising regulation violated those handler's First Amendment rights. The Judicial Officer has not ruled on that petition, but instead held it in abeyance pending the outcome of *Wileman*. Since the outcome of *Wileman*, the Judicial Officer has not yet ruled. Therefore, it was entirely premature for the ALJ to dismiss this petition until at least the Judicial Officer's ruling in the just referenced case.

Petitioner's Appeal Petition at 2-3.

I disagree with Petitioner's contention that the Chief ALJ dismissed the Petition prematurely. Section 900.52(c)(2) of the Rules of Practice provides that an administrative law judge's decision upon a motion to dismiss must be made after due consideration of the motion and any opposition to the motion but, otherwise, leaves the timing of a decision on a motion to dismiss to the discretion of the administrative law judge, as follows:

§ 900.52 Institution of proceeding.

. . . .

> (c) *Motion to dismiss petition*— . . . .
>
> (2) *Decision by Administrative Law Judge.* The Judge, after due consideration [of the motion to dismiss and any opposition to the motion to dismiss], shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65. . . .

7 C.F.R. § 900.52(c)(2).

Administrative proceedings should be conducted as expeditiously as possible consistent with the requirements of due process, the Administrative Procedure Act, and the Rules of Practice. While, for purposes of administrative economy, the Chief ALJ could have awaited the issuance of a final decision and order in *In re Cal-Almond*, 56 Agric. Dec. ___ (Dec. 24, 1997), prior to issuing the Initial Decision and Order in this proceeding, the Chief ALJ was not required by due process, the Administrative Procedure Act, or the Rules of Practice to do so.

Second, Petitioner contends that:

> . . . Respondent should not be entitled to a dismissal of the petition unless, all of the factual allegations in the petition are assumed true, and that, with that assumption, [Petitioner] could not prove any set of facts in support thereof which would entitle it to relief.

Petitioner's Appeal Petition at 3.

When considering a motion to dismiss filed in accordance with the Rules of Practice, allegations of material fact in a petition must be construed in the light most favorable to a petitioner.[5] However, even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, I find that

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[5]*See In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 113-14 (1997) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss filed pursuant to 7 C.F.R. § 900.52(c)); *In re Asakawa Farms, Inc.*, 50 Agric. Dec. 1144, 1149 (1991) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss for want of standing filed pursuant to 7 C.F.R. § 900.52(c)), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993). *See also In re United Foods, Inc.*, 57 Agric. Dec. ___, slip op. at 20-21 (Mar. 4, 1998) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner when considering a motion to dismiss filed pursuant to 7 C.F.R. § 1200.52).

Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130 (1997), is dispositive of Petitioner's First Amendment claims and that the Petition fails to state a claim upon which relief can be granted. Therefore, I agree with the Chief ALJ's Initial Decision and Order in which he granted Respondent's Motion to Dismiss and dismissed Petitioner's Petition with prejudice.

Third, Petitioner contends that the Chief ALJ should have allowed Petitioner to amend its Petition rather than dismissing the Petition, as follows:

> At page 5 of the ALJ's decision, the ALJ rejected Petitioner's request to amend the petition to allege First Amendment violations for the 1997-1998 crop year as a result of the Almond Board reinstituting the credit-back advertising regulations, but the ALJ erroneously claimed that "speech related" actions of the Almond Board is not subject to scrutiny under the standards of First Amendment jurisprudence. The ALJ clearly erred.
>
> . . . .
>
> . . . Under the newly adopted credit-back regulations that are in effect for the 1997-1998 crop year . . . Petitioner must expend more money than in the previous year in assessments, or only be allowed a partial credit provided that its promotion and advertising efforts are consistent with restrictions of § 981.441. Thus, the "new" regulations again being implemented by the Almond Board for the 1997-1998 crop year would violate the First Amendment, as set forth in *Wileman*, because the Marketing Order does restrain the freedom of Petitioner to "communicate any message to any audience". Thus, instead of dismissing this case, the Chief Administrative Law Judge should permit the Petitioner to amend the Complaint to include the 1997-1998 crop year.

Petitioner's Appeal Petition at 6-7.

I disagree with Petitioner's contention that the Chief ALJ's denial of Petitioner's motion to amend the Petition was error.[6] The Chief ALJ denied

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[6]The record does not clearly establish that Petitioner filed a motion to amend the Petition. Petitioner states in Petitioner's Response to Respondent's Motion to Dismiss, at 6, that "the Chief Administrative Law Judge should permit the Petitioner to amend the Complaint to include the 1997-1998 crop year" [and] "Petitioner is entitled to amend its Petition to allege the new facts and new implementation of the Almond Board regulations with respect to the 1997-1998 crop year." However, Petitioner's statements in Petitioner's

(continued...)

Petitioner's motion to amend the Petition based on the fact that the amendment requested by Petitioner would be a challenge to a "speech related" action of the Almond Board which, according to *Wileman Bros.*, is not subject to scrutiny under the standards of First Amendment jurisprudence.

However, Petitioner contends that, under the newly adopted credit-back regulations, Petitioner is required to expend more money than in previous years and is restrained from communicating "any message to any audience" (Petitioner's Appeal Petition at 7.) The Court specifically addressed Petitioner's contention in *Wileman Bros., supra*, 117 S. Ct. at 2138-39, holding that a reduction in resources available to conduct advertising caused by compelled assessments does not implicate the First Amendment, as follows:

> . . . Respondents argue that the assessments for generic advertising impinge on their First Amendment rights because they reduce the amount of money that producers have available to conduct their own advertising. This is equally true, however, of assessments to cover employee benefits, inspection fees, or any other activity that is authorized by a marketing order. The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler's advertising budget does not itself amount to a restriction on speech.

Moreover, neither the credit-back program nor the creditable program requires almond handlers to advertise, but rather both programs give the handler the option to advertise and receive credit for promotional expenditures as provided in the Almond Order. While both the credit-back and creditable programs limit the type of promotion for which a handler may receive credit, neither the credit-back program nor the creditable program prohibits or restricts a handler from promoting or advertising almonds in any other way or from communicating any

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(...continued)
Response to Respondent's Motion to Dismiss do not appear to operate as an application or request for a ruling, *viz.*, a motion. *In re United Foods, Inc.*, 57 Agric. Dec. ___, slip op. at 29-31 (Mar. 4, 1998). Nonetheless, the formalities of court practice do not apply to motions filed in administrative proceedings, and the Chief ALJ treated Petitioner's statements in Petitioner's Response to Respondent's Motion to Dismiss as a motion to amend the Petition and ruled on those statements. Respondent was not prejudiced by the Chief ALJ's treatment of Petitioner's statements as a motion, and I do not find that the Chief ALJ erred by exercising his authority under section 900.59(a)(2) of the Rules of Practice (7 C.F.R. § 900.59(a)(2)) to rule on Petitioner's "motion" to amend its Petition.

other message to any audience. *In re Cal-Almond*, 56 Agric. Dec. ___, slip op. at 87 n.25 (Dec. 24, 1997).

For the foregoing reasons, the following Order should be entered.

Order

The relief requested by Petitioner is denied and the Petition is dismissed with prejudice.

to exhaust administrative remedies is not a matter of judicial discretion. Rather, "an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." 509 U.S. at 154.

The agency regulation before us--7 C.F.R. § 1.142(e)(4)--satisfies § 10(c) of the APA, as *Darby* interpreted it. The regulation suspends the finality of ALJ decisions pending appeal to the judicial officer. The regulation also requires exhaustion of administrative remedies. It deems "final" for the purposes of judicial review only decisions of the judicial officer on appeal. Since the statute (7 U.S.C. § 2149(c)) permits judicial review only of "final" decisions of the Secretary, the regulation is the equivalent of an agency rule stating, as a condition to judicial review, that an aggrieved party must first appeal to the judicial officer. *See Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388 (D.C. Cir. 1995).

Marine Mammal's failure to prosecute an administrative appeal would thus appear to doom its petition. Nevertheless, it insists the case is properly before us because it falls within three "well established and recognized exceptions" to the exhaustion doctrine: (1) the ALJ's ruling constituted a "fundamental abuse of the administrative process;" (2) exhaustion would have been futile; (3) the petition for review challenges the ALJ's ruling on constitutional grounds.

One may wonder whether judicially-recognized exceptions to a judicially-created exhaustion requirement are still pertinent after *Darby*. If courts are forbidden from requiring exhaustion when § 10(c) of the APA does not, why should courts be free to excuse exhaustion when the next to last clause of § 10(c) demands it? If an agency rule requires, without exception, that a party must take an administrative appeal before petitioning for judicial review, on what basis may a court excuse non-compliance? *See, e.g., Ayuda, Inc. v. Thornburgh*, 948 F.2d 742, 759 (D.C. Cir. 1991). *But cf. Bowen v. Massachusetts*, 487 U.S. 879, 901-02, 108 S. Ct. 2722, 101 L.Ed.2d 749 (1988). Neither party discusses these questions and our disposition of the case does not compel us to decide them. The three supposed exceptions to the exhaustion doctrine Marine Mammal relies upon do not relieve it of the consequences of its failure to appeal to the judicial officer.

We will begin with what Marine Mammal describes as the exception for a "fundamental abuse of the administrative process." The quoted language appears, without elaboration, in a footnote in *Central Television, Inc. v. FCC*, 834 F.2d 186, 191 n. 11 (D.C. Cir. 1987), which in turn cited *Washington Association for Television & Children v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983). Washington Association did not address, as we do here, the consequences of a petitioner's failure to comply with agency rules requiring an appeal before it seeks judicial

review. The issue in Washington Association was whether a litigant's failure to raise an objection in its administrative appeal precluded it from raising the objection on judicial review. That is a very different matter. The requirement that objections must first be presented to the agency, although sometimes treated as part of the judicially-created exhaustion doctrine, is largely derived from statute. Many of the statutes are cited in the Washington Association opinion. 712 F.2d at 682 n. 6. Some of these statutes contain exceptions, framed in varying terms, but expressing the general idea that an objection may be raised for the first time in court if the petitioner has good grounds for not raising it before the agency. *See, e.g.*, 15 U.S.C. § 78y(c)(1) ("No objection . . . may be considered by the court unless it was urged before the [agency] or there was reasonable ground for failure to do so."); 29 U.S.C. § 160(e) ("No objection that has not been urged before the [agency] . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). A safety-valve of this sort makes sense when, for instance, the allegedly erroneous ground for the agency's decision was neither argued nor reasonably anticipated during the administrative proceedings. But it makes no sense to hold, as Marine Mammal asks us to do, that one may bypass an administrative appeal whenever an ALJ's decision is so wrongheaded that it amounts to a "fundamental abuse." For one thing, deciding whether the ALJ's decision amounted to a "fundamental abuse" (as distinguished, we suppose, from just plain "abuse") would thrust the court into the merits. Yet the purpose of the exercise would be to determine if the court could decide the merits despite the litigant's failure to exhaust. For another thing, this sort of exception would defeat the aim of rules requiring--in the words of § 10(c) of the APA--appeals to "superior agency authority." Administrative appeals permit agencies to correct mistakes by "inferior" officers. Judicial review may thereby be entirely avoided. If the decision of an "inferior" officer is so seriously in error that one might justifiably call it a fundamental abuse of the administrative process, this is all the more reason for insisting that the aggrieved party appeal and give the agency a chance to rectify the error. We therefore reject Marine Mammal's contention that it can petition for judicial review, without bothering to prosecute an administrative appeal, simply because it believes the ALJ made a fundamental error in ruling against it. Whether some other sort of administrative misconduct would warrant judicial intervention before agency proceedings have run their course is a question we do not address here. *See Gulf Oil Corp. v. United States Dept. of Energy*, 663 F.2d 296, 306-09 (D.C. Cir. 1981).

Marine Mammal's next excuse for not appealing is that doing so would have been "futile." Here the idea is that nothing would have been gained by attempting

to appeal the ALJ's order to the judicial officer because the agency does not permit non-parties to appeal. In denying the motion to intervene and the petition for review of the consent decree, the ALJ said that 7 C.F.R. § 1.145(a) (1997) prohibits anyone other than "a party" to a decision "to appeal or otherwise seek the review or modification" of the decision. *In re Sugarloaf Dolphin Sanctuary, Inc.*, AWA Docket No. 96-55 (Nov. 25, 1996). Marine Mammal takes this to mean that it "was prohibited from seeking review . . . by the express terms of Rule 1.145." Reply Brief at 6 (emphasis omitted). Whether the judicial officer would have agreed is far from clear. Marine Mammal was not a party to the proceeding against Sugarloaf. But before the ALJ, it surely was "a party" to its own motion to intervene and its petition for review. Federal appellate courts facing analogous situations under the Federal Rules of Appellate Procedure routinely hear appeals from denials of motions to intervene as of right, even though "Federal Rules of Appellate Procedure 3 and 4 clearly contemplate that only parties may file a notice of appeal." *United States v. City of Oakland*, 958 F.2d 300, 301 (9th Cir. 1992); *see* Fed. R. App. P. 3, 4. Non-parties may move to intervene for the purposes of appeal; "denials of such motions are, of course, appealable." *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S. Ct. 586, 98 L.Ed.2d 629 (1988) (per curiam); *see* 15A Charles Alan Wright et al., Federal Practice and Procedure § 3902.1, at 112-18 (2d ed.1992). There is reason to believe that the Department treats § 1.145(a) as consistent with the Federal Rules of Appellate Procedure, and specifically Rule 4. *See In re Velasam Veal Connection*, 55 Agric. Dec. 300, 303-06 (1996); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108-09 (1984). We therefore do not view § 1.145(a) as a clear bar to Marine Mammal's appeal of the ALJ's refusal to allow it to intervene and contest the consent decree. We do not believe, in other words, that the provision rendered an appeal futile.

Marine Mammal offers another version of futility: if it had appealed, the judicial officer would have ruled against it. It cites two cases in which the judicial officer denied motions to intervene in disciplinary proceedings; both cases stated that the Department's rules of practice "make no provision for intervention in [such a] proceeding." *In re Syracuse Sales Co.*, P&S Docket No. D-92-52, 1993 WL 459887, at *2 (Nov. 5, 1993); *In re Bananas, Inc.*, 42 Agric. Dec. 426 (1983). While these adverse precedents increased the likelihood that Marine Mammal would lose, that cannot be enough. It must appear that pursuing available administrative remedies would have been "clearly useless," that the ultimate denial of relief was a "certainty." *UDC Chairs Chapter, Am. Ass'n of Univ. Professors v. Board of Trustees*, 56 F.3d 1469, 1476 (D.C. Cir. 1995) (citation and internal quotation marks omitted); *Communications Workers of Am. v. AT&T Co.*, 40 F.3d 426, 433 (D.C. Cir. 1994); *see also Randolph-Sheppard*

Vendors of Am. v. Weinberger, 795 F.2d 90, 105-07 (D.C. Cir. 1986). There is no such certainty here. In neither of the cases Marine Mammal cites was there any significant analysis of the Department's rules of practice; both decisions offered an alternative rationale for sustaining the denial of intervention, a rationale not resting on the rules of practice; neither dealt with a proceeding conducted under the Animal Welfare Act; and in neither case did the decision maker face a would-be intervener claiming that a refusal to allow it into the case would amount to a constitutional violation. An agency, like a court, may alter or modify its position in response to persuasive arguments and to avoid serious constitutional questions. *See, e.g., United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37, 73 S. Ct. 67, 97 L.Ed. 54 (1952); *Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1456 (D.C. Cir. 1988). Given the posture of this case, it is not outside the realm of possibility that the judicial officer would have allowed Marine Mammal to intervene and challenge the consent decree. Doubt about the success of prosecuting an administrative appeal is no reason to excuse a litigant's failure to make the attempt. *See, e.g., UDC Chairs*, 56 F.3d at 1476; *Communications Workers of Am.*, 40 F.3d at 433; *see also Smith v. Blue Cross & Blue Shield United*, 959 F.2d 655, 659 (7th Cir. 1992).

This leaves only the possible exception for constitutional claims. Marine Mammal argues that the Department's enforcement of the Animal Welfare Act offends the Fifth Amendment to the Constitution because nonpossessory owners of animals covered by the Act are excluded from participating in proceedings that could affect the animals' fate. The constitutional nature of this argument, Marine Mammal thinks, excuses it from having to present the challenge to the judicial officer on appeal. There are several problems with this line of reasoning.

Marine Mammal is very much mistaken in believing that there is some bright-line rule allowing litigants to bypass administrative appeals simply because one or all of their claims are constitutional in nature. *See, e.g., Thetford Properties v. United States Dep't of Hous. & Urban Dev.*, 907 F.2d 445, 448 (4th Cir. 1990). Exhaustion even of constitutional claims may promote many of the policies underlying the exhaustion doctrine. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975); *Rafeedie v. INS*, 880 F.2d 506, 513-17 (D.C. Cir. 1989); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 733-40 (D.C. Cir. 1987) (Edwards, J.) (separate opinion); *see generally* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.5 (3d ed. 1994). Here those policies--giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies' expertise, compiling a record adequate for judicial review, promoting judicial efficiency, *see, e.g., McCarthy v. Madigan*, 503 U.S. 140, 145-46, 112 S. Ct. 1081, 117

L.Ed.2d291 (1992); *Salfi*, 422 U.S. at 765; *McKart v. United States,* 395 U.S. 185, 193-95, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969)--weigh decidedly against Marine Mammal's position.

Marine Mammal asks us to pass on the constitutionality of certain rules and regulations in the context of the Animal Welfare Act. Exactly how those rules and regulations apply to nonpossessory owners of animals in that context is a matter of some complexity and, so far as we can tell, one of first impression before the agency. All we have to go on is a summary ALJ decision, containing four sentences of analysis. We have no idea whether the Secretary, acting through the Department's judicial officer, would have agreed with the ALJ's view if given a chance to consider the matter. The judicial officer might well have decided the case differently, eliminating entirely the need for us to rule on the constitutional questions. Or the judicial officer might have affirmed the ALJ's decision. Even then, we might have had the benefit of a more thorough explanation for the result and a better understanding of the Department's position regarding the regulatory scheme Marine Mammal wants to challenge. *See, e.g., New York State Opthalmological Soc'y v. Bowen*, 854 F.2d 1379, 1387 (D.C. Cir. 1988); *Ticor Title Ins. Co.*, 814 F.2d at 743 (Edwards, J.) (separate opinion). These circumstances provide compelling reasons for holding Marine Mammal to 7 C.F.R. § 1.142(c)(4)'s exhaustion requirement, even if we were free to create an exception to it (which we do not decide). *See W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 312, 88 S. Ct. 450, 19 L.Ed.2d 546 (1967) (per curiam); *Public Utils. Comm'n v. United States*, 355 U.S. 534, 539-40, 78 S. Ct. 446, 2 L.Ed.2d 470 (1958).

The petition for review is dismissed on the ground that Marine Mammal failed to appeal to the judicial officer.

So ordered.

DAVID M. ZIMMERMAN v. UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE.
No. 97-3414.
Filed May 26, 1998.

Due process — ALJ bias — Sanction.

The United States Court of Appeals for the Third Circuit denied dealer Zimmerman's petition for review. The court held that the Administrative

Procedure Act and USDA regulations establish what process is due in agency adjudications and that the dealer was accorded due process in the administrative proceeding. The judicial officer's refusal of the dealer's request for oral argument did not deny the dealer due process, and the dealer was not precluded from introducing evidence regarding the size of his business. The administrative law judge's preclusion of irrelevant evidence, admonishment of the dealer's son during the hearing, and use of hyperbole and emotional response to evidence in his written decision are not sufficient to show that the administrative law judge was biased. The civil penalty assessed against the dealer was warranted in law and justified by the facts. The court rejected Zimmerman's challenge that the civil penalty was arbitrary and capricious and held that mere unevenness in the application of the sanction does not render its application in a particular case unwarranted in law.

Before: SLOVITER and GREENBERG Circuit Judges, and POLLAK, District Judge.[*]

United States Court of Appeals
Third Circuit

MEMORANDUM OPINION

SLOVITER, Circuit Judge:

David Zimmerman petitions for review of the decision of the Secretary of Agriculture suspending his license to breed dogs for sixty days, imposing a $51,250 civil penalty, and ordering him to cease and desist from numerous violations of the Animal Welfare Act (AWA). Zimmerman claims that the Secretary's decision should be reversed and vacated because: 1) he was denied his constitutional right to a full and fair hearing; 2) the civil penalty is unwarranted in law and in fact, was not based on the entire record of the proceedings, and was arbitrary and capricious. We note that he does not challenge the fact of the violations of the AWA on this appeal.

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[*]Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

I.

Zimmerman was licensed under the AWA as a dog dealer. He owned a small farm in central Pennsylvania, on which he operated a breeding kennel with 250-300 dogs. Between August 1993 and October 1995, the Animal Plant and Health Inspection Service (APHIS), an agency within the United States Department of Agriculture (USDA), inspected Zimmerman's facility ten times. On each occasion, numerous violations of the AWA were revealed and Zimmerman was advised both orally and in writing of his noncompliance.

In July 1994, APHIS filed an Administrative Complaint against Zimmerman for his repeated violations. Zimmerman retained counsel who answered the Complaint in September 1994. Subsequently, in December 1995, Zimmerman requested that his attorney withdraw his appearance and that he be allowed to proceed *pro se*. Zimmerman, who is a Team Mennonite, states that his religious sect mandated that he represent himself in the proceedings before the Administrative Law Judge. After the Motion to Withdraw Appearance was granted, the USDA filed an Amended Complaint alleging additional violations of the AWA. Zimmerman never filed an Amended Answer.

During the administrative hearing, the government offered the testimony of Robert Markman, an APHIS inspector, and three APHIS veterinarians who inspected Zimmerman's kennel and who accompanied the inspector on different visits during the two years. They testified that they observed repeated violations of the AWA during the ten inspections conducted between August 1993 and October 1995.

Zimmerman testified in his own defense and also presented the testimony of Ronald Kreider, Roy Romberger and Eugene Grove. Kreider, a pet store owner, testified that he has rarely had problems with the dogs he has purchased from Zimmerman. He further testified that he buys approximately one hundred dogs a year from Zimmerman, paying between $100 and $175 per dog. Romberger, a representative of the Lancaster County Farm Bureau, testified by giving a statement relating to the scope of Zimmerman's farm operation and requesting that the ALJ not assess civil penalties against the Zimmerman family. App. at 260. Romberger was unable to offer any testimony with regard to whether Zimmerman committed the alleged AWA violations. Grove, a Pennsylvania State Dog Warden, testified that he has known Zimmerman for twenty years and has only imposed one fine on Zimmerman, and that was for unsanitary conditions in the kennel.

The ALJ found that Zimmerman had willfully committed 63 violations of the AWA and its regulations. These included: (1) nine violations of 9 C.F.R. § 2.40,

failure to provide adequate veterinary care; (2) six violations of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75, failure to maintain proper records; (3) seven violations of 7 U.S.C. § 2141 and 9 C.F.R. § 2.50, failure to properly mark or identify each dog; (4) thirteen violations each of 9 C.F.R. § 3.1 and § 3.6, failure to provide, maintain and clean housing facilities and failure to meet general requirements for primary enclosures; (5) five violations of 9 C.F.R. § 3.11, failure to remove excreta and food waste; (6) three violations of both 9 C.F.R. § 3.2 and 9 C.F.R. § 3.4, failure to provide adequate ventilation and lighting in indoor housing, and failure to provide shelter from the elements in outdoor housing; and four other miscellaneous violations.[1] *Id.* The ALJ ordered Zimmerman to cease and desist from these violations, fined him $51,250 and suspended his license for 60 days. *Id.* at 45-49.

Zimmerman appealed the decision of the ALJ to the USDA's judicial officer, who affirmed the ALJ's decision. App. at 69-72. Zimmerman then petitioned this Court for review.

II.

A.

Zimmerman claims that his right to due process was violated because he did not receive a full and fair hearing before the Secretary of Agriculture. He argues that he did not receive a full and fair hearing because 1) he was not permitted to present evidence of the size of his business, and 2) the ALJ who decided the matter was biased.[2] This Court exercises plenary review of alleged due process violations. *Sewak v. INS*, 900 F.2d 667, 671 (3d Cir. 1990).

As the government states in its brief, the Administrative Procedure Act (APA) and the USDA regulations establish what process is due in agency adjudications. To comply with the full and fair hearing requirements of due process, the APA and the USDA regulations require that there must be the right to present, with or

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[1]One violation each of 9 C.F.R. § 2.131, failure to exercise proper care in handling animals; 9 C.F.R. § 3.9 failure to clean feeding receptacles; 9 C.F.R. § 3.10, failure to provide clean water; and 9 C.F.R. § 3.12, failure to maintain enough employees to adequately operate the kennel. App. at 34-45.

[2]Zimmerman also maintains that his due process rights were violated because he was denied oral argument before the Judicial Officer on appeal of the ALJ decision. This argument is without merit. The USDA regulations state that a Judicial Officer may grant, refuse or limit any request for oral argument in its discretion. 7 C.F.R. § 1.145(d). The Judicial Officer denied oral argument, finding that the issues were not complex and are controlled by established precedent. App. at 13; *see Federal Communications Commission v. WJR, the Goodwill Station, Inc.*, 337 U.S. 265, 282-84 (1949).

without the assistance of counsel, oral and written testimony in a hearing before an impartial decisionmaker. 5 U.S.C. §§ 554, 555, 557; 7 C.F.R. § 1.141. Additionally, due process requires that the decision of the agency be based solely on the record compiled during the hearing. *See Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970) (holding that procedural due process under the Fifth Amendment requires timely and adequate notice, an opportunity to confront witnesses and present evidence, the right to appear with counsel, a determination by an impartial decisionmaker, and a decision that states the reasons for the decision and the evidence relied upon based solely on the record).

Zimmerman maintains that he was not allowed to present evidence about the size of his business, which is a factor the ALJ must consider in determining the appropriate sanctions to be imposed for violations of the AWA. As noted above, Romberger testified on behalf of Zimmerman by reading a prepared statement. Romberger began his testimony by stating that Zimmerman lost about 100 puppies during the APHIS inspections because they were traumatized by the inspectors intruding into their kennels. App. at 259. The ALJ interrupted the testimony, stated that he did not have jurisdiction over that issue, which required filing a claim against the government, and stated that if Romberger had no information as to whether Zimmerman had committed the alleged violations, he should bring his statement to a close. Romberger then closed his statement by stating that the Zimmermans owned only a small farm that did not produce much income. The ALJ then offered Zimmerman the opportunity to elicit more direct testimony from Romberger, but Zimmerman declined.

Nothing in this sequence shows that the ALJ precluded Zimmerman from presenting evidence of the size of his business. Instead, the ALJ precluded only evidence irrelevant to the issue at hand.

Zimmerman maintains that the ALJ displayed actual bias during the proceedings and in his opinion on this matter. The only evidence of bias to which Zimmerman points is the ALJ's interruption of the testimony of Romberger and his admonishment of Zimmerman's son. As noted above, the interruption of Romberger's testimony was merely a ruling on the irrelevance of the testimony about the lost puppies. Moreover, Romberger testified to the size of the farm operation and not the kennel operation, which is the relevant factor to be considered in assessing the civil penalty.

Likewise, the ALJ's admonishing Zimmerman's son did not show bias. The ALJ allowed Zimmerman's son to assist his father in organizing his documents while testifying. During cross examination, the ALJ told Zimmerman's son to leave the witness stand as he was "there to help organize [his] father's papers . . . [and not] there to whisper in his ear while he's testifying." App. at 393. This

direction by the ALJ was not inappropriate. Indeed, the fact that the ALJ allowed the son to help his father while on the witness stand shows, if anything, that the ALJ was sympathetic to the fact that Zimmerman was proceeding *pro se*.

Zimmerman also maintains that the ALJ's bias was evident in his written decision by the use of "strong hyperbole and emotion." This is not sufficient to show bias. As the government notes, a judge's emotional response to evidence is permissible and does not show bias so long as it does not "display clear inability to render fair judgment." *United States v. Bertoli*, 40 F.3d 1384, 1412 (3d Cir. 1994). There is nothing in the record that suggests that the ALJ had a clear inability to render a fair judgment.

B.

Zimmerman contends that the $51,250 civil penalty imposed by the Secretary is not justified in law or fact and was arbitrary and capricious.[3] Upon review, "[a]n agency's choice of sanction is not to be overturned unless it is unwarranted in law or without justification in fact." *Cox v. United States Dept. of Agriculture*, 925 F.2d 1102, 1107 (8th Cir. 1991).

Under the AWA, the Secretary is empowered to assess a civil penalty of up to $2,500 for each violation of the Act. 7 U.S.C. § 2149(b). The Secretary found that Zimmerman committed 63 violations of the AWA. Thus, Zimmerman could have been fined $157,500 under the Act. Therefore, since the penalty imposed does not exceed that amount, the penalty was warranted in law.

The factors relevant to the penalty are "the size of the business of the person involved, the gravity of the violation[s], the person's good faith, and the history of previous violations." 7 U.S.C. § 2149(b). We must limit our review to determine whether there is substantial evidence to support the Secretary's findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The substantial evidence standard requires that the agency decision be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

The Secretary found that Zimmerman's kennel operation was of significant size. App. at 47. There is adequate evidence to support this conclusion from the

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[3]Zimmerman also claims that the ALJ and the Secretary failed to consider the entire record in determining the civil penalty. He contends that this Court cannot affirm the sanction because the ALJ or Judicial Officer did not make specific findings on the credibility of Romberger. This argument lacks merit. As noted above, Romberger did not offer any testimony concerning the size of Zimmerman's kennel operation. Thus, there was no need for the ALJ to give it any weight one way or the other.

facts that Zimmerman had between 250-300 dogs in his kennel, and that he constructed a new building on the premises, further expanding his kennel operation. Moreover, Kreider, one of Zimmerman's witnesses, testified that he bought up to $17,500 worth of dogs a year from Zimmerman.

Perhaps most significant was the Secretary's finding that the gravity of Zimmerman's violations was serious, a finding amply supported by the evidence. Not only was Zimmerman repeatedly cited over two years for AWA violations concerning the health and welfare of his dogs, but many of the violations were serious, with the veterinarians testifying that they could have potential impact on the animals' health.

Finally, the Secretary found that Zimmerman lacked good faith in remedying the violations, a finding supported by evidence of Zimmerman's repeated and continuous citations, often for the same violations. Inspector Markman testified that Zimmerman was told of these violations after each inspection, but they were not redressed by the time of the next inspection.

In light of the foregoing, we reject Zimmerman's challenge to the Secretary's decision to impose a $51,250 fine. Zimmerman maintains that the penalty was arbitrary and capricious as compared to other fines assessed by the Secretary.

This argument lacks merit because "mere unevenness in the application of the sanction does not render its application in a particular case `unwarranted in law.'" *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 188 (1973).

III.

We have considered all of Zimmerman's other contentions, and conclude that they do not merit further discussion. We will therefore deny the Petition for Review.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: JAMES MICHAEL LaTORRES.
AWA Docket No. 97-0012.
Decision and Order filed July 28, 1997.

Failure to appear at hearing - Admission of material allegations - Inadequate care and facilities for animals - Wilfulness - Sanction policy - Civil penalty - License disqualification.

Respondent failed to appear at the hearing after being duly notified of the time and place it was to commence. Such failure constitutes an admission of the material allegations alleged in the Complaint. A hearing was nonetheless held in Respondent's absence, at which Complainant produced evidence of numerous violations of the Animal Welfare Act. Specifically, Judge Bernstein found that Respondent failed to: provide a structurally sound transport enclosure; provide adequate shelter from inclement weather; store food adequately; provide adequate food; keep the primary enclosure clean; keep the premises clean; maintain an adequate written program of veterinary care; remove animal wastes; provide adequate ventilation; and maintain an effective program of pest control. Judge Bernstein further found that Respondent's violations were wilful and grave, that he failed to display good faith, and that his business could derive substantial income. Upon consideration of these factors, Judge Bernstein ordered a civil penalty in the amount of $5,000 and ordered that Respondent be disqualified from obtaining a license for five years, and thereafter until he has paid the civil penalty.

Frank Martin, Jr. for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Animal Welfare Act, as amended, (7 U.S.C. § 2131 *et seq.*) ("the Act"), instituted by a Complaint filed on October 18, 1996, by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"). The Complaint alleged that Respondent wilfully violated the regulations and standards issued under the Act (9 C.F.R. § 1.1 *et seq.*).

On January 16, 1997, I issued an Order scheduling the hearing in this matter to commence on June 3, 1997, in Tampa, Florida. On March 27, 1997, I issued a Notice of Hearing setting forth a specific location for the June 3, 1997, hearing. Complainant appeared at the June 3, 1997, hearing represented by its counsel, Frank Martin, Jr. Although duly served with the January 16 Order and March 27, 1997, Notice, Respondent failed to appear at the hearing.

Pursuant to section 1.141(e) of the Rules of Practice (7 C.F.R. § 1.141(e)) a respondent who, after being duly notified, fails to appear at the hearing for good cause shall be deemed to have admitted any facts presented at the hearing and all

material allegations of fact contained in the Complaint. In addition, Complainant presented persuasive evidence consisting of credible testimony by Dr. Robert Brandes and Mr. Gregory Wallen, experienced USDA inspectors who inspected Respondent's facilities, and documentary evidence in support of the allegations. I, therefore, accept Complainant's credible and uncontroverted evidence and Complainant's allegations and I make the following findings, conclusions, and order.

Findings of Fact

1. Respondent, James Michael LaTorres, is an individual whose address is Post Office Box 475, Gibsonton, Florida 33534.

2. At all times material, Respondent was licensed and operating as an exhibitor as defined in the Act and the regulations. Respondent's license was terminated on November 22, 1995, because he failed to renew it (CX-6, 7; Tr. 6-10).

3. After Respondent became licensed and annually thereafter, he received copies of the regulations and standards and agreed in writing to comply with them (section 2.2 of the regulations, 9 C.F.R. § 2.2; Complaint; CX-6).

4. From January 25, 1994, through August 3, 1995, Respondent's facility and animal were inspected by Dr. Robert Brandes, an experienced APHIS Veterinary Medical Officer, and Mr. Gregory Wallen, an experienced APHIS Inspector (Tr. 10-19 and 20-60). These inspections revealed that Respondent was not in compliance with the regulations and standards issued under the Act. Respondent was informed of these violations (Tr. 14, 26) and was given copies of each inspection report (CX-1 through 5; Tr. 43-44).

5. As found during APHIS' January 25, 1994, inspection of Respondent's facility (CX-1), Respondent:

a. Failed to provide the elephant named "Stony" with a transport primary enclosure that was structurally sound and maintained in good repair to protect "Stony" from injury (Tr. 15); and

b. Failed to provide "Stony" with adequate shelter from inclement weather (Tr. 17-19).

6. As found during APHIS' March 2, 1994, inspection of Respondent's facility (CX-2), Respondent failed to provide "Stony" with a transport primary enclosure that was structurally sound and maintained in good repair to protect "Stony" from injury (Tr. 28-30).

7. As found during APHIS' May 3, 1995, inspection of Respondent's facility (CX-3), Respondent:

a. Failed to store food for "Stony" to adequately protect the food against

infestation or contamination by vermin (Tr. 32-33);

b. Failed to provide "Stony" with wholesome and uncontaminated food (Tr. 33-36);

c. Failed to keep the primary enclosure for "Stony" clean (Tr. 36-38);

d. Failed to keep the premises clean and free from accumulations of trash (Tr. 39-40); and

e. Failed to maintain an adequate written program of veterinary care under the supervision and assistance of a doctor of veterinary medicine (Tr. 40-42).

8. As found during APHIS' June 19, 1995, inspection of Respondent's facility (CX-4), Respondent:

a. Failed to maintain an adequate written program of veterinary care under the supervision and assistance of a doctor of veterinary medicine (Tr. 45-46); and

b. Failed to keep the primary enclosure for "Stony" clean (Tr. 46-48).

9. As found during APHIS' August 3, 1995, inspection of Respondent's facility (CX-5), Respondent:

a. Failed to maintain an adequate written program of veterinary care under the supervision and assistance of a doctor of veterinary medicine (Tr. 48-52);

b. Failed to remove and dispose of animal wastes so as to minimize vermin infestation, odors, and disease hazards (Tr. 52-54);

c. Failed to provide indoor housing facilities which were adequately ventilated to provide for the health and comfort of "Stony" (Tr. 54-56);

d. Failed to provide "Stony" with food of sufficient nutritive value to maintain him in good health (Tr. 57-58); and

e. Failed to maintain an effective program of pest control (Tr. 59-60).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent is an exhibitor as defined in the Act.
3. On January 25, 1994, Respondent wilfully violated:

a. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.137(a) of the standards (9 C.F.R. § 3.137(a)) by failing to provide the elephant named "Stony" with a transport primary enclosure that was structurally sound and maintained in good repair so as to protect "Stony" from injury; and

b. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.127(b) of the standards (9 C.F.R. § 3.127(b)) by failing to provide "Stony" with adequate shelter from inclement weather.

4. On March 2, 1994, Respondent wilfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.137(a) of the standards (9 C.F.R.

§ 3.137(a)) by failing to provide "Stony" with a transport primary enclosure that was structurally sound and maintained in good repair to protect "Stony" from injury.

5. On May 3, 1995, Respondent wilfully violated:

a. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain a written program of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

b. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.125(c) of the standards (9 C.F.R. § 3.125(c)) by failing to store food so as to adequately protect it against deterioration, molding, or contamination by vermin;

c. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.129(a) of the standards (9 C.F.R. § 3.129(a)) by failing to provide "Stony" with wholesome and uncontaminated food;

d. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and sections 3.131(a), (b) of the standards (9 C.F.R. §§ 3.131(a), (b)) by failing to keep the primary enclosure of "Stony" clean and sanitized; and

e. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.131(c) of the standards (9 C.F.R. § 3.131(c)) by failing to keep the premises clean and free of accumulations of trash.

6. On June 19, 1995, Respondent wilfully violated:

a. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain a written program of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and

b. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and sections 3.131(a), (b) of the standards (9 C.F.R. §§ 3.131(a), (b)) by failing to keep the primary enclosure of "Stony" clean and sanitized.

7. On August 3, 1995, Respondent wilfully violated:

a. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain a written program of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

b. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.125(d) of the standards (9 C.F.R. § 3.125(d)) by failing to provide for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards;

c. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.126(b) of the standards (9 C.F.R. § 3.126(b)) by failing to provide adequately

ventilated indoor housing facilities for "Stony";

d. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.129(a) of the standards (9 C.F.R. § 3.129(a)) by failing to provide "Stony" with food of sufficient nutritive value to maintain him in good health; and

e. Section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.131(d) of the standards (9 C.F.R. § 3.131(d)) by failing to establish and maintain an effective pest control program.

Discussion Regarding Sanctions

APHIS conducted five inspections of Respondent's facility between January 25, 1994, and August 3, 1995. During each inspection, APHIS pointed out deficiencies to Mr. LaTorres and made recommendations for corrections (CX-1 through CX-5). Respondent received a copy of each inspection report (CX-1 through CX-5). APHIS discussed the Animal Welfare Act with Respondent and spent time educating him as to the requirements of the Act and the regulations and standards (Tr. 14, 26-27). Mr. Wallen testified that Mr. LaTorres seemed not to care about his responsibilities under the Act and regulations (Tr. 27).

The violations were wilful. The term "wilful violation" has been defined, in the context of a regulatory statute, to mean that the violator "(1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). Respondent's repeated violations over twenty months constitute a clear disregard of the statutory and regulatory requirements.

Section 19(b) of the Act (7 U.S.C. § 2149(b) (1988)) provides:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.[1]

With regard to the size of Respondent's business, Complainant alleges without contradiction that Mr. LaTorres had a business from which he could derive a

[1]It may be noted that the Judicial Officer has pointed out that consideration need not be given under the Animal Welfare Act to a respondent's ability to pay civil penalties. *In re Johnson*, AWA Docket No. 91-18, slip op. at 11 (June 3, 1992).

substantial income (Tr. 25-26). The gravity of the violations is evident. Respondent did not display good faith. His conduct during twenty months indicates a consistent disregard for and unwillingness to comply with the Act and the regulations and standards.

The Department has limited resources available in its enforcement efforts (Tr. 25), and therefore relies heavily on the deterrent effect of disciplinary proceedings and sanctions. Sanctions are necessary to dissuade not only Respondent but others from committing similar violations. The Act authorizes a maximum penalty of $2,500 per violation. I, therefore, find that the requested civil penalty of $5,000 is appropriate. In addition, Respondent will be disqualified from obtaining a license under the Act and regulations for five years and continuing thereafter until he has paid the civil penalty assessed against him.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards and, in particular, shall cease and desist from:

(a) Failing to maintain a current, written program of adequate veterinary care under the supervision of a veterinarian;

(b) Failing to provide a suitable method for the removal and disposal of animal wastes;

(c) Failing to provide animals with shelter from inclement weather;

(d) Failing to maintain transport primary enclosures that are structurally sound, in good repair, and appropriate to protect the animals from injury and to contain the animals;

(e) Failing to store food to adequately protect it against infestation or contamination by vermin;

(f) Failing to clean primary enclosures for animals as required;

(g) Failing to establish and maintain an effective program for the control of pests;

(h) Failing to provide animals with wholesome and uncontaminated food;

(i) Failing to provide animals with food of sufficient nutritive value; and

(j) Failing to adequately ventilate indoor housing facilities for animals.

2. Respondent is assessed a civil penalty of $5,000, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and forwarded to: Frank Martin, Jr., Office of the General Counsel, Room 2014 - South Building, United States Department of Agriculture, Washington, DC

20250-1417.

3. Respondent is disqualified for a period of five years from becoming licensed under the Act and regulations, and continuing until he has paid the civil penalty assessed against him.

This Decision and Order shall become final and effective without further proceedings 35 days after the date of service upon Respondent as provided by section 1.142 of the Rules of Practice, 7 C.F.R. § 1.142, unless appealed to the Judicial Officer by Respondent within 30 days of service as provided in section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final and effective March 10, 1998.--Editor]

In re: PETER A. LANG, d/b/a SAFARI WEST.
AWA Docket No. 96-0002.
Decision and Order filed January 13, 1998.

Cease and desist order — Civil penalty — Handling of animals — Late filed response to appeal.

The Judicial Officer affirmed the decision by Chief Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of $1,500 against Respondent and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Complainant proved by a preponderance of the evidence that Respondent, in violation of 9 C.F.R. § 2.131(a)(1), failed to handle one male lechwe as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort. While the male lechwe in question died, there was no conclusive evidence of the cause of death. However, while one of the purposes of 9 C.F.R. § 2.131(a)(1) is to prevent death, section 2.131(a)(1) is explicitly designed to prevent trauma, overheating, excessive cooling, behavioral stress, physical harm, and even unnecessary discomfort to animals. Therefore, Respondent's failure to handle the male lechwe as expeditiously and carefully as possible need not have been the cause of the June 10, 1994, death of male lechwe in order to find that Respondent violated 9 C.F.R. § 2.131(a)(1). The Chief ALJ did not err by excluding unduly repetitious evidence. Complainant did introduce evidence at the hearing of violations of the Regulations and Standards that were not alleged in the Complaint. However, the Chief ALJ refused to allow Complainant to amend the Complaint to conform to the proof, and Respondent was only found to have violated 9 C.F.R. § 2.131(a)(1) as alleged in paragraph 5 of the Complaint. Therefore, Respondent was not harmed by Complainant's introduction of evidence of violations of the Regulations and Standards that were not alleged in the Complaint.

Colleen A. Carroll, for Complainant.
Respondent pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended

(7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter Rules of Practice], by filing a Complaint on October 2, 1995.

The Complaint alleges that: (1) on or about June 8, 1994, Peter A. Lang, d/b/a Safari West [hereinafter Respondent], transported three lechwes in a manner that caused trauma, behavioral stress, and physical harm and resulted in the death of one of the lechwes, in violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) (Compl. ¶ 3); (2) on or about June 9, 1994, Respondent failed to ensure that animals that were being transported were observed at least once every 4 hours, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.140(a) of the Standards (9 C.F.R. § 3.140(a)) (Compl. ¶ 4); and (3) on or about June 10, 1994, Respondent handled two lechwes in a manner that caused trauma, behavioral stress, and physical harm and resulted in the death of one of the lechwes, in violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) (Compl. ¶ 5).

On October 25, 1995, Respondent filed an Answer denying the material allegations in the Complaint. Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing in San Francisco, California, from December 10, 1996, through December 12, 1996. Colleen A. Carroll, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent appeared pro se.

On March 11, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof; on April 30, 1997, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Brief and Summary in Support Thereof; and on May 15, 1997, Complainant filed Complainant's Reply to Respondents' [sic] Proposed Findings of Fact, Conclusions of Law, Brief and Summary in Support Thereof.

On May 20, 1997, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that with respect to one lechwe that died on June 10, 1994, Respondent failed to handle the animal as expeditiously and carefully as possible so as to prevent 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)) (Initial Decision and Order at 8); (2) ordered Respondent to cease and desist from failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or

unnecessary discomfort (Initial Decision and Order at 20); and (3) assessed Respondent a civil penalty of $1,500 (Initial Decision and Order at 20).

On July 11, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1]

Respondent's Appeal was served on Complainant on July 18, 1997, and in accordance with section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)) Complainant's response was due August 7, 1997. Complainant requested and was granted an extension of time to file Complainant's response to Respondent's Appeal no later than September 22, 1997 (Motion to Amend Briefing Schedule, filed August 4, 1997; Informal Order, filed August 5, 1997). On September 22, 1997, Complainant, by telephone, requested and was granted a second extension of time to file Complainant's response to Respondent's Appeal no later than September 26, 1997 (Complainant's Response to Respondent's Motion to Strike Brief at 2; Informal Order, filed September 22, 1997). On October 2, 1997, Complainant filed Complainant's Response to Appeal by Respondent of Decision and Order; on October 8, 1997, Respondent filed a motion to strike Complainant's Response to Appeal by Respondent of Decision and Order; on October 30, 1997, Complainant filed Complainant's Response to Motion to Strike Brief; and on October 31, 1997, the case was referred to the Judicial Officer for decision.

As an initial matter, Complainant's Response to Appeal by Respondent of Decision and Order was filed 6 days late. Therefore, I have not considered Complainant's Response to Appeal by Respondent of Decision and Order with respect to the appeal in this proceeding, and Complainant's Response to Appeal by Respondent of Decision and Order forms no part of the record in this proceeding.[2]

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

[2]Complainant states in Complainant's Response to Respondent's Motion to Strike Brief at 2 that:

> . . . Late in the afternoon of September 26, 1997, counsel for [C]omplainant received, through departmental mail, an informal order issued September 22, 1997, granting an extension to September 26, 1997. Complainant immediately called the Office of the Judicial Officer seeking additional time.

(continued...)

Based upon a careful consideration of the record in this proceeding, I agree with the Chief ALJ's conclusion that with respect to the lechwe that died on June 10, 1994, Respondent failed to handle the animal as expeditiously and carefully as possible, so as to prevent 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)) (Initial Decision and Order at 8), and I agree with the sanction imposed by the Chief ALJ against Respondent (Initial Decision and Order at 20). Therefore, I have adopted the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion of sanctions.

Complainant's exhibits are designated by the letters "CX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2132. Definitions

When used in this chapter—

(...continued)

Complainant's request for a third extension of time was left on the voice mail of the Office of the Judicial Officer at approximately 4:13 p.m., September 26, 1997. The Office of the Hearing Clerk closes for the purpose of filing documents in proceedings conducted under the Rules of Practice at 4:00 p.m. Therefore, Complainant's 4:13 p.m., motion for a third extension of time to file Complainant's response to Respondent's Appeal, made after the Office of the Hearing Clerk closed, is late and is denied.

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

7 U.S.C. § 2132(f).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,

DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

(a)(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.

. . . .

PART 3—STANDARDS

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

. . . .

TRANSPORTATION STANDARDS

. . . .

§ 3.140 Care in transit.

(a) During surface transportation, it shall be the responsibility of the driver or other employee to visually observe the live animals as frequently as circumstances may dictate, but not less than once every 4 hours, to assure that they are receiving sufficient air for normal breathing, their ambient temperatures are within the prescribed limits, all other applicable standards are being complied with and to determine whether any of the live animals are in obvious physical distress and to provide any needed veterinary care as soon as possible. . . . No animal in obvious physical distress shall be transported in commerce.

9 C.F.R. §§ 1.1, 2.100(a), .131(a)(1), 3.140(a).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . .

Findings of Fact

1. Peter A. Lang is, and at all times relevant to these proceedings was, a licensed dealer under the Animal Welfare Act, doing business as Safari West, in Santa Rosa, California (Tr. 18).

2. Safari West is a 400-acre private wildlife reserve [the] purpose [of which] is conservation of endangered species through propagation, education, and research. Safari West is financially supported by Respondent, through his other business endeavors. (Tr. 880-81.)

3. In or around April of 1994, Respondent arranged for the purchase of two male and one female red lechwes and one male ellipsen waterbuck from the San Diego Wild Animal Park. Arrangements were made [for Respondent to take possession of] the animals in San Diego, California, on June 8, 1994. (Tr. 36-38.)

4. A lechwe is a medium-sized African antelope. Males weigh approximately 250 to 270 pounds and females weigh between 150 and 200 pounds. Male lechwes have horns which can grow to approximately . . . 1½ feet long. (Tr. 26-28, 142.)

5. Respondent had arranged to [take possession of] a giraffe and a bushbuck at the Los Angeles Zoo in April of 1994. While Respondent was en route to the Los Angeles Zoo to [obtain] the bushbuck and the giraffe, the Los Angeles Zoo canceled the shipment due to difficulties in preparing the giraffe for transport. (Tr. 160-61, 272-73.)

6. Respondent rescheduled the giraffe and bushbuck pickup for June 9, 1994, in combination with the trip to the San Diego Wild Animal Park. He also planned to pick up animals at Santa Ana Zoo and Fresno Zoo on this trip. Prior to the trip, Respondent apprised zoo staff at the San Diego Wild Animal Park of his planned route and the additional stop at the Los Angeles Zoo. (Tr. 36-37, 40, 131.)

7. Respondent transports animals in a trailer which is 29 feet long and 6 feet 4 inches wide. There is a gooseneck area which is 7 feet long and 3½ feet high. The gooseneck can be divided into two compartments, each of which is 3 feet wide. The rest of the trailer can be divided every 2 feet, creating 11 stalls. Each stall has ventilation panels, access doors, and feed doors. The rear 8 feet of the roof expands upward to a maximum height of 13 feet and 9 inches. (CX 9; [Tr. 18].)

8. Respondent arrived at the Santa Ana Zoo at approximately 9:00 a.m. on June 8, 1994. At that time, Respondent [loaded] 7 red-handed tamarins, 1 serval cat, and 2 mitred conures [on his trailer. Respondent left the Santa Ana Zoo at approximately 12:00 noon, June 8, 1994, and proceeded to the San Diego Wild Animal Park.] (Tr. 18-19.)

9. Respondent arrived at the San Diego Wild Animal Park at [approximately]

2:30 p.m. on June 8, 1994, where he was scheduled to load three lechwes--[two] male[s] and [one] female--and one waterbuck [into his trailer]. (Tr. 18.)

10. At the San Diego Wild Animal Park, Respondent discussed with animal managers Richard M. Massena and Sharon Joseph the loading of the lechwes into the trailer. Respondent suggested placing the female in the gooseneck portion of the trailer. Mr. Massena felt that the lechwe would not have sufficient room in that area and recommended placing all of the lechwes in the main area of the trailer in separate stalls. Since placing them in separate stalls would not have left enough room for the animals that were to be loaded [at the] Los Angeles [Zoo], a mutual decision was reached to place them together in a double stall. Mr. Massena determined that they should be compatible since they had been housed together in a small enclosure for 3½ to 4 weeks prior to the Respondent's arrival. (Tr. 50-52, 13[0]-35, 151.)

11. The lechwes and the waterbuck were loaded [into Respondent's trailer] without incident. Mr. Massena requested that Respondent wait for 1½ hours to monitor the compatibility of the lechwes in the trailer. [Respondent complied with Mr. Massena's] request, and [Mr. Massena] determined . . . that the lechwes were compatible. (Tr. 134, 151[, 643, 910-11].) Respondent checked on the animals [in the trailer] (Tr. 912) and left the San Diego Wild Animal Park between 4:30 and 5:00 p.m. on June 8, 1994. ([RX 4;] Tr. 18[-19, 911].)

12. Respondent traveled to Carlsbad, California, for dinner, arriving at approximately 6:15 p.m. The animals were checked before and after dinner. Respondent left Carlsbad, California, at approximately 10:15 p.m.[, June 8, 1994.] ([RX 4;] Tr. 643-44, 956.)

13. Respondent arrived at a hotel in Los Angeles, California, around midnight. Respondent fed, watered[, and checked] the animals. Respondent informed the night watchman of the contents of the trailer. The watchman agreed to keep an eye on the trailer and notify Respondent of any noise. At the hotel the next morning, Respondent fed, watered, and checked all the animals in the trailer, leaving the water tubs on board. [Respondent] then . . . traveled approximately 15 minutes to the Los Angeles Zoo. ([RX 4;] Tr. 645.)

14. Respondent arrived at the Los Angeles Zoo at approximately 8:00 a.m. on June 9, 1994 (Tr. 645, 957). The staff at the zoo were not ready to load the animals into Respondent's trailer. Staff and equipment were not in place; the veterinarian was not present; and the paperwork was not ready. The unpreparedness of the zoo caused a delay of approximately 2 hours. Respondent made a number of suggestions to Mr. Barnes[, the Los Angeles Zoo mammal curator,] regarding the loading; however, Respondent relied on the decisions of Mr. Barnes since he was more familiar with the animals. (Tr. 645-48, 918-23,

928-32.)

15. Two sable antelope, one greater kudu, one masai giraffe, and one harness bushbuck were loaded [into Respondent's trailer] at the Los Angeles Zoo (Tr. 19). The loading proceeded without event, except for the crating of the bushbuck, which caused an injury to the bushbuck's nose, with substantial bleeding and some swelling. A veterinarian, who was called to check on the bushbuck, determined that it was safe to transport the animal, but instructed the animal keeper to listen to the bushbuck periodically to ensure that the bushbuck was breathing. (Tr. 162-63, 166, [171-73], 929-31.)

16. Between the loadings of the various animals, Ms. Lang provided the small animals from the Santa Ana Zoo with food (Tr. 650, 705). Following the loading, while waiting for the Los Angeles Zoo staff to provide him with paperwork for the animals, Respondent moved the trailer to the shade and checked the animals on board. Prior to leaving the Los Angeles Zoo, [Respondent removed] the water tubs [from the trailer]. (Tr. 932-33.)

17. Respondent left the Los Angeles Zoo between 10:30 and 11:30 a.m.[, June 9, 1994.] Two zookeepers [from the Los Angeles Zoo], Kelley Greene and Robin Noll, joined Respondent for the remainder of the trip, to ensure the safe transport of the giraffe and bushbuck [(Tr. 160-62)]. After leaving the Los Angeles Zoo, Respondent's truck overheated, and he stopped for approximately 30 minutes while he cooled the radiator with some of the animals' drinking water (Tr. [18,] 176-77, 651, 936).

18. Respondent stopped for gas at either Wheeler Ridge or Frazier Park, approximately 1½ hours from the Los Angeles Zoo. Respondent put the gas pump on automatic and circled the trailer checking all of the animals on board. While he was refueling and checking the animals, Ms. Greene, Ms. Noll, and Ms. Lang used the rest room and purchased food and beverages. ([RX 4;] Tr. 180, 656, 958-59.)

19. Respondent next traveled approximately 2 hours to the Fresno Zoo ([RX 4;] Tr. [18,] 959). At the Fresno Zoo, Respondent [loaded] three cattle egret and two scarlet ibis [into his trailer (Tr. 317).] At the Fresno Zoo, Ms. Lang, Ms. Greene, and Ms. Noll all used the rest room and filled water bottles (Tr. 658).

20. Respondent spent approximately 15 minutes at the Fresno Zoo, then traveled approximately 10 minutes to a gas station ([RX 4;] Tr. 185-86). At the gas station, Respondent placed the fuel nozzle in the tank and put it on automatic. He then circled the trailer and checked on all the animals; he checked the lechwes last. Upon checking the lechwes, Respondent discovered that the female [lechwe] had been gored. (Tr. 942.) Respondent asked Ms. Noll to pull her car alongside the trailer to block the view of the gas station patrons. Respondent and Ms. Noll

moved the injured lechwe onto the pavement of the gas station. A portion of the intestinal tract was out and bedding material from the trailer was adhering to the intestines. During this period of time, Ms. Greene and Ms. Lang were in the mini-mart using the rest room and purchasing snacks. Respondent summoned them to the trailer to assist with the lechwe. Respondent then directed Ms. Lang to return to the mini-mart to purchase an ace bandage. (Tr. [186-90], 27[7-]79.) An ace bandage was not available, and Ms. Greene suggested that Respondent use a tee-shirt instead to bind the intestines, which he did. The birds in the gooseneck were moved to the pickup truck to make room for the lechwe. During the process of moving [the lechwe] from the pavement to the gooseneck, the lechwe expired. After she died, the lechwe was placed in the bed of the pickup truck and covered with a suitcase. (Tr. 187-93, 279-81, 660-61, 943-4[5].)

21. During the course of attempting to stabilize the lechwe, Ms. Noll asked Respondent to administer an euthanasia drug. Respondent was not carrying any euthanasia drugs because his veterinarian does not recommend that individuals without medical training administer them. (Tr. 188-89, 191, 280, 512, 943-44.)

22. From the Fresno gas station, Respondent traveled 3 hours to a gas station in the Livermore[, California,] area. At the gas station, Respondent again refueled and checked all of the animals. After Ms. Greene left the rest room, she requested that she be able to check the bushbuck, and Respondent opened the door so she could [determine whether the bushbuck was] breathing. (Tr. 196-97, 275, 281.)

23. Respondent did not stop again until reaching Safari West[, in Santa Rosa, California,] less than 4 hours later, at approximately 9:30 p.m.[, June 9, 1994 (RX 4; Tr. 19, 667).] Respondent's employee, John Roberts, had prepared for the animals' arrival by laying down bedding and placing fresh food and water in the stalls (Tr. 667, 751-52, 960-62, 965). The bushbuck, giraffe, and serval cat were unloaded into stalls in Respondent's barn. The rest of the animals from the Santa Ana and Fresno Zoos were removed from the trailer and taken to a holding area where they were fed and watered. . . . (Tr. 197-98, 203, 206-07, 283, 670-71, 773-74, 777-91, 965, 968-70.)

24. At approximately 9:45 p.m., [June 9, 1994,] after the [bushbuck, giraffe, serval cat, and the animals from the Santa Ana and Fresno Zoos] were unloaded, Respondent, Ms. Lang, Ms. Greene, Ms. Noll, and Mr. Roberts went to the house for refreshments. Ms. Greene and Ms. Noll then retired to the guest house, while Respondent and Mr. Roberts returned to the barn to feed and water the animals. (Tr. [209-]10, 671-72, 759-60, 793-94, 974-76.)

25. On the following day, June 10, 1994, Respondent began to unload the remaining animals at 8:00 a.m. and found that one of the two remaining lechwes

was down in the trailer and unable to stand. The healthy lechwe left the trailer without incident. Respondent then removed the other lechwe from the trailer, but the lechwe was unable to remain upright. Respondent attempted to stabilize the animal by giving him fluids and dopram to increase his heart rate. Within minutes, the lechwe expired. Respondent attempted to revive [the lechwe] by providing mouth to nostril resuscitation, but was unsuccessful. (Tr. 19, 213-16, 806-08.)

26. . . . [The remaining animals were] unloaded [from the trailer] (Tr. 216, 809).

Conclusions of Law

1. The Secretary has jurisdiction in the matter.

2. With respect to the lechwe that died on June 9, 1994, the record evidence does not establish that Respondent failed to handle the animal as expeditiously and carefully as possible [in a manner that does not cause] trauma, behavioral stress, physical harm, [or] unnecessary discomfort, in violation of [section 2.131(a)(1) of the Regulations] (9 C.F.R. § 2.131(a)(1)).

3. The record evidence does not establish that [on or about June 9, 1994,] Respondent failed to ensure that the animals that [were being] transported . . . were observed at least once every 4 hours, in violation of [section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.140(a) of the Standards] (9 C.F.R. § 3.140(a)).

4. With respect to the lechwe that died on June 10, 1994, the record evidence establishes that Respondent failed to handle the animal as expeditiously and carefully as possible [in a manner that did 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)).

Discussion

[Complainant] . . . allege[s] three violations of the Regulations and Standards relating to the transport[ation of animals] that occurred between June 8 and June 10, 1994. Specifically, paragraphs 3 through 5 of the Complaint allege that:

> 3. On or about June 8, 1994, respondents [sic] violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)), by transporting three lechwes in a manner that caused trauma, behavioral stress and physical harm, and resulted in the death of one of the lechwes.

4. On or about June 9, 1994, respondents [sic] willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to ensure that animals that were being transported were observed at least once every four hours, in violation of section 3.140(a) of the Standards (9 C.F.R. § 3.140(a)).

5. On or about June 10, 1994, respondents [sic] violated section 2.131(a) of the Regulations, (9 C.F.R. § 2.131(a)), by handling two lechwes in a manner that caused trauma, behavioral stress and physical harm, and resulted in the death of one of the lechwes.

Complaint at 1-2.

Complainant addressed issues at the hearing and in post-hearing submissions that were not part of the Complaint. Specifically, assertions were made about veterinary care, feeding and watering, and unloading animals. At the hearing, Complainant expressed an intent to amend the Complaint in order to conform to the proof presented. [Section 1.137 of the Rules of Practice allows amendment of a complaint as follows:

§ 1.137 Amendment of complaint or answer.

At any time prior to the filing of a motion for a hearing, the complaint or answer may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137.

The Chief ALJ] advised Complainant that such an amendment would not be allowed (Tr. 340)[, and Complainant did not file a timely appeal of the Chief ALJ's ruling that he would not permit an amendment of the Complaint] . . . .

Therefore, only evidence pertaining to feeding and watering and veterinary care to the extent that it is relevant to the handling of the lechwes is relevant to this proceeding. The [evidence regarding the handling of] animals other than the lechwes is not relevant to the allegations . . . in the Complaint, and ha[s] not been considered.

A. Care in Transit

Complainant alleges that Respondent violated the [R]egulations [and Standards] by failing to observe the animals at least every 4 hours [(Compl. ¶ 4)]. This allegation is not, however, supported by a preponderance of the evidence[[3] Section 3.140(a) of] the Standards requires that:

> **§ 3.140 Care in transit.**
>
> (a) During surface transportation, it shall be the responsibility of the driver or other employee to visually observe the live animals as frequently as circumstances may dictate, but not less than once every 4 hours, to assure that they are receiving sufficient air for normal breathing, their ambient temperatures are within the prescribed limits, all other applicable standards are being complied with and to determine whether any of the live animals are in obvious physical distress and to provide any needed veterinary care as soon as possible.

9 C.F.R. § 3.140(a).

[[3]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 45 n.7 (Nov. 6, 1997); *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 5 n.*** (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).]

The only support Complainant has for this contention is testimony from two Los Angeles zookeepers about what they did not see during the last 10 hours of Respondent's trip. Ms. Greene and Ms. Noll, who accompanied Respondent on the trip between Los Angeles and Santa Rosa, testified that they never saw Respondent check the animals. Ms. Noll and Ms. Greene were, however, away from the trailer for some amount of time at every stop. Ms. Noll testified that the longest she was away from the trailer was the 5 minutes she spent refueling her own vehicle at the gas station outside of Fresno. Other testimony, however, indicates that she, as well as Ms. Greene, used the rest room at every stop, while Respondent was refueling. (Tr. 195, 242-43.)

Respondent testified that he [was] able to check all of the animals [during these stops]. There is no evidence to indicate that this [was] not the case. There were metal screens on the left side of the trailer through which one could see all of the animals except for the lechwes, the bushbuck, and the animals in the gooseneck. (Tr. 275.) The rear door had to be opened to see the bushbuck, and panels had to be slid open to observe the lechwes and the animals in the gooseneck. It is reasonable that Respondent was able to do this while Ms. Noll and Ms. Greene were unable to observe him. In fact, the keepers never claimed to have seen Respondent refuel; therefore, it [is reasonable] that they would not have seen him contemporaneously observe the animals. [Further, the undisputed fact that, during the refueling stop outside of Fresno, Respondent discovered that the female lechwe had been gored, indicates that Respondent not only was able to inspect the animals during refueling stops, but was actually inspecting the animals.]

. . . .

B. Lechwe Deaths

Complainant alleges that both of the lechwes died as a result of improper handling on the part of Respondent. [Section 2.131(a)(1) of the Regulations] provides that:

> **§ 2.131 Handling of animals.**
>
> (a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

9 C.F.R. § 2.131(a)(1).

1. **Female lechwe**

The female lechwe died on June 9, 1994, presumably after being gored by one of the male [lechwes. When Respondent discovered that the female lechwe had been gored,] the lechwes had been on [Respondent's] trailer for 25 hours. The animal suffered from a single wound to the abdomen, which resulted in disembowelment. Dr. Warren Thomas, former director of the Los Angeles Zoo, testified that goring can occur in a variety of ways:

BY MR. LANG:

Q. We had a tragedy with an animal that got -- that was gored, and we don't know whether it was accidently gored or stressed gored, or -- pardon me. We had an animal that was gored, en route, in Fresno.

Are all gorings necessarily related to stress?

[BY DR. THOMAS:]

A. This -- I have trouble with the way you asked the question.

Q. Okay.

A. Because, gorings can occur in a variety of ways. Male animals have horns that serve the function of defending themselves, or defending their territory. That's how nature has endowed them with their ability to survive.

When you have them in contact with other animals, and other animals are gored, it can be for a variety of reasons. It can be defending territory, one male with another. It can be even with one male and a female, that's encroaching on his territory.

It can be an accidental thing. You know, you can have a fright syndrome -- and something walks by, it could be another animal, it could be another male, it could be a female, and as part of the fright syndrome, he strikes. It isn't as though he's defending his territory, he's defending his corpus. You know he doesn't know what's out there, and he's simply responding to external stimuli.

> There can be -- you have to know the whole scenario to be able to put together what causes a goring. It can be one animal in the wrong place at the wrong time, and the vehicle lunges, and he drops his head down to catch his own balance, and the animal gets impaled on him. You know, there's -- as many different situations as you have, that's how many different scenarios you can put together.

Tr. 589-90.

Dr. Thomas and Dr. Glenn Benjamin also testified that if a goring was the result of aggression, there usually would be more than one wound (Tr. 501, 591). Since the female lechwe suffered from only a single wound, there is an implication that it was accidental rather than [related to] stress or aggression. . . .

Complainant argues that Respondent is responsible for the death of the female lechwe because the lechwes did not have sufficient room and were not housed compatibly. The animal care managers at the San Diego Wild Animal Park, however, determined that the animals were compatible and did have enough room (Tr. 134-35). Dr. Thomas testified that Respondent correctly relied on the zoo's expertise and knowledge with regard to those particular animals. He stated that the zoo is responsible for loading the animals and that if [zoo employees believed] that the animals should not have been grouped together, the zoo should not have allowed Respondent to take them. (Tr. 577-78.) Dr. Gary Kuehn testified that "as a general rule it's major folly to disregard the information that comes from people who know the animals best." (Tr. 827.) Mr. Randolph Rieches, the mammal curator at the San Diego Wild Animal Park, also agreed that Respondent reasonably relied on the determination of Mr. Massena and Ms. Joseph, animal care managers for the mammal department at the San Diego Wild Animal Park (Tr. 105). [Respondent is responsible for handling the lechwe in accordance with section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). The agreement by experts at the San Diego Wild Animal Park who were familiar with the particular lechwes, to place the three lechwes together in a double stall, does not relieve Respondent of the responsibility to comply with section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). However, I find that the agreement by the knowledgeable employees at the San Diego Wild Animal Park to place the lechwes together in one double stall and their determination that the animals were compatible is evidence that Respondent's action of transporting the three lechwes together in the same double stall was not a failure to handle the animals as carefully as possible, and Complainant has failed to rebut this evidence.]

Complainant argues that Mr. Massena and Ms. Joseph based their decision to place the lechwes together on the assumptions that Respondent "would (1) travel

expeditiously to Santa Rosa, (2) unload the animals upon arrival, and (3) care for the animals properly during the trip." (Complaint's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof, at 25.) . . . .

Mr. Massena was aware that Respondent [would be loading] additional animals in Los Angeles the following day and that it would take at least 10 hours to get from Los Angeles to Santa Rosa (Tr. 131, 137). The female lechwe was gored during the twenty-fifth hour of the trip, approximately 5 hours after departing the Los Angeles Zoo. The [female lechwe was gored] well within the time frame Mr. Massena should have anticipated [that it would take for Respondent to arrive in Santa Rosa]. The fact that the animals were not unloaded upon arrival had no affect on the health of the female lechwe, since she died prior to arrival in Santa Rosa. Complainant has failed to prove that Respondent did not properly care for the female lechwe during the trip; and has not proved that behavioral stress induced by improper [handling] caused the goring.

. . . .

Complainant additionally alleges that Respondent was in violation of the [R]egulations [and Standards] because he did not obtain veterinary care for the lechwe. The lechwe died within minutes of being discovered. Respondent spent those minutes trying to stabilize the animal. After the lechwe died, there was no reason to consult a veterinarian. The male lechwes did not appear agitated or unhealthy. Returning to the Fresno Zoo at that point would only have lengthened the trip and increased stress to the other animals.

Complainant maintains that Respondent should be held responsible because he did not intend to return to the Fresno Zoo, even if the lechwe had lived. This contention is based on the negative response Respondent gave when his wife asked if they were going back to Fresno. Respondent claims that he meant they would not return until the animal was stable. It is impossible to know what Respondent would have done if the lechwe had lived. Since the lechwe did not live, however, the question is moot and need not be considered.

2. **Male lechwe**

[One of] the male lechwes died 42 hours after being loaded into [Respondent's] trailer. . . .

. . . .

The [male] lechwes . . . were . . . transported in a manner [that caused trauma, behavioral stress, physical harm, or unnecessary discomfort]. The animals experienced a number of stressful conditions which [may have] contributed to the death of [one of] the male lechwe[s]. While Respondent could not have entirely

prevented stress, there were actions he could have taken to make the animals more comfortable. Specifically, Respondent could have more closely observed the temperature inside the trailer, watered the animals more often while traveling, unloaded the lechwes upon arrival in Santa Rosa, shortened the length of the trip, and carried [fewer] animals.

Loading the lechwes into the trailer created initial stress. The [male lechwes] were kept in the trailer for nearly 42 hours, approximately 30 hours of which they were in transit. They were subjected to high temperatures which likely increased with each additional animal loaded into the trailer. Since Respondent was spending a great amount of time in southern California during a warm . . . month, he should have periodically checked the temperature inside the trailer to ensure that the animals were not subjected to excessive temperatures. Also, he should have watered the lechwes more often, even if they did not appear to need it. Dr. Benjamin testified that lechwes should be watered every 4 to 6 hours (Tr. 542-43). . . .

Reducing the number of animals [loaded in the trailer] during the trip also could have reduced the amount of stress. Each loading and unloading of animals added to the stress with the noise involved (Tr. 142, 502-503, 532). After the lechwes were loaded, a waterbuck was loaded, and then five animals were loaded at the Los Angeles Zoo. The rear doors had to be opened an additional time in Los Angeles for the veterinarian to examine the bushbuck. Next, the gooseneck compartment, adjoining the lechwes' stall, was opened to load five birds at the Fresno Zoo. When the gored lechwe was discovered, a door had to be opened and the animal removed. The birds in the gooseneck were unloaded and then reloaded after the lechwe expired. Upon arrival at Safari West, the bushbuck, giraffe, and all of the animals in the gooseneck were unloaded. The serval cat was unloaded through the lechwes' stall, as the cat did not fit through the side door.

Each time the animals were checked or fed and watered, doors were opened and closed causing stress from the noise and the exposure to light. The longer the trip, the more the animals had to be checked. Because the bushbuck had been crated, the bushbuck could not be viewed through the ventilation panels, and the rear door had to be opened each time the bushbuck was checked. Also, doors had to be opened to view the animals in the gooseneck compartments and a panel had to be slid open to view the lechwes. According to Respondent's testimony, the animals were observed prior to leaving San Diego, twice in Carlsbad, twice at the hotel in Los Angeles, twice at the Los Angeles Zoo, three times while refueling, and finally upon [arrival at] Safari West[, in Santa Rosa, California]. They were, therefore, disturbed 11 times [and] suffer[ed] from the stress of being confined to a trailer for 42 hours.

The high amount of stress should have caused a heightened concern for the remaining lechwes, including a greater interest in removing them from the trailer as soon as possible. Although witnesses testified that the animals should have been comfortable in the trailer overnight as long as they were provided with food and water, unloading them would have facilitated closer observation. . . . Although there were some obstacles to unloading the animals after dark, Respondent testified that if he had suspected a problem he would have unloaded the lechwes right into his yard upon arrival (Tr. 976). Considering the amount of stress that the animals had suffered, and considering the possibility that the animals were not compatible--especially in light of the female [lechwe] being gored--a problem should have been suspected and the [male] lechwes immediately unloaded [upon arrival in Santa Rosa].

The length of Respondent's trip was extended due to matters outside of Respondent's control. Specifically, the Los Angeles Zoo caused unnecessary delay by not being prepared for Respondent's arrival despite knowing how far he still had to travel. Also, time spent attending the wounded lechwe, and delay caused by the truck overheating, could not be avoided. Nevertheless, the possibility of delay is a contingency that must be [considered] when one plans to transport wild animals. Th[e trip that is the subject of this proceeding] was not the first time Respondent had vehicle problems during a transport. He should have taken this possibility into account. Although Respondent may not have had problems loading at Los Angeles prior to this occasion, delays in loading should be anticipated. Therefore, Respondent . . . should have planned this trip under the assumption that he might not arrive at Santa Rosa prior to nightfall. Under this assumption, Respondent's itinerary should have appeared overly ambitious, and have been rejected.

The length of the trip and the number of animals being carried were apparently being dictated by efficiency concerns. Dr. Warren Thomas, former director of the Los Angeles Zoo, testified that it is common in the industry to arrange trips in a manner that allows the hauler to fill his trailer (Tr. 591-92). While economic feasibility cannot be discounted as a concern, the welfare of the animals should be a greater priority. There is no bright line rule for how long a trip should be or how many animals should be carried. [Dealers transporting animals] need to consider all relevant factors--such as temperature and compatibility of the animals--as well as individual needs of the animals--such as frequent watering--before planning a trip. Transporting animals is always dangerous, and the health of the animals cannot be guaranteed. Had Respondent . . . engaged in proper planning and coordination, however, [the male lechwes could have been handled more expeditiously and carefully and trauma, behavioral stress, and discomfort] could

have been reduced and the death of [one of] the male lechwe[s may] have been avoided.

Sanctions

Complainant recommends the maximum civil penalty of $2,500 for each violation and a cease and desist order. [Section 19(b) of the Animal Welfare Act provides that sanctions shall be imposed as follows:

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order]

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(b).

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to Joseph Hickey and Shannon Hansen), 50 Agric. Dec.

476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

Respondent has shown good faith . . . [in cooperating with the investigation by the Animal and Plant Health Inspection Service of the events which led to the institution of this proceeding]. . . . Furthermore, there is no indication that Respondent intentionally caused harm to the lechwe[, and I do not find that Respondent's violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) was willful]. Respondent does not have a history of previous violations. [However, a failure over the course of 42 hours to handle an animal as expeditiously and carefully as possible, in a manner to prevent trauma, behavioral stress, physical harm, and unnecessary discomfort, is very serious]. In addition, Respondent has a fairly large business. Although, he does not make money buying and selling animals, there are a large number of animals present at his facility.

Based on these considerations, I conclude that a civil penalty of $1,500 and a cease and desist order are appropriate and warranted.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises seven issues in Respondent's Appeal. First, Respondent contends that:

A. The manner in which the Respondent handled the male lechwe on June 10, 1994 in no way caused it harm or death.

> The . . . Complaint states . . . and Judge Palmer in the [Initial] Decision and Order found "[o]n or about June 10, respondents [sic] violated section 2.131(a) of the Regulations, (9 C.F.R. § 2.131(a)), by handling two lechwes in a manner that caused trauma, behavioral stress and physical harm, and resulted in the death of one of the lechwes."

There is no testimony or evidence whatsoever suggesting that the Respondent did anything on June 10, 1994 to cause trauma, behavioral

> stress and physical harm that resulted in the death of one of the lechwes. The only thing the Respondent did on June 10, 1994 was remove the male lechwe from the trailer and administer first aid. That certainly cannot be considered a violation of 9 C.F.R. § 2.131(a)(1).

Respondent's Appeal at 1-2 (footnotes omitted).

The record does reveal that on the morning of June 10, 1994, Respondent unloaded from his trailer, and administered first aid to, a male lechwe, that died within minutes after Respondent unloaded and gave first aid to the animal. However, the Chief ALJ's reasons for finding that Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)), which, with minor changes, I have adopted (Decision and Order, *supra*, pp. 24-27), do not include Respondent's act of unloading the male lechwe on June 10, 1994, or the first aid Respondent administered to the male lechwe on June 10, 1994. Instead, the basis for finding Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) include Respondent's actions and failures to act, which are fully addressed in this Decision and Order, *supra*, pp. 24-27, and need not be repeated here, from the time the lechwes were loaded into his trailer at the San Diego Wild Animal Park on June 8, 1994, through, and including, Respondent's failure to unload the lechwes at his premises in Santa Rosa, California, until approximately 12 hours after his arrival in Santa Rosa, California.

Respondent's focus on his June 10, 1994, acts of unloading and administering first aid to the male lechwe that died, which Respondent had handled in violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) over the course of the immediately preceding 42 hours, is misplaced. I find that the Chief ALJ's conclusion, that Respondent failed to handle the lechwe 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)), is fully supported by the record.

Second, Respondent contends that "[t]he Respondent never willfully nor intentionally violated 9 C.F.R. 2.131(a)(1)." (Respondent's Appeal at 2.) 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.[4] Therefore, the fact that Respondent did not "intentionally

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[4]*See Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (continued...)

cause harm to the lechwe" (Initial Decision and Order at 19; Decision and Order, *supra*, p. 29) 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)). However, there is some evidence in this record that Respondent did not willfully violate section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). The Chief ALJ found that Respondent violated 9 C.F.R. § 2.131(a)(1), but did not find that Respondent's violation was willful. In these circumstances, the record is not strong enough to reverse the Chief ALJ on this issue.

Third, Respondent contends that:

C. The male lechwe died from capture myopathy, a fatal and irreversible disease caused at the time the lechwe was loaded into the trailer.

(...continued)
(5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 43 n.4 (Nov. 6, 1997); *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 143-44 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965).

> Judge Palmer states in the Decision and Order that, "the animal (2nd lechwe) probably died from capture myopathy, a deadly condition caused by the stress of capture." There is nothing the Respondent could have done to cure, reverse in anyway [sic] or remedy the outcome of death for the lechwe by capture myopathy. Capture myopathy, as the name implies, and as Judge Palmer correctly states, occurs at the time an animal is captured, and in this instance, when it was loaded into the trailer at the San Diego Wild Animal Park. As Judge Palmer correctly states in the Decision and Order, ". . . it is a deadly condition". . . .
>
> Capture myopathy is an irreversible disease. In the Decision and Order, Judge Palmer, states six things the Respondent could have done differently. As discussed below . . . none of those six items could have stopped or cured capture myopathy. The outcome still would have been the same. In fact, some of the measures that Judge Palmer suggests would have been harmful or even dangerous to the other animals and the lechwe and the others were unnecessary.

Respondent's Appeal at 3 (emphasis in original) (footnotes omitted).

The Chief ALJ does state that the male lechwe "*probably* died from capture myopathy" (Initial Decision and Order at 15 (emphasis added)). However, I do not find that the record supports a finding that capture myopathy was the cause of the June 10, 1994, death of the male lechwe, and I have deleted the Chief ALJ's reference to the probable cause of death in this Decision and Order. Further, Respondent's focus on the cause of the June 10, 1994, death of the male lechwe is misplaced. Even if I found that the capture myopathy was the cause of death of the male lechwe (which I do not find), that finding would not negate the fact that Respondent failed to handle the male lechwe as expeditiously and carefully as possible in a manner that did not cause trauma, behavioral stress, physical harm, and unnecessary discomfort to the animal. 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. Therefore, Respondent's actions and failures to act need not have been the cause of the June 10, 1994, death of the male lechwe in order to find that Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). Moreover, while it is undisputed that the male lechwe in question died on June 10, 1994, the male lechwe's death is not a necessary prerequisite to a finding that Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R.

§ 2.131(a)(1)), and my determination that Respondent violated 9 C.F.R. § 2.131(a)(1) is not based upon a finding that Respondent's actions or inaction caused the death of the male lechwe in question.

Fourth, Respondent, citing pages 443 and 444 of the transcript, contends that:

> **D. Judge Palmer did not allow the admission of USDA material showing the lead investigator could not find where the Respondent had violated the C.F.R.**
>
> Judge Palmer did not allow the admission of USDA materials showing that Lupe Aguilar, the lead investigator for the case, could not find any where in the 9 CFR sections where the Respondent had violated the Animal Welfare Regulations. . . . The USDA personnel were Ms. Lupe Aguilar, Dr. Homer Malaby, and Ms. Diane Ward. None of these individuals could find a violation of the C.F.R. . . .

Respondent's Appeal at 4 (footnote omitted).

The record reveals that the Chief ALJ did exclude the introduction of evidence concerning a "file," as follows:

> BY MR. LANG:
>
> Q. After your investigation -- and you were the only USDA investigator I saw or spoke to -- to your knowledge, did I willfully violate any USDA laws?
>
> [BY MS. WARD:]
>
> A. From the facts of the case that I had -- and I never saw the completed case -- I did not feel there were any violations of the 9 CFR.
>
> Q. Were -- did your file have other people's statements?
>
> Do you feel it was a complete file?
>
> MS. CARROLL: Objection. I think we need some clarification about what file this is. Is this a personal file that this witness had --
>
> BY MR. LANG:

Q. Did your file --

MS. CARROLL: -- or, the official file?

BY MR. LANG:

Q. Did your file that was given to you to do this investigation -- was it complete, in that it had other witnesses' statements?

MS. CARROLL: And --

JUDGE PALMER: I'm going to sustain the objection. I don't know what was in that file. And, I don't know that I really want to revive the whole file.

He's [sic] stated, based upon being told to go out there and investigate, and based upon some statements she had -- she indicated whose statements she had. And from her observation, she didn't find a violation.

Tr. 442-44.

The Chief ALJ excluded questions concerning the "file" referenced by Respondent on the ground that Respondent had already established that Ms. Diane Ward, based on her knowledge of the investigation, did not "find a violation." I infer that the Chief ALJ found that Respondent's inquiry into the "file" referenced on pages 442 through 444 of the transcript would have been unduly repetitious. The Administrative Procedure Act and the Rules of Practice both provide for the exclusion of unduly repetitious evidence,[5] and I do not find that the Chief ALJ

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[5]The Administrative Procedure Act provides, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

(continued...)

erred by excluding evidence concerning the "file" referenced on pages 442 through 444 of the transcript.

Fifth, Respondent contends that "[t]he [Initial] Decision and Order and the hearing were based on sections of the C.F.R. that the Respondent was not notified of until the hearing started. . . ." (Respondent's Appeal at 5.)

Complainant did introduce evidence at the hearing of violations of the Regulations and Standards that were not alleged in the Complaint. Specifically, Complainant introduced evidence regarding veterinary care, feeding and watering, and unloading animals. Complainant stated that Complainant was considering an amendment to the Complaint in order to conform to the proof presented. However, the Chief ALJ advised Complainant that an amendment of the Complaint would not be allowed, as follows:

> MR. LANG: Your Honor, I again object. I came --
>
> JUDGE PALMER: I note your objection, and I share your concern. Because, I did review the complaint just now, and the only charges in the complaint -- they're very specific -- deal with the lechwes.
>
> MS. CARROLL: Yes.
>
> JUDGE PALMER: And, they also specify regulations other than those that she's been citing.
>
> MS. CARROLL: Well, we do include -- 3.140 and the 2.131 are the specified regulations. And the government is considering moving to amend the complaint to conform to proof --

---

(...continued)

Section 1.141(h)(1)(iv) of the Rules of Practice provides:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence.* (1) *In general.* . . .
>
> . . . .
>
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

JUDGE PALMER: Well, I'll deny it. I must tell you this, that I reviewed another one of your cases recently while writing a decision, and I know that there's some law out there that says you can amend a complaint to match evidence. But, I do think the government -- in all this time, with all the statements that it has, and all the resources it has as [sic] its hands -- should have the case in a posture, at the time we come to a hearing, that a respondent -- particularly one who's representing himself pro se, or any respondent -- should know exactly what it is he's got to face.

And, if he's now going to be asked to talk about how he handled the monkeys -- I'm going to call them monkeys, it's easier for me than tamarins -- and so forth, when the complaint only specified lechwes or how he's supposed to water other animals, other than the lechwes and so forth, I just don't think that's fair.

So, I'm not going to permit that amendment.

Tr. 339-40.

Further, the Chief ALJ specifically states in the Initial Decision and Order that:

Complainant addressed issues at the hearing and in post-hearing submissions that were not part of the Complaint. Specifically, assertions were made about veterinary care, feeding and watering, and unloading animals. At the hearing Complainant expressed an intent to amend the Complaint in order to conform to the proof presented. I advised Complainant that such an amendment would not be allowed. (Tr. 340). All of the activities in question took place during the same three day period; therefore, there was sufficient time to include any additional allegations in the original complaint, or in an amended complaint filed prior to the hearing. Despite relaxed pleading requirements in administrative proceedings, Respondent has a right to notice of the allegations against him in order to properly prepare a defense prior to the hearing. . . .

I have, therefore, only considered evidence pertaining to feeding and watering and veterinary care to the extent that it is relevant to the handling of the lechwes. The procedures used to unload animals other than the lechwes is not relevant to the allegations charged in the Complaint, and

have not been considered.

Initial Decision and Order at 9-10.

Moreover, the Chief ALJ only concluded, and I only conclude, that Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) as alleged in paragraph 5 of the Complaint. Respondent has not been found to have violated the Regulations or Standards that were not cited in the Complaint. Under these circumstances, I do not find that Respondent was harmed by Complainant's introduction of evidence of violations of the Regulations and Standards that were not alleged in the Complaint.

Sixth, Respondent contends that "[t]he Respondent's expertise was critical in determining the best and most suitable course of action during the transportation of the animals." (Respondent's Appeal at 13.)

I do not find Respondent's level of expertise relevant to the issue of whether, with respect to the lechwe that died on June 10, 1994, Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). Complainant did stipulate to the fact that Respondent had successfully transported exotic animals in the past without incident (Tr. 18, 446), and there is some evidence that Respondent is an experienced handler of exotic animals (Tr. 504, 831-32). However, Complainant's stipulation and the evidence of Respondent's experience is not relevant to whether, on a particular occasion, June 8, 1994, through June 10, 1994, Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). Even if I found that Respondent is an experienced handler of exotic animals and generally uses good judgment with respect to the handling of exotic animals, those findings would not affect the outcome of this proceeding.

Seventh, Respondent contends that "Judge Palmer's suggestions for alleviation of stress and death in the male lechwe are incorrect and are situations that would have been stressful or dangerous to the lechwes and other animals or were unnecessary." (Respondent's Appeal at 14.)

Respondent is required by section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) to handle animals *as expeditiously as possible and carefully as possible* in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. The Chief ALJ found that, with respect to the male lechwe that died on June 10, 1994, Respondent failed to comply with 9 C.F.R. § 2.131(a)(1). The Chief ALJ discusses some of the actions that Respondent could have taken to avoid the violation, as follows:

> The lechwes in question were not transported in a manner which subjected them to the least amount of stress possible. The animals

> experienced a number of stressful conditions which likely contributed to the death of the male lechwe. While Respondent could not have entirely prevented stress, there were actions he could have taken to make the animals more comfortable. Specifically, Respondent could have more closely observed the temperature inside the trailer, watered the animals more often while traveling, unloaded the lechwes upon arrival in Santa Rosa, shortened the length of the trip, and carried less animals.

Initial Decision and Order at 15-16.

Respondent contends that watering the animals more frequently during the trip would not have cured capture myopathy, that he watered the animals as frequently as required in section 3.139(a) of the Standards (9 C.F.R. § 3.139(a)), that the animals did not appear to require more water, and that providing the animals with more water would have increased the time the animals were in transit and the stress on the animals (Respondent's Appeal at 14-19).

First, there is no evidence to support a finding that the male lechwe that died on June 10, 1994, died of capture myopathy.

Second, Respondent's compliance with the minimum requirements in section 3.139(a) of the Standards (9 C.F.R. § 3.139(a)) does not constitute compliance with section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). Respondent is required to comply with both section 3.139(a) of the Standards and section 2.131(a)(1) of the Regulations. Section 3.139(a) of the Standards provides that:

> **§ 3.139 Food and water requirements.**
>
> (a) All live animals shall be offered potable water within 4 hours prior to being transported in commerce. Dealers, exhibitors, research facilities and operators of auction sales shall provide potable water to all live animals transported in their own primary conveyance *at least every 12 hours* after such transportation is initiated.

9 C.F.R. § 3.139(a) (emphasis added).

Respondent did not offer water to the animals in his trailer for a period of 10½ hours. The evidence establishes that Respondent provided water to the animals in his trailer up to the time that he left the Los Angeles Zoo, between 10:30 and 11:30 a.m., June 9, 1994, and did not again offer water to the animals until after he arrived in Santa Rosa, unloaded the bushbuck, giraffe, serval cat, and the animals from the Santa Ana Zoo and the Fresno Zoo, and went to the house for refreshments.

Dr. Benjamin testified that, if possible, he would have water available to lechwes at all times, and if it was not possible to have water available at all times, he would try to give lechwes water every 4 to 6 hours (Tr. 542-43). Considering the heat, estimated to be in the 90's and the 100's at times (CX 8 at 5), and the length of the trip, I agree with the Chief ALJ's finding that offering water to the animals more frequently would have reduced the stress on the animals. More frequent watering would have slightly lengthened time for the trip and caused some stress when trailer doors were opened to provide the water. However, Respondent could have taken other steps to reduce the time necessary for the trip from the San Diego Wild Animal Park to Santa Rosa that would have much more than offset the extra time necessary to offer water to the animals and offered water to the animals in a manner that limits the amount of stress (Tr. 542-43).

Respondent contends that he was not required by the Animal Welfare Act or the Regulations and Standards to unload the lechwes upon arrival in Santa Rosa, California. Respondent's reliance on the absence of a specific requirement that he unload the animals immediately upon arrival at their final destination is misplaced. The record supports a finding that Respondent's holding the male lechwe that died June 10, 1994, in Respondent's trailer for 42 hours, approximately 12 hours of which were after arrival in Santa Rosa, was a failure to handle the animal as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort (Tr. 58-59, 112-13, 120-21, 148-50, 620). Even Respondent testified that if he had suspected a problem, he would have unloaded the lechwes into his yard upon arrival (Tr. 976). I do not find that the Chief ALJ erred when he found that one of the actions that Respondent could have taken to avoid causing trauma, behavioral stress, physical harm, and unnecessary discomfort to the male lechwe that died on June 10, 1994, was to release the animal from the trailer upon arrival in Santa Rosa on June 9, 1994, rather than waiting until the morning of June 10, 1994.

Respondent contends that carrying fewer animals, shortening the time for the trip, and monitoring the temperature inside the trailer would not have in any way changed the outcome of capture myopathy (Respondent's Appeal at 25, 28, 34). Further, Respondent contends that he was not required by the Animal Welfare Act or the Regulations and Standards to carry fewer animals (Respondent's Appeal at 25), that there are no prescribed temperature requirements for dealers transporting hoofed stock (Respondent's Appeal at 35), and that the Regulations only require that he travel expeditiously (Respondent's Appeal at 28). Again, there is no evidence to support a finding that the male lechwe that died on June 10, 1994, died of capture myopathy, and Respondent's reliance on the absence of specific

requirements is misplaced. The record supports the Chief ALJ's finding that had Respondent carried fewer animals, monitored the heat in the trailer, and shortened the time of the trip, trauma, behavioral stress, and discomfort would have been reduced and the June 10, 1994, death of the male lechwe may have been avoided.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent, Peter A. Lang, doing business as Safari West, is assessed a civil penalty of $1,500. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
1400 Independence Avenue, S.W.
Washington, DC 20250-1413

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 65 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0002.

2. Respondent, Peter A. Lang, doing business as Safari West, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and, in particular, shall cease and desist from failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

In re: PETER A. LANG, d/b/a SAFARI WEST.
AWA Docket No. 96-0002.
Order Denying Petition for Reconsideration filed May 13, 1998.

Petition for reconsideration — Petition to reopen — Allegations affecting business and reputation — Willfulness — Preponderance of the evidence — Irrelevant evidence.

The Judicial Officer denied Respondent's Petition for Reconsideration. Petitions for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) relate to reconsideration of the Judicial Officer's decision only; not to reconsideration of an administrative law judge's decision. The Rules of Practice provide that either party may reopen a hearing to take further evidence (7 C.F.R. § 1.146(a)(2)). Respondent did not file a petition to reopen; therefore, new evidence attached to the Petition for Reconsideration is not part of the record and is not considered in connection with the Petition for Reconsideration. The Administrative Procedure Act and the Rules of Practice require that the complaint include allegations of fact and provisions of law that constitute a basis for the proceeding and the Due Process Clause of the Fifth Amendment to the Constitution of the United States requires that the complaint reasonably apprise a respondent of the issues in controversy. Therefore, while mere allegations in a complaint could possibly harm a respondent's business or reputation, proceedings of this type may only be instituted by filing a complaint and including in the complaint allegations of fact and provisions of law which constitute a basis for the proceeding. The impact on a respondent's business of the institution of a disciplinary proceeding under the Animal Welfare Act is not one of the factors required to be considered when determining the amount of the civil penalty to be assessed against a respondent. Willfulness is not a prerequisite for concluding that a respondent has violated the Animal Welfare Act or assessing a civil penalty or issuing a cease and desist order in accordance with 7 U.S.C. § 2149(b). Complainant proved by a preponderance of the evidence that Respondent, in violation of 9 C.F.R. § 2.131(a)(1), failed to handle one lechwe as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort. The Chief ALJ did not err by excluding irrelevant evidence. Respondent's expertise with respect to handling animals is not relevant to whether on a particular occasion Respondent violated the Regulations and Standards.
Colleen A. Carroll, for Complainant.
Respondent, pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 2, 1995.

The Complaint alleges that: (1) on or about June 8, 1994, Peter A. Lang, d/b/a Safari West [hereinafter Respondent], transported three lechwes in a manner that caused trauma, behavioral stress, and physical harm and resulted in the death of one of the lechwes, in violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) (Compl. ¶ 3); (2) on or about June 9, 1994, Respondent failed to ensure that animals that were being transported were observed at least once every 4 hours, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.140(a) of the Standards (9 C.F.R. § 3.140(a)) (Compl. ¶

4); and (3) on or about June 10, 1994, Respondent handled two lechwes in a manner that caused trauma, behavioral stress, and physical harm and resulted in the death of one of the lechwes, in violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) (Compl. ¶ 5).

On October 25, 1995, Respondent filed an Answer denying the material allegations in the Complaint. Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing in San Francisco, California, from December 10, 1996, through December 12, 1996. Colleen A. Carroll, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent appeared pro se.

On March 11, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof; on April 30, 1997, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Brief and Summary in Support Thereof; and on May 15, 1997, Complainant filed Complainant's Reply to Respondents' [sic] Proposed Findings of Fact, Conclusions of Law, Brief and Summary in Support Thereof.

On May 20, 1997, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that with respect to one lechwe that died on June 10, 1994, Respondent failed to handle the animal as expeditiously and carefully as possible so as to prevent 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)) (Initial Decision and Order at 8); (2) ordered Respondent to cease and desist from failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort (Initial Decision and Order at 20); and (3) assessed Respondent a civil penalty of $1,500 (Initial Decision and Order at 20).

On July 11, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] Complainant failed to file a timely response to Respondent's Appeal, and on October 31, 1997, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On January 13, 1998, I issued a Decision and Order: (1) concluding that

---

[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Respondent failed to handle a lechwe that died on June 10, 1994, as expeditiously and carefully as possible in a manner that did 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)); (2) assessing Respondent a civil penalty of $1,500; and (3) ordering Respondent to cease and desist from failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 16, 43-44 (Jan. 13, 1998).

On March 12, 1998, Respondent filed Petition for Reconsideration, and on May 1, 1998, Complainant filed Complainant's Reply to Respondent's Petition for Reconsideration. On May 5, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued January 13, 1998.

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or

use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

7 U.S.C. § 2132(f).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding

purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

(a)(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.

. . . .

PART 3—STANDARDS

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

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TRANSPORTATION STANDARDS

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§ 3.140 Care in transit.

(a) During surface transportation, it shall be the responsibility of the driver or other employee to visually observe the live animals as frequently as circumstances may dictate, but not less than once every 4 hours, to assure that they are receiving sufficient air for normal breathing, their ambient temperatures are within the prescribed limits, all other applicable standards are being complied with and to determine whether any of the live animals are in obvious physical distress and to provide any needed veterinary care as soon as possible. . . . No animal in obvious physical distress shall be transported in commerce.

9 C.F.R. §§ 1.1; 2.100(a), .131(a)(1); 3.140(a).

Prior to addressing the specific issues raised by Respondent in his Petition for Reconsideration, there are two general aspects of Respondent's Petition for Reconsideration that must be addressed. First, Respondent requests reconsideration of the Initial Decision and Order issued by the Chief ALJ on May 20, 1997, as well as the Decision and Order issued on January 13, 1998 (Pet. for Recons. at 2).

Section 1.143(a) and (b)(1) of the Rules of Practice requires a ruling on all motions and requests, as follows:

§ 1.143 Motions and requests.

(a) *General.* All motions and requests shall be filed with the Hearingf Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147, (2) requests for subpoenas pursuant to § 1.149, and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to

filing an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

(b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.

7 C.F.R. § 1.143(a), (b)(1).

Section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) provides that *any* motion will be entertained other than a motion to dismiss on the pleading. Generally, the word *any* is broadly inclusive.[2] Section 1.143(a) of the Rules of Practice (7 C.F.R. § 1.143(a)) provides that the administrative law judge shall rule upon *all* motions and requests filed or made prior to filing an appeal of the administrative law judge's decision pursuant to 7 C.F.R. § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on *any* motions or requests. As commonly used, the word *all* does not permit an

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[2]*See United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (the use of the words *each* and *any* to modify *employee* which, in turn, is defined to include *any* employed individual, discloses congressional intention to include all employees within the scope of the Fair Labor Standards Act, unless specifically excluded); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992) (the word *any* is generally used in the sense of *all* or *every* and its meaning is most comprehensive), *cert. denied sub nom. Doughboy Recreational, Inc. v. Fleck*, 507 U.S. 1005 (1993); *Kalmbach, Inc. v. Insurance Company of the State of Pennsylvania, Inc.*, 529 F.2d 552, 556 (9th Cir. 1976) (the common understanding of the word *any* is that it means *all* or *every*; generally, though not necessarily, the word *any* serves to enlarge the noun it modifies); *FDIC v. Winton*, 131 F.2d 780, 782 (6th Cir. 1942) (the word *any* modifying the word *deposits* in a provision of the Federal Reserve Act means *one indiscriminately of whatever kind or quantity*); *Kuhlman v. W. & A. Fletcher Co.*, 20 F.2d 465, 468 (3d Cir. 1927) (an Act giving *any* seaman authority to sue, applies to *every* seaman); *Kmart Corp. v. Key Industries, Inc.*, 877 F. Supp. 1048, 1051 (E.D. Mich. 1994) (the word *any* in a provision of the Michigan long-arm statute includes *each* and *every*); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036-37 (1996) (Ruling on Certified Questions) (generally, the word *any* is broadly inclusive; as commonly used the word *all* does not permit an exception or exclusion not specified; and the context in which the words *all* and *any* are used in 7 C.F.R. § 1.143(a) and (b)(1), respectively, provides no basis for reading the words *all* and *any* narrowly); *In re Billy Gray*, 52 Agric. Dec. 1044, 1090 (1993) (the word *any* is a broad and comprehensive term), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re Beef Nebraska, Inc.*, 44 Agric. Dec. 2786, 2830 (1985) (the word *any* is a broad and comprehensive term), *aff'd*, 807 F.2d 712 (8th Cir. 1986); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (the word *any* is a broad and comprehensive term); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 792 (1978) (Remand Order) (the word *any* is a broad and comprehensive term, and there is no basis for engrafting an exception not stated), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984).

exception or exclusion not specified.[3] Moreover, the context in which the words *all* and *any* are used in section 1.143(a) of the Rules of Practice (7 C.F.R. § 1.143(a)) and section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), respectively, provides no basis for reading the words *all* and *any* narrowly.

Thus, I find section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) requires the Judicial Officer to entertain Respondent's Petition for Reconsideration of the Chief ALJ's Initial Decision and Order, which was filed after the filing of an appeal, and section 1.143(a) of the Rules of Practice (7 C.F.R.

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[3]*See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944) (stating that *all* means all, not substantially all); *William v. United States*, 289 U.S. 553, 572 (1933) (describing the word *all* as a comprehensive word); *McLean v. United States*, 226 U.S. 374, 383 (1912) (stating that *all* excludes the idea of limitation); *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969) (stating that *all* means the whole of that which it defines, not less than its entirety and that the purpose of the word *all* is to underscore that intended breadth is not to be narrowed); *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 464 (S.D. Miss. 1964) (stating that *all* means *the whole, the sum of all the parts, the aggregate* and that *all* is about the most comprehensive and all inclusive word in the English language), *aff'd per curiam*, 358 F.2d 723 (5th Cir. 1966); *Travelers Ins. Co. v. Cimarron Ins. Co.*, 196 F. Supp. 681, 684 (D. Or. 1961) (stating that the word *all* when referring to the amount, quantity, extent, duration, quality, or degree means *the whole of* and that a statute which says *all* excludes nothing); *Fischer & Porter Co. v. Brooks Rotameter Co.*, 86 F. Supp. 502, 503 (E.D. Pa. 1949) (stating that the word *any* implies totality as plainly as does the word *all* and the only difference is that *any* arrives at totality by a series of choices for consideration, whereas *all* arrives at totality in a single leap); *In re Central of Georgia Ry.*, 58 F. Supp. 807, 813 (S.D. Ga. 1945) (stating that a more comprehensive and all-inclusive word than *all* can hardly be found in the English language, there is a totality about the word *all* that few words possess), *rev'd on other grounds and remanded sub nom. Liberty National Bank & Trust Co. v. Bankers Trust*, 150 F.2d 453 (5th Cir. 1945); *United States v. Bachman*, 246 F. 1009, 1011 (E.D. Pa. 1917) (stating that the word intended to embrace every member of a class, where the number of the members of the class exceeds two, is the word *all*); *Beckwith v. Chicago, M. & St. P. Ry.*, 223 F. 858, 860 (W.D. Wash. 1915) (stating that the word *all* is very comprehensive in its meaning); *The Koenigin Luise*, 184 F. 170, 173 (D.N.J. 1910) (describing the word *all* as an inclusive term); *In re Cal-Almond, Inc.*, 56 Agric. Dec. 1158, 1168 (1997) (stating that as commonly used, the word *all* does not permit an exception or exclusion not specified); *In re Lindsay Foods, Inc.*, 56 Agric. Dec. 1643, 1652 (1997) (Remand Order) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(b)(2) narrowly); *In re Far West Meats*, 55 Agric. Dec. 1045, 1050 (1996) (Clarification of Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly); *In re Far West Meats*, 55 Agric. Dec. 1033, 1037 (1996) (Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1041 (1973) (stating that: the word *all* means as much as possible, every individual component, every, and any whatever; the word *all* signifies the whole of; a more comprehensive word than *all* cannot be found in the English language; a more comprehensive and all-inclusive word than *all* can hardly be found in the English language), *aff'd*, 369 F. Supp. 632 (S.D.N.Y. 1973).

§ 1.143(a)) requires the Judicial Officer to rule on Respondent's Petition for Reconsideration of the Chief ALJ's Initial Decision and Order.

However, section 1.142(c)(4) of the Rules of Practice provides, as follows:

> **§ 1.142 Post-hearing procedure.**
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> . . . .
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> (c) *Judge's decision.* . . .
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> . . . .
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> (4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

On July 11, 1997, Respondent filed a timely appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145. Consequently, while the Initial Decision and Order is part of the record,[4] the Initial Decision and Order never became effective and no purpose relevant to this proceeding would be served by reconsidering the Initial Decision and Order.

Further, section 1.146(a)(3) of the Rules of Practice provides that a party to a proceeding may seek reconsideration of the decision of the Judicial Officer, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
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> (a) *Petition requisite.* . . .

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[4]See 5 U.S.C. § 557(c).

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Thus, petitions for reconsideration filed pursuant to section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) after the Judicial Officer's decision has been issued relate to reconsideration of the Judicial Officer's decision only.[5]

Therefore, Respondent's Petition for Reconsideration, as it relates to the Chief ALJ's Initial Decision and Order, is denied.[6]

Second, Respondent attaches to his Petition for Reconsideration new evidence[7] in support of his Petition for Reconsideration. Section 1.146(a)(2) of the Rules of Practice provides that either party may file a petition to reopen a hearing to take further evidence, as follows:

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[5]*See generally, In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (stating that "[p]etitions for reconsideration under the Rules of Practice relate to reconsideration of the Judicial Officer's decision"); *In re Lincoln Meat Co.*, 48 Agric. Dec. 937, 938 (1989) (stating that "[t]he Rules of Practice do not provide for a Motion for Reconsideration to the Administrative Law Judge").

[6]I cannot conceive of a circumstance in a proceeding instituted under the Rules of Practice in which I would grant a petition to reconsider an initial decision and order once there has been a final decision and order issued by the Judicial Officer because reconsideration of an initial decision and order, which cannot become effective, would not serve any purpose relevant to the proceeding.

[7]The new evidence that Respondent attaches to his Petition for Reconsideration consists of nine documents, as follows: (1) a facsimile transmittal from Jim Ashby to Nancy Lang dated February 20, 1998, concerning hourly temperatures (Pet. for Recons. at 12A); (2) a facsimile transmittal from Jim Ashby to Judy dated February 24, 1998, concerning hourly temperatures (Pet. for Recons. at 12B); (3) Table 1. Effective temperatures at various speeds and ambient temperatures (Pet. for Recons. at 15A); (4) a passage allegedly copied from "Bothma (Ed.) 1989. *Game Ranch Management*. J.L. van Schaik (Pty) Ltd. Pretoria, South Africa" (Pet. for Recons. at 23 n.60, 23A); (5) Declaration of Peter A. Lang, dated March 11, 1998 (Pet. for Recons., App. I); (6) Declaration of Glenn Benjamin, DVM, dated March 7, 1998 (Pet. for Recons., App. III); (7) letter dated April 7, 1995, from Alan R. Christian to Peter A. Lang (Pet. for Recons., App. IV); (8) United States Department of Agriculture, Animal and Plant Health Inspection Service, Civil Penalty Stipulation Agreement (Pet. for Recons., App. IV); and (9) Declaration of Warren Thomas, DVM, dated March 9, 1998 (Pet. for Recons., App. V).

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite.* . . .

. . . .

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

Respondent did not file a petition to reopen the hearing. Therefore, the new evidence[8] attached to the Petition for Reconsideration is not part of the record of this proceeding, and I have not considered this new evidence in connection with the Petition for Reconsideration.

Respondent raises eight issues in his Petition for Reconsideration. First, Respondent contends that the allegations in the Complaint have caused him "to lose his ability to conduct business with a majority of the zoos in North America" and have "completely ruined" his reputation (Pet. for Recons. at 3).

The Administrative Procedure Act provides that notice of matters of fact and law asserted must be provided to those entitled to notice of an agency hearing, as follows:

§ 554. Adjudications

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(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to

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[8]See note 7.

be held; and

(3) *the matters of fact and law asserted.*

5 U.S.C. § 554(b) (emphasis added).

Similarly, the Rules of Practice require that allegations of fact and provisions of law that form a basis for the proceeding must be included in a complaint, as follows:

§ 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

. . . .

Complaint means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.

. . . .

§ 1.133 Institution of proceedings.

. . . .

(b) *Filing of complaint or petition for review.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131[9] or any regulation, standard, instruction or order issued pursuant thereto, whether based on information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

. . . .

[9]One of the statutes listed in 7 C.F.R. § 1.131 is the Animal Welfare Act.

§ 1.135 Contents of complaint or petition for review.

(a) *Complaint.* A complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, *the allegations of fact and provisions of law which constitute a basis for the proceeding*, and the nature of the relief sought.

7 C.F.R. §§ 1.132, .133(b), .135(a) (emphasis added).

Moreover, while it is well settled that the formalities of court pleading are not applicable in administrative proceedings,[10] due process applies and the Complaint in an administrative proceeding must reasonably apprise the litigant of the issues in controversy.[11] Therefore, in order to comply with the Administrative Procedure

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[10] *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. Int'l Bros. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

[11] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Tammi Longhi*, 56 Agric. Dec. 1373, 1387-89 (1997), *appeal docketed*, No. 97-3897 (6th Cir. Aug. 12, 1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1323 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 200 n.9 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 132 (1996); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1097-98 (1994); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53 (b)(2)); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233-32 (1987); *In re H & J Brokerage*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re*

(continued...)

Act and the Rules of Practice, the Complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the Complaint must apprise Respondent of the issues in controversy. While I find it unfortunate that mere allegations in a complaint would harm any respondent's business or reputation, this proceeding may only be instituted by filing a complaint and including in the complaint allegations of fact and provisions of law which constitute a basis for the proceeding.

Second, Respondent "wonders if the $1,500" civil penalty assessed against him "is so important to the government when the consequences [to Respondent's business of merely instituting this proceeding against Respondent] are so huge." (Pet. for Recons. at 3.)

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) specifically provides the factors to be considered when determining the amount of the civil penalty to be assessed against a violator: (1) the appropriateness of the penalty with respect to the size of the business of the person involved; (2) the gravity of the violation; (3) the person's good faith; and (4) the history of previous violations.[12] I examined each of the factors required to be considered (7 U.S.C. § 2149(b)) when I assessed a $1,500 civil penalty against Respondent, and I addressed these

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(...continued)
Dane O. Petty, 43 Agric. Dec. 1406, 1434 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

[12]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *Gus White III* was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating that respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating that ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating that ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating that the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating that the holding in *In re Gus White III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

factors in the Decision and Order. *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 29 (Jan. 13, 1998). 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 required 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 Respondent's business, that impact would not be considered when determining the amount of the civil penalty to be assessed against Respondent.[13]

Third, Respondent contends that:

> Because Respondent was charged with causing the death of the male lechwe, and because the [Judicial Officer] has rejected the allegation that the Respondent's conduct in fact caused the animal's death, the Respondent has been found not guilty of the offence with which he was charged and cannot be found guilty of an uncharged lesser offense.

Pet. for Recons. at 3.

I disagree with Respondent's contention that he was not found to have violated a Regulation which he is alleged in the Complaint to have violated. The Complaint alleges, *inter alia*, that:

> 5. On or about June 10, 1994, respondents [sic] violated section 2.131(a) of the Regulations, (9 C.F.R. § 2.131(a)), by handling two lechwes in a manner that caused trauma, behavioral stress and physical harm, and resulted in the death of one of the lechwes.

Compl. ¶ 5.

I concluded that, with respect to the lechwe that died on June 10, 1994, Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) as alleged in the Complaint, as follows:

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[13]*Cf. In re James J. Everhart*, 56 Agric. Dec. 1400, 1417 (1997) (stating that respondent's disability is not a mitigating factor with respect to the amount of the civil penalty to be assessed); *In re Dora Hampton*, 56 Agric. Dec. 301, 319-20 (1997) (stating that age cannot be considered either as a defense to respondent's violations of the Animal Welfare Act, the Regulations, and the Standards, or as a mitigating factor); *In re Volpe Vito Inc.*, 56 Agric. Dec. 166, 258 (1997) (stating that failing health is not a defense to violations of the Animal Welfare Act, the Regulations, and the Standards, and is not considered as a mitigating factor with respect to the sanction to be imposed), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997).

Conclusions of Law

. . . .

4. With respect to the lechwe that died on June 10, 1994, the record evidence establishes that Respondent failed to handle the animal as expeditiously and carefully as possible [in a manner that did 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)).

In re Peter A. Lang, 57 Agric. Dec. ___, slip op. at 16 (Jan. 13, 1998).

While the Complaint alleges that Respondent handled two lechwes in a manner that resulted in the death of one of the lechwes (Compl. ¶ 5), death is not an element that must be proven in order to prove a violation of section 2.131(a)(1) of the Regulations. 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; however, the regulatory provision is explicitly designed to prevent trauma, overheating, excessive cooling, behavioral stress, physical harm, and even unnecessary discomfort to animals (9 C.F.R. § 2.131(a)(1)). Therefore, Respondent's actions and failures to act need not have been the cause of the June 10, 1994, death of the lechwe in question in order to find that Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). Consequently, Complainant is not required to prove that Respondent's handling of the lechwes resulted in the death of one of the lechwes, even though Complainant gratuitously alleges in the Complaint that Respondent handled two lechwes in a manner that caused the death of one of the lechwes.

Fourth, Respondent contends that the Complaint should be dismissed because Complainant failed to prove that Respondent willfully violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)) (Pet. for Recons. at 5-6).

I disagree with Respondent's contention that Complainant must prove willfulness in order to prove that Respondent violated the Animal Welfare Act or the Regulations and Standards. Proof of willfulness is not a prerequisite to concluding that a respondent has violated the Animal Welfare Act or the Regulations and Standards or assessing a civil penalty or issuing a cease and desist order in accordance with section 19(b) of the Animal Welfare Act (7 U.S.C. §

2149(b)).[14]

Fifth, Respondent contends that there is no proof that he violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)), and the decision of the Judicial Officer is arbitrary (Pet. for Recons. at 6-35).

I disagree with Respondent's contention that there is no proof that he violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). As fully explicated in *In re Peter A. Lang*, 57 Agric. Dec. ___ (Jan. 13, 1998), I found that Complainant proved by a preponderance of the evidence[15] that Respondent, in violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)), failed to handle a lechwe that died on June 10, 1994, as expeditiously and carefully as possible in a manner that did not cause trauma, behavioral stress, physical harm, and unnecessary discomfort. None of Respondent's arguments in his Petition for Reconsideration persuades me that Complainant failed to prove by a

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[14]*See In re Delta Air Lines, Inc.*, 53 Agric. Dec. 1076, 1084 (1994) (describing respondent's violations of the Animal Welfare Act and the Regulations and Standards as "serious" rather than "willful" and stating that there is no need to determine whether respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful since no license is being suspended or revoked). *Cf. In re JSG Trading Corp.*, 57 Agric. Dec. ___, slip op. at 71-73 (Mar. 2, 1998) (stating that it is not necessary to prove that respondents' violations of the Perishable Agricultural Commodities Act, 1930, as amended [hereinafter the PACA], were willful in order to prove that respondents violated the PACA).

[15]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 27 (Mar. 20, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455 n.7 (1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

preponderance of the evidence that Respondent violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)).

Sixth, Respondent contends that the Complaint was amended after the hearing started depriving him of an adequate opportunity to prepare a defense (Pet. for Recons. at 35-37).

I disagree with Respondent's contention that the Complaint was amended. Complainant did address issues at the hearing and in post-hearing submissions that were not part of the Complaint. Further, at the hearing, Complainant expressed an intent to amend the Complaint in order to conform to the proof, but the Chief ALJ advised Complainant that such an amendment would not be allowed (Tr. 339-40). Complainant did not file a timely appeal of the Chief ALJ's ruling on Complainant's incipient motion to amend the Complaint, and the Complaint was never amended.

Seventh, Respondent contends it was error for the Chief ALJ to deny admission into evidence of a letter from Robert A. Willems, DVM, to Dr. Mike Staton, dated April 13, 1993 (Pet. for Recons. at 37-38).

The Administrative Procedure Act provides, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence.* (1) *In general.*
>
> . . . .
>
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or

which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

I have reviewed the letter from Dr. Robert A. Willems, dated April 13, 1993 (Pet. for Recons., App. VI) and find that it concerns an incident that occurred more than 1 year prior to the date of the violations alleged in the Complaint and was written more than 1 year prior to the date of the violations alleged in the Complaint. I agree with the Chief ALJ's determination that the letter is irrelevant (Tr. 445-46) and should be excluded.

Eighth, Respondent contends that his expertise with respect to handling animals is relevant to the issue of whether he violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1)). I disagree with Respondent's contention that his expertise is relevant to the issue in this proceeding; viz., whether, on a particular occasion, Respondent violated the Regulations and Standards. Even if I found that Respondent is an experienced handler of exotic animals and generally uses good judgment with respect to the handling of exotic animals, those findings would not affect the outcome of this proceeding.

For the foregoing reasons and the reasons set forth in the Decision and Order filed January 13, 1998, *In re Peter A. Lang, supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[16] Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on January 13, 1998. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic

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[16]*In re Jerry Goetz*, 57 Agric. Dec. ___, slip op. at 23 (Apr. 3, 1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. ___, slip op. at 4-5 (Feb. 2, 1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. ___, slip op. at 10 (Jan. 26, 1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

stay and the Order in the Decision and Order filed January 13, 1998, is reinstated, with allowance for time passed.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent, Peter A. Lang, doing business as Safari West, is assessed a civil penalty of $1,500. The penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and forwarded to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
1400 Independence Avenue, SW
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 65 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0002.

2. Respondent, Peter A. Lang, doing business as Safari West, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and, in particular, shall cease and desist from failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

In re: JAMES HARRELL WHITENER and ELAINE WHITENER, and FRIENDS FOR LIFE, INC.
AWA Docket No. 96-0038.
Decision and Order filed March 2, 1998.

Operating as a dealer without a license - Breeder loans - Donations - Surplus sales - Civil penalty -

License disqualification - Cease and desist order.

Administrative Law Judge James W. Hunt found that Respondents bought, sold, or traded 69 animals without being licensed as a dealer pursuant to the Act. In so doing, Judge Hunt rejected Respondents' arguments that the transactions were excepted under the Act as breeder loans, donations, or sales under conditions approved by APHIS inspectors. Judge Hunt also determined that Respondent Elaine Whitener was involved in the transactions, and rejected her testimony to the contrary as not credible. In considering the appropriate sanction, Judge Hunt found that Respondents acted in bad faith and committed repeated violations, but did not profit from their activities and do not have a large business. As such, Judge Hunt imposed a $10,000 civil penalty, a cease and desist order, and disqualified Respondents from becoming licensed for a period of ten years.

Sharlene A. Deskins, for Complainant.
Jill Simpson, Rainsville, AL, for Respondents.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This disciplinary proceeding was instituted by a Complaint filed on April 10, 1996, by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture (USDA). The Complaint alleges that Respondents violated the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*)("AWA" or "Act") and the regulations promulgated pursuant to the Act (9 C.F.R. § 1.1 *et seq.*) by operating as a dealer without having a license by selling or trading animals in commerce on at least six occasions.

A hearing was held in Atlanta, Georgia, on October 22 and 23, 1997. Complainant was represented by Sharlene A. Deskins, Esq. Respondents were represented by Jill Simpson, Esq.

Law

Section 2134 of the Animal Welfare Act (7 U.S.C. § 2134) states:

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

Section 2.1 of the Regulations (9 C.F.R. § 2.1) provide:

> (a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the

licensing requirements under paragraph (a)(3) of this section, must have a valid license . . . .

Section 1.1 of the Regulations (9 C.F.R. § 1.1) defines a "dealer" as:

. . . .

[A]ny 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: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

Statement of the Case

Respondents James Harrell Whitener and Elaine Whitener, husband and wife, have lived at Route 1, Box 100, Gaylesville, Alabama, for the last three years. They lived before that in Kennesaw, Georgia. James Harrell Whitener will be referred to as "Whitener"; his wife will be referred to as "Elaine."

In 1989, Whitener formed Respondent Friends for Life, Inc., a not-for-profit corporation. The stated purpose of the corporation was to help endangered animals. He was president while Elaine Whitener was listed as a director. (CX 40.) Neither James Harrell Whitener nor Elaine Whitener nor Friends for Life had an APHIS license to be an animal exhibitor or dealer at any time relevant to this proceeding.

In 1990, Grady McGee, an APHIS licensed dealer, agreed to serve on the board of Friends for Life at Whitener's invitation. McGee, who said he considered Whitener and Friends for Life to be the same, allowed Whitener to use his license to sell animals provided that he was advised of all transactions. McGee also had some animals on "breeder loan" from Whitener. (CX 7.) A breeder loan is an arrangement whereby one person sends an animal for breeding to another animal owner and for the two persons to then "split the babies" between them. (Tr. 243.)

Section 2.1 of the regulations provides a licensing exemption for persons who transport animals "solely for the purpose of breeding." (9 C.F.R. § 2.1(a)(3)(v).)

Wayne Taylor, another APHIS licensed dealer, met Whitener through McGee and received some animals for breeding from Whitener. He also allowed Whitener to use his license to purchase ringtail cats in Texas, but declined Whitener's invitation to join Friends for Life. (Tr. 541; CX 8.)

In 1992, "James H. Whitener c/o Friends for Life Inc.," applied for an APHIS exhibitor's license for the Georgia facility. Whitener was listed as president and Elaine Whitener was listed as the secretary. (CX 94.) The Georgia facility was inspected by APHIS animal care inspectors Richard Overton and Ralph Ayers. They turned down Whitener's application because the facility did not have a perimeter fence around his carnivorous animals.

Sometime after the inspection, Whitener, returning a call from Ayers, called Ayers at his home. At the beginning of their conversation, which lasted about a half hour, Ayers said to Whitener that their talk was "all off the record" and that "we're talking unofficially." Whitener responded: "This is between me and another friend, you know." However, unknown to Ayers, Whitener tape recorded the conversation.[1] Ayers told Whitener that there were complaints that Whitener was dealing in animals without having a license. (Tr. 433.) Ayers told Whitener that he might occasionally sell a "surplus animal every now and then" at auction without a license but that he had to have a license to buy and sell animals:

MR. WHITENER:
Right, right.

MR. AYERS:
--you don't have to be licensed with--

MR. WHITENER:
Yeah.

MR. AYERS:
--but, you know, if you're buying and selling and--

MR. WHITENER:

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[1]Complainant objected to the tape's admission. Ayers did not deny the conversation. It was admitted as relevant evidence under the regulations (7 C.F.R. § 1.141(h)(iv)) even though, as Complainant notes, such a recording may not be lawful in some jurisdictions.

Well, we're not doing that no how.

MR. AYERS:
--you would need to be licensed at that point.

MR. WHITENER:
Right. I mean the animals I've had I've bought from Tom years and years ago, you know, and what it is, the animals I had advertised in the Animal Finders Guide were surplus animals. See, I had--in other words, I had surplus animals I had bought from Tom to make sure I had good breeding animals.

Tr. 438-39.

Ayers suggested that Whitener consider reapplying for a license. Whitener mentioned the possibility of putting up a temporary perimeter fence to obtain a license, but he also told Ayers that he probably would sell his Georgia facility and move to Alabama before reapplying. (Tr. 435, 441.) They then discussed how Whitener could dispose of the remaining animals at his facility.

MR. WHITENER:
But, you know, as far as disposing of any animals, you know, I'll just do it here locally, and do it through word of mouth, and not through an advertisory [sic], you know.

MR. AYERS:
Yeah, like Grady [McGee] and Wayne [Taylor].

MR. WHITENER:
You know, I'll just --

MR. AYERS:
You can go through Grady or Wayne over there

MR. WHITENER:
But--well, like I say, I ain't got that many--I ain't got that many to get rid of no how, you know.

Tr. 458-59.

Ralph Ayers testified that he had inspected the facilities of Grady McGee and Wayne Taylor and was aware that they had some animals on breeder loan from Whitener pursuant to "some kind of contract." He said he told Whitener that he could sell these animals through McGee and Taylor "because they were licensed, but Mr. Whitener couldn't sell the animals there at his house unless he wanted, you know, to get out of the animal business, get rid of his surplus animals and sell those animals. He could do that, you know, one time over a short period and get out. And Mr. Whitener was talking about moving, you know, to Alabama at the time." (Tr. 411-12, 419-20.)

Richard Overton, the other inspector, testified that:

> Q. What, if any, conversation did you have with Mr. Whitener regarding his ability to deal animals?
>
> A. [Overton]. The general statement that we had were, the gist of the conversation as I remember it we discussed what they needed to do to continue on in the business. My understanding is they owned some animals jointly with breeding loan, and those animals could remain either, one, they would have a period of two to three months to sell those animals, and there wasn't a lot of animals as far as I knew, or they could leave them with the other owner. The other issue as far as I understood or remembered clearly what was going on was that if they wanted to continue on in the business he could work for someone else, and if he--as long as he didn't keep any animals at his site. If he kept animals at his site, he would have to have that site as a secondary site for someone else and that he would have to be inspected. Generally, what I, my best memory on the thing was that they were going to move somewhat in the near future and start up a new site in Alabama.

Tr. 331.

Overtone said APHIS allows persons getting out of the animal business two or three months to dispose of their animals in order to give them a "reasonable time without being stressed or to have fire sales, to give animals away." (Tr. 332.)

On March 25, 1993, APHIS sent Whitener a "Notification and Warning of Violation of Federal Regulations." It stated:

> The Department of Agriculture has evidence that on or about January 28, 1992, and August 1992, you or your organization committed the following violations of Federal Regulations: 9 C.F.R. 2.1(a)(1)(2) - Operating as a

dealer without a license and failure to obtain a license. On January 28, 1992, sold a cougar and serval when unlicensed. In August 1992, advertised and offered for sale 11 lynx when unlicensed.

CX 44.

Whitener admitted that "I knew I needed a license to sell animals according to the rules and regulations and the book." (Tr. 590.)

Sometime about the time APHIS sent this warning to Whitener in 1993, Janet Mercer, an APHIS licensed dealer living in Oklahoma who raises and sells animals for pets at her facility called "Coon Creek Pets," saw an ad in the Animal Buyer's Guide for the sale of ringtail cats. She called one of the two telephone numbers in the ad and was told by the person who answered to call the other number. This other number, (404) 428-4669, was Whitener's phone number. (Tr. 17.) She spoke to Whitener and made arrangements with him to acquire a pair of ringtails and to trade a hedgehog for the third. The animals were shipped to Mercer on March 29, 1993. The consignment sheet lists Wayne Taylor as the shipper but is signed by a "James H." with an indecipherable last name. (CX 2.) Whitener told Mercer that he had shipped the animals. Mercer said she did not know Wayne Taylor and Taylor said he never sold any animals to Mercer. Mercer testified that Whitener sold the animals to her and that she sent him a certified check. Whitener said the animals were given to Mercer on a breeder's loan. The record does not show that these animals allegedly on loan were ever returned to him. Mercer joined "Friends for Life" after Whitener and Elaine told her the purpose of the organization was to save animals and because she would get a "cut rate." She said she assumed that Whitener and Friends for Life were the same. (Tr. 126, 151-156, 167-168, 188.)

Mercer testified that on July 28, 1993, she and her husband drove to Tennessee where they met with Elaine Whitener and exchanged some animals, "part of them were breeder loan and part of them were trades." (Tr. 159.) Elaine Whitener said she never met Mercer in Tennessee.

On February 4, 1994, Mercer obtained ten ringtail cats, four badgers and two bobcats from Whitener. She said Whitener had then "run an ad on ringtail cats in the Animal Finders Guide, and I was to make a certain amount off of each sale, and I think both of our phone numbers were in that ad . . . because I was going to help sell them." (Tr. 160-161; CX 11.) Mercer's testimony is somewhat contradictory as to whether all or just some of the cats were to be sold: "We bought the ten ringtail cats in, some of them were to be left there for breeders loan, but we ended up selling all of them." (Tr. 219.) However, she then said "these

[ringtails] were to be sold. These were not left to me on breeders loan. These were on a partnership selling deal . . . he dropped the cats off, and as the money came in I sent him the money for the cats." (Tr. 226, 245.) In any event Mercer said she gave Whitener $900 cash when he dropped them off. She in turn sold several of the cats as pets for $600 a pair. (Tr. 195-196.) However, she apparently did breed some of the cats and gave some of the babies to Whitener. (Tr. 244.) She said Whitener himself arranged one sale of the cats to a Kevin Chambers and told her to send the animals to Chambers. (Tr. 231.)

Whitener testified that most of the ringtails were on breeder loan to Mercer: "Most of them were supposed to have been on breeders loan, she was handling the disposition of them, she was doing some trading and whatnot, and these animals were traded, but we were supposed to have cats, X amount of them strictly as breeders. You know, checked the animals out, and the ones that appeared to be good breeders, keep the breeders because a baby on the open market today is worth a thousand dollars, when on the fur market they're only worth fifty or seventy dollars." (Tr. 559.) He said Mercer had sold the animals to Kevin Chambers and had done so without his permission and that he "never received a dime on these animals." (Tr. 554-57, 559.)

In May 1994, Whitener called Mercer to ask if she wanted any Canadian lynx. He said she responded "that she could sell Canadian lynx, you know, there was market for them in her area. So okay, I say 'Okay, how many do you need? How many do you want?' Okay. So we arrived at a figure." (Tr. 513.) Whitener then borrowed $4,000 from his son and he and his wife drove to Nebraska to a licensed lynx breeder named Melvin Bodenstedt who sells the animals for fur and breeding. Whitener gave Bodenstedt the money in return for seventeen lynx and had all the papers of the transaction put in Mercer's name so that the title to the lynx, according to Whitener, transferred directly from Bodenstedt to Mercer. He said that he and his wife then delivered eleven of the animals to Mercer while he kept four that he gave to his wife. The two remaining are unaccounted for. (Tr. 515-17, 537.)

Mercer described this arrangement with Whitener as follows: "I was going to buy the [lynx] kittens from him--this is the way--it's kind of mixed up, but I mean I was supposed to give him $500 apiece for each kitten, and anything over five hundred that I sold the cats for I got to keep." She said the animals were to be sold only as pets. Mercer sent Whitener two checks, made payable to Friends for Life, totaling one thousand eight hundred and seventy three dollars. (Tr. 162, 164, 167; CX 25, 26.)

Whitener described the transaction with Mercer involving the lynx as a "partnership-type deal" and that she was to initially pay him half of his $4000

investment, but that she has never paid him and that he still owes his son the money he borrowed. (Tr. 518.) When asked about the checks from Mercer, he said he did not know what those payments represented and that she still owes him three thousand dollars. (Tr. 536.)

In April 1994, Vincent Hall, a licensed animal exhibitor in Pennsylvania operating as "Paws and Claws," placed an ad in the Animal Finders Guide for two badgers. Whitener contacted Hall who agreed to pay Whitener $800 for the badgers. Hall said they were for his zoo. The animals were shipped to Hall from the Atlanta, Georgia, airport on April 12, 1994. (Tr. 34, 53; CX 16, 19.) Whitener said he did not ship the badgers to Hall and that they were shipped by Janet Mercer. Whitener said that, even though Mercer lives in Oklahoma, she probably shipped the animals from the Atlanta airport on one of the occasions she visited him in Georgia and that, since they were partners, she probably had Hall send the check for the badgers to him. (Tr. 572-74.) Mercer said she could not remember anyone named Vincent Hall. (Tr. 166.) The shipping record for the badgers containing the signature of the shipper appears very similar to Whitener's signature. Mercer's name does not appear on the document. (CX 16; RX 30.)

In September 1994, Whitener and Sherry Carney, an APHIS licensee, agreed to jointly buy twelve fennec foxes from Michael Powell, in Florida. Powell said that on September 3, Elaine Whitener arranged to transport the foxes to Georgia except for two that she traded to an Angela Henderson for four geoffrey cats. Whitener said that Elaine was not involved in the transaction and that Powell had sold the animals to Henderson. Powell and Henderson identified Elaine Whitener as the person they dealt with. (CX 28, 30.)

On September 29, Powell shipped another eight foxes to Whitener, followed by two more to replace two that died. (Tr. 248; CX 28, 30.) Whitener testified that he agreed to buy the foxes with Carney after she told him there was a good market for them. He said he put up the money to acquire the animals. Whitener also said that the foxes were never sold because they were sick and that all but four died. He still has four which Elaine now owns. Powell said Whitener still owes him over $3,000. (Tr. 505-06; CX 28.)

On October 15, 1994, Carney acquired two European lynx from Whitener and Friends for Life. She said she considers Whitener and Friends for Life to be "the same thing." (Tr. 256; CX 32.) Carney testified that she agreed to trade a TV satellite dish worth thirty-five hundred dollars to Whitener for the lynx. She described the arrangement as follows: "Well, I feel I wanted the lynx, they wanted the satellite system, so it was a mutual thing. You know, I didn't have the money for the lynx, they didn't have the money for the system so, you know, I didn't think that that was illegal." (Tr. 267.) She sold the two lynx for $3,000, but she never

gave the satellite system or any of the money to Whitener. Carney said that sometime in 1997 Whitener told her she could keep the satellite system and to consider the lynx a "donation." (Tr. 249, 252, 258.)

Whitener's description of the arrangement was that Carney was having financial problems and that since he did not have any money to give her, he gave her the two lynx. He said that it was his intention not to receive anything for the animals and that it was her idea to give him the satellite system for better television reception when he moved to Alabama. (Tr. 498-502.)

Whitener testified that his sales of animals through various licensed dealers was based on overhearing a purported conversation between APHIS inspectors Ayers and Overtone during their inspection of his facility in 1992 in which, according to Whitener, Overtone told Ayers,"if Harrell [Whitener] goes through somebody like Wayne Taylor or Grady McGee, you know, and he is given one dollar that would make him an employee of that company and he could sell animals and ship either from this place or the other place . . . ." (Tr. 540.)

Based on this alleged eavesdropping, Whitener said he arranged to receive one dollar from Grady McGee to "legally make me a employee of his" (Tr. 586) and then entered into some sort of contract with Wayne Taylor. (Tr. 541.) He then purchased ringtail cats in Texas pursuant to this "contract" with Taylor and ran an advertisement to sell them through the Animal Buyers Guide. (Tr. 586.) He said he put both his and Taylor's phone numbers in the ad because Overtone had told him "[d]on't advertise with just one phone number. If there's two phone numbers in there, then that would show some relationship between the two parties." (Tr. 541-42, 586.) As for his arrangement with Janet Mercer, Whitener testified that, because he believed he could sell through any licensed dealer with whom he had established a "relationship," he could sell through Mercer because she had signed a contract with Friends for Life: "I felt at that time that Friends for Life was the mother company and owned or controlled the animals in her [Mercer's] possession, and that was the way she related to me, and she had a USDA license. I was under the auspices [sic] mentally that as long as I had a contract and someone had a legitimate USDA license that that person could sell the animals and they could be shipped from whomever." (Tr. 543-545.) He also said that, although he could not keep animals for sale at his unlicensed facility, "to my understanding the way it was explained to me I can take possession as long as they never hit that facility . . . ." (Tr. 580.) Whitener did not say who "explained" this information to him or where the animals such as the ringtail cats he acquired in Texas and Florida were kept until they were sold.

Whitener testified that his wife, Elaine, is still on the board of Friends for Life, but that she was listed as a director only because she was the bookkeeper. He said

he controls Friends for Life and that Elaine has never participated in any of its animal transactions. Since moving to Alabama, Whitener has listed Elaine as the owner of all the animals, which includes the four lynx and four foxes obtained from Bodenstedt and Powell. He said she has an operation separate from Friends for Life that she calls the "Animal Zone" and for which she has applied for an APHIS license. Whitener currently has a license but said he is now retired except for selling some dog food and collects Social Security. (Tr. 562, 582-84, 593.)

Elaine Whitener testified that she was not involved in buying or selling any animals. She said that she has been a board member of Friends for Life "at one time or another," but is not now a member and that when it was first formed, the "Elaine Whitener" on the board was not her but her sister-in-law whose name is also Elaine Whitener. This sister-in-law is not otherwise identified in the record. The address of the "Elaine Whitener" on the articles of incorporation for Friends for Life was not that of her sister-in-law but the address of Respondent Elaine Whitener. (Tr. 10, 612, 620, 623-24.)

Discussion

Respondents contend that the animals involved in the transactions with Mercer, Powell, Hall, and Carney were either breeder loans, donations, or sales under conditions approved by APHIS inspectors Ralph Ayers and Richard Overtone. They also contend that they were not required to have a license because the animals were sold for food, fiber, or fur and that persons making sales for that purpose are not required to have a license.[2]

Whitener admitted that he knew that the rules and regulations did not permit him to buy and sell animals without a license and he had also received a warning about selling animals without a license. He contends, however, that he was not required to be licensed because he sold animals through licensed dealers. This argument that he did not need a license is based on overhearing an alleged conversation between APHIS inspectors and a subsequent recorded telephone

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[2]9 C.F.R. § 2.1 of the Regulations provide:

(3) The following persons are exempt from the licensing requirements under section 2 or section 3 of the Act:

. . . .

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

conversation with inspector Ayers at his home. These conversations, however, provide little if any support for his position. Whitener was initially told by the inspectors that he could occasionally sell a surplus animal at auction or as an employee of a licensed dealer, but that he would need a license for other sales. Whitener's response to Ayers in their conversation was that he had sold only surplus animals. Their discussion then turned to ways for Whitener to dispose of his other remaining animals after Whitener had indicated to Ayers in 1992 that he was going to close the Georgia facility and move to Alabama. He further indicated that he had to dispose of only a few animals. It was thus in the context of Whitener closing his facility that Ayers advised Whitener that in this circumstance he could get rid of his breeder loan and other remaining animals through McGee and Taylor since, as Ayers knew, they already had some of Whitener's animals on breeder loan. Overtone also testified that it was APHIS policy to give a person intending to get out of the business some leeway in disposing of animals to avoid too great a loss by allowing the person a limited period of time to get rid of the animals.

Ayers, moreover, tried to make it clear to Whitener that the animals were to be sold only through McGee and Taylor by repeating this direction to Whitener. Whitener acknowledged Ayers' advice by saying he would sell the animals locally and not advertise them and that "I ain't got that many to get rid of no how, you know." There was nothing in Ayers' advice to Whitener to suggest that he could sell the animals through anyone except McGee and Taylor, and even those were to be disposed of promptly. There was certainly nothing even remotely suggesting that Ayers was telling Whitener that he could acquire additional animals in Texas, Florida and Nebraska and then sell them over the next two years in, among other places, Oklahoma and Pennsylvania, through any dealer with whom he could develop some sort of "relationship." To even suggest that an APHIS official would give such advice is completely contrary to APHIS' policy of strict interpretation and strict enforcement of the Animal Welfare Act.[3] There is, in short, no support for Whitener's argument that APHIS officials gave him a licensing exemption to buy and sell animals through any licensed animal dealer, except to get rid of a few remaining animals through McGee and Taylor. As Ayers put it, Whitener was only being permitted to get out of the animal business by disposing of his

[3]APHIS' active enforcement of the Animal Welfare Act is reflected in statistics showing that of the total number of hearings in 1997 by USDA's administrative law judges arising under nine different laws, over thirty percent of these hearings involved enforcement just of the Animal Welfare Act.

remaining animals "one time over a short period and get out."[4] (Tr. 412.)

In his dealings with Janet Mercer, one or two of the ringtail cats Whitener gave her appear to have been as a loan for breeding, but the other ringtails and the lynx he transferred to her constitute either sales to her or, through her, sales to others. Since his partnership arrangement with her, as he admitted, was that he would receive part of the proceeds from the sales she made, he as well as Mercer is deemed to have acted as a dealer in selling the animals. His failure, and the failure of Friends for Life, the organization through which he frequently operated, to have a license to sell these animals constitutes a violation of the Act and regulations.

Whitener denies that he sold badgers to Vincent Hall. He contends that Mercer sold the animals. However, the name on the shipping documents appears to be very similar if not identical to his signature, while Mercer's name does not appear anywhere on the documents. There is also no evidence whatsoever to support his contention that Mercer, who lives in Nebraska, somehow shipped the animals from the Atlanta airport. Moreover, the check to pay for the badgers was sent to him. Whitener's testimony denying that he sold the badgers to Hall is just not credible. I find that Complainant has proven by a preponderance of the evidence that Whitener sold the badgers to Hall.

Whitener admitted that he put up the money for the foxes that he and Carney purchased, but suggests that the transaction was somehow not improper because he was unable to sell any of the foxes, most of which died. The Act, however, requires that a person who buys, as well as sells, animals be licensed. As Whitener was a party to the purchase of the foxes while unlicensed he was in violation of the Act and regulations.

Whitener contends that he gave Carney two lynx and that he neither expected nor received anything in return. Carney, on the other hand, testified that the deal with Whitener was for her to give him the TV satellite system he wanted in exchange for the lynx. In view of Whitener's general unreliability as a witness, I credit Carney's testimony that Whitener gave her the lynx in exchange for the satellite system. The transaction was therefore a sale since, at the time the agreement was made, Whitener expected to be compensated in the form of a satellite system for the animals he was giving Carney. At that point in time

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[4]As Complainant's counsel notes in her brief, even assuming Overtone and Ayers had told Whitener that he did not need a license to buy or sell animals through any licensed dealer, this was erroneous information and does not estop APHIS from enforcing the Act and regulations in this proceeding. *OPM v. Richmond*, 496 U.S. 414 (1990). As for Whitener's claim that, for one dollar, he became McGee's employee, this was no more than a sham.

Whitener violated the Act since the exchange constituted a sale of animals without a license even though he later (after, it is noted, the complaint in this case was filed) tried to change the sale to a gift by telling Carney to consider the lynx a donation.

Respondents further contend that they were not required to have a license because the animals were sold for food, fiber, or fur. The record shows that Mercer intended to sell the animals she acquired from Whitener as pets and Hall said the badgers he obtained were to be exhibited. Whitener himself implied that he intended that the animals were to be sold for exhibition or as pets because he said animals sold for that purpose are far more valuable than animals sold for fur. It can be inferred from this evidence and in the absence of any evidence to the contrary that all the animals were being sold for exhibition, breeding, or as pets.

As Complainant has more than met its burden of proving that Respondents violated the Act and regulations by not having a license for the animals they bought and sold, the burden is on Respondents to come forward with rebuttal evidence showing that they were not required to have a license because the animals were sold for food, fiber, or fur. However, they could only show that the animals, as fur bearing creatures, could be sold for fur. They failed to show that any of the animals were in fact sold for that purpose.

Finally, Respondents contend that Elaine Whitener did not participate in any of the animal transactions and therefore did not violate the Act or regulations. She said she was not one of the directors of Friends for Life when it was established. However, even her husband, while minimizing her role with the organization, did not deny that she was one of its original directors and there was no substantiation for her claim that her sister in law was one of the original directors. I find that her testimony is not credible and that she was a director of Friends for Life from the outset. As a director she had the authority to direct and control the organization and its transactions.

Elaine further denies that she was actually involved in any of the transactions by her husband and Friends for Life. However, she accompanied her husband during the transaction involving the lynx that were acquired in Nebraska and transferred to Mercer in Oklahoma. She denied being involved in the animal transactions with Mercer in Tennessee and with Powell and Henderson in Florida, while Mercer, Powell, and Henderson all identified her as the person with whom they dealt. Finally, she acquired possession of animals from her husband including the four lynx that were part of the transaction with Bodenstedt and Mercer and the foxes that were acquired from Powell. I do not find her denials that she was involved in any of the animal transactions to be credible. I therefore find that Elaine Whitener, together with her husband and Friends for Life, acted as a dealer

in the buying and selling of animals in commerce without a license and that they did so for compensation notwithstanding that Friends for Life was ostensibly a non-profit corporation.

Sanction

The Department's sanction policy, as set forth in *S. S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), is that:

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

Section 2149(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) also commands, in determining the sanction to impose, that:

> The Secretary shall give due consideration of the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such penalty may be compromised by the Secretary.

Complainant seeks a $35,000 penalty and a five-year suspension of Whitener's license.

Respondents repeatedly violated the Act and regulations despite knowing that they were required to be licensed before acting as a dealer and despite receiving a warning in 1992. Their argument that they acted pursuant to a licensing exemption from APHIS officials and that they sold animals only for food, fiber, or fur has no merit whatever. They instead acted in bad faith when they sought approval to sell off their existing animals without being required to obtain a license by telling APHIS inspectors that they had sold only surplus animals and that they had to dispose of only a few remaining animals in their possession before moving from Georgia to Alabama. Then, after being granted this limited approval to dispose of their animals over a short period of time, they proceeded over the next two years to acquire and sell a significant number of additional animals through any licensed animal dealer with whom they could develop some sort of "relationship."

Despite this scheme the record does not indicate that they made any profit from

their activities and may have incurred a loss. The record also does not indicate that they have a large facility and Whitener is also now retired and living on Social Security. The requested monetary penalty shall be reduced to $10,000 but because Respondents' flagrant and wilful violations demonstrate that they are not trustworthy the requested time to disqualify them from being licensed shall be doubled to ten years.

Findings of Fact

1. Respondents James Harrell Whitener and Elaine Whitener are officers and directors of Respondent Friends for Life, Inc., a corporation whose activities they direct and control. Their current address is Route 1, Box 100, Gaylesville, Alabama 35973. Their prior address was 4680 Hadaway Road, Kennesaw, Georgia 30144.

2. Respondents at all times material herein operated as a dealer as defined in the Animal Welfare Act and USDA regulations without having a license.

3. On or about March 13, 1993, Respondents sold or traded three ringtail tail cats to Janet Mercer, a licensed dealer in Oklahoma.

4. On or about February 26, 1994, Respondents sold or traded ten ringtail cats to Janet Mercer.

5. In April 1994, Respondents sold two badgers to Vincent Hall, a licensed exhibitor in Pennsylvania.

6. On or about May 29, 1994, Respondents purchased 17 Canadian lynx from Melvin Bodenstedt in Nebraska.

7. On or about May 29, 1994, Respondents sold 11 Canadian lynx to Janet Mercer.

8. On or about September 3, 1994, Respondents purchased or traded for 12 foxes from Michael Powell in Florida.

9. On or about September 3, 1994, Respondents sold or traded two foxes to Angela Henderson in Florida.

10. On or about September 29, 1994, Respondents bought or traded for ten foxes from Michael Powell in Florida.

11. On or about October 15, 1994, Respondents sold or traded two European lynx to Sherry Carney.

12. Respondent James Harrell Whitener currently holds a USDA license.

Conclusions of Law

Respondents violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134)

and section 2.1 of the regulations (9 C.F.R. § 2.1).

Order

1. Respondents, their agents and employees, successors and assigns, directly, indirectly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondents are jointly and severally assessed a civil penalty of $10,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States and shall be sent to:

Sharlene A. Deskins, Esq.
Office of the General Counsel
Marketing Division, Rm. 2014, South Building
United States Department of Agriculture
Washington, DC 20250-1400

The certified check or money order should include the docket number of this proceeding, AWA Docket No. 96-0038.

3. The license of Respondent James Harrell Whitener is suspended for ten years and continuing thereafter until he complies with the requirements of the Act and regulations and the civil penalty is paid in full. Respondents Elaine Whitener and Friends for Life, Inc., are disqualified from applying for a license under the Act for ten years and thereafter until they comply with the Act and regulations and until the civil penalty is paid in full.

This Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice. (7 C.F.R. § 1.145).

[This Decision and Order became final April 9, 1998.--Editor]

In re: C.C. Baird, d/b/a Martin Creek Kennel.
AWA Docket No. 95-0017.
Decision and Order filed March 20, 1998.

Cease and desist order — Civil penalty — License suspension — Recordkeeping violations — Failing to provide appropriate animal care facilities — Random source dogs — Preponderance of evidence.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to fully and correctly maintain records disclosing the names, addresses, driver's license numbers, and vehicle license numbers of sellers from whom he acquired animals (9 C.F.R. § 2.75(a)(1)), that Respondent acquired *random source* dogs from prohibited sources (9 C.F.R. § 2.132), and that Respondent failed to comply with the Standards for the care of animals (9 C.F.R. § 3.1(f)), as required by the Animal Welfare Act and the Standards and Regulations. However, since the ALJ erroneously found no willfulness on this record and imposed only a $5,000 civil penalty and a cease and desist order, the Judicial Officer reversed the ALJ's willfulness finding and increased the sanction. Complainant need only prevail by a preponderance of the evidence. Federal agencies have broad discretion to decide against whom to institute disciplinary proceedings and may even use selective enforcement if the administrative decision to do so is not arbitrary. Hearsay is routinely admissible in USDA proceedings. Signed affidavits are admissible hearsay. A violation is willful within the meaning of the APA if a person carelessly disregards statutory requirements (*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996)). A class "B" dealer may not acquire *random source* dogs except from authorized sources. Any unlicensed sellers from whom Respondent acquires dogs must have bred and raised the dogs on their own premises. Respondent has not fully and correctly maintained proper records where Respondent made no effort to verify sellers' information provided to Respondent. Non-enforcement of a regulation neither affects the validity of a regulation nor estops the Department from subsequent enforcement, but non-enforcement may affect the sanction. Each animal involved in a violation is a separate violation. The Department's sanction policy places great weight on the sanction recommendations of administrative officials. The administrative officials recommended a cease and desist order, a $50,000 civil penalty, and license revocation. However, the Judicial Officer modified the recommended sanction, as follows: 1) the Judicial Officer adopted the ALJ's cease and desist order; 2) the civil penalty is increased to $9,250; and 3) Respondent's license is suspended for 14 days and thereafter until Respondent demonstrates to APHIS full compliance with the AWA.

Robert A. Ertman, for Complainant.
Robert G. Gilder, Southaven, Mississippi, and Kevin N. King, Hardy, Arkansas, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

I. INTRODUCTION.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 17, 1995.

The Complaint alleges that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], willfully violated the Animal Welfare Act and the Regulations and

Standards by failing to keep complete records, by acquiring *random source* dogs from prohibited sources, and by failing to comply with the Regulations and Standards relating to the care, transportation, and handling of animals. On March 16, 1995, Respondent filed an Answer denying the material allegations of the Complaint; and on May 16, 1995, Respondent filed an Amended Answer containing affirmative defenses.

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing on October 1 and 2, 1996, in Memphis, Tennessee. Robert A. Ertman, Esq., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Robert G. Gilder, Esq., of Southaven, Mississippi, and Kevin N. King, Esq., of Hardy, Arkansas, represented Respondent. On January 31, 1997, Respondent filed Proposed Findings of Fact, Proposed Conclusions of Law, and Memorandum in Lieu of Oral Closing Argument [hereinafter Respondent's Brief]. On February 3, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof [hereinafter Complainant's Brief].

On April 9, 1997, the ALJ issued an Initial Decision and Order assessing Respondent a civil penalty of $5,000 and ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On May 1, 1997, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* On May 30, 1997, Respondent filed Respondent's Response to Appeal Petition. On June 9, 1997, Complainant filed Complainant's Memorandum in Support of Appeal [hereinafter Complainant's Appeal]. On July 30, 1997, Respondent refiled Respondent's May 30, 1997, Response to Appeal Petition, together with Respondent's Brief in Opposition to the Complainant's Appeal of Initial Decision and Order [hereinafter Respondent's Reply]. On August 27, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ that Respondent violated the Animal Welfare Act and the Regulations and Standards, as alleged in paragraphs II, III, and IV(3) of the Complaint. I disagree, however, with the ALJ on the issue of willfulness and on the imposed sanctions; but, my disagreements are not of such nature as to require

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*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

a rejection of the ALJ's analysis. Therefore, pursuant to the Rules of Practice (7 C.F.R. § 1.145(I)), I am adopting the Initial Decision and Order as the final Decision and Order, with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law.

Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

II. APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS.

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

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

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in

this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

§ 2158. Protection of pets

(a) Holding period

(1) Requirement

In the case of each dog or cat acquired by an entity described in paragraph (2), such entity shall hold and care for such dog or cat for a period of not less than five days to enable such dog or cat to be recovered by its original owner or adopted by other individuals before such entity sells such dog or cat to a dealer.

(2) Entities described

An entity subject to paragraph (1) is—

(A) each State, county, or city owned and operated pound or shelter;

(B) each private entity established for the purpose of caring for animals, such as a humane society, or other organization that is under contract with a State, county, or city that operates as a pound or shelter and that releases animals on a voluntary basis; and

(C) each research facility licensed by the Department of Agriculture.

(b) Certification

(1) In general

A dealer may not sell, provide, or make available to any individual or entity a random source dog or cat unless such dealer provides the recipient with a valid certification. . . .

7 U.S.C. §§ 2131, 2132(f), 2140, 2149(a), (b), 2158(a), (b)(1).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

Random source means dogs and cats obtained from animal pounds or shelters, auction sales, or from any person who did not breed and raise them on his or her premises.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer. . . . The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

(a)(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.

. . . .

§ 2.132 Procurement of random source dogs and cats, dealers.

(a) A class "B" dealer may obtain live random source dogs and cats only from:

(1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;

(2) State, county, or city owned and operated animal pounds or shelters; and

(3) A legal entity organized and operated under the laws of the State in which it is located as an animal pound or shelter, such as a humane shelter or contract pound.

(b) A class "B" dealer shall not obtain live random source dogs and cats from individuals who have not bred and raised the dogs and cats on their own premises.

(c) Live nonrandom source dogs and cats may be obtained from persons who have bred and raised the dogs and cats on their own premises, such as hobby breeders.

(d) No person shall obtain live random source dogs or cats by use of false pretenses, misrepresentation, or deception.

(e) Any dealer, exhibitor, research facility, carrier, or intermediate handler who also operates a private or contract animal pound or shelter shall comply with the following:

(1) The animal pound or shelter shall be located on premises that are physically separated from the licensed or registered facility. The animal housing facility of the pound or shelter shall not be adjacent to the licensed or registered facility.

(2) Accurate and complete records shall be separately maintained by the licensee or registrant and by the pound or shelter. The records shall be in accordance with §§ 2.75 and 2.76, unless the animals are lost or stray. If the animals are lost or stray, the pound or shelter records shall provide:

(i) An accurate description of the animal;

(ii) How, where, from whom, and when the dog or cat was obtained;

(iii) How long the dog or cat was held by the pound or shelter before being transferred to the dealer; and

(iv) The date the dog or cat was transferred to the dealer.

(3) Any dealer who obtains or acquires a live random source dog or cat from a private or contract pound or shelter, including a pound or shelter he or she operates, shall hold the dog or cat for a period of at least 10 full days, not including the day of acquisition, excluding time in transit, after acquiring the animal, and otherwise in accordance with § 2.101.

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

. . . .

(c) *Surfaces*—(1) *General requirements.* The surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]

. . . .

(2) *Maintenance and replacement of surfaces.* All surfaces must be maintained on a regular basis. Surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

. . . .

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and the animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

. . . .

TRANSPORTATION STANDARDS

. . . .

§ 3.15 Primary conveyances (motor vehicle, rail, air, and marine).

. . . .

(g) The interior of the animal cargo space must be kept clean.

. . . .

§ 3.19 Handling.

. . . .

(b) Any person handling a primary enclosure containing a dog or cat must use care and must avoid causing physical harm or distress to the dog or cat.

. . . .

(2) A primary enclosure containing a dog or cat must not be tossed, dropped, or needlessly tilted, and must not be stacked in a manner that may reasonably be expected to result in its falling. It must be handled and positioned in the manner that written instructions and arrows on the outside of the primary enclosure indicate.

9 C.F.R. §§ 1.1, 2.75(a)(1), .100(a), .131(a)(1), .132, 3.1(c)(1)(I), (c)(2), (f), .15(g), .19(b)(2) (footnote omitted).

III. ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED).

. . . .

A. Statement of the Case.

Respondent, . . . licensed under the Animal Welfare Act as a class "B" animal dealer, operates Martin Creek Kennel in Williford, Arkansas. [Respondent]

started the business in September 1989, when he acquired an old kennel. [Respondent] and his wife . . . invest[ed] between $150,000 and $200,000 to upgrade the facility. [These improvements] included erecting a heated and air-conditioned building where the animals are kept. [Respondent] buys dogs and cats which, after conditioning, [Respondent] sells to various research institutions. The facility is inspected about four times a year by [the Animal and Plant Health Inspection Service of the United States Department of Agriculture [hereinafter APHIS]]. The record does not disclose any violations of the [Animal Welfare] Act [or the Regulations and Standards prior to those which are the subject of this proceeding]. Mr. Lonnie Leavell, an APHIS investigator, who had been to [Respondent's] kennel on several occasions, agreed that Respondent had made "vast improvements" in the facility (Tr. 35). George Ingram, a doctor of veterinary medicine, testified that [Respondent's] kennel is [normally] clean, that it has a good health program, and that [most of] the dogs are in excellent shape (Tr. 167).

[Respondent] buys all kinds of dogs, but mostly hunting dogs. [Respondent] acquires the dogs from people who drop them off at [Respondent's] kennel, from municipal pounds, and from owners who take their dogs to monthly "hunting dog trad[e] days" or "dog swap." [(Tr. 158.)] Mr. Daniel Hutchings, a senior APHIS investigator, testified that the dogs at these swaps have usually gone through a number of hands and are generally worthless for hunting purposes[, as follows:

BY MR. HUTCHINGS:]

A. Generally speaking, they're associated with a flea market or an auction of all kinds of items. The dog breed or dog swap is a small part of the main function going on at that point in time. People bring their culled dogs in, their trade dogs in, dogs that are generally worthless for hunting purposes, and trade those dogs to other individuals or sell them to USDA licensed dealers.

. . . .

A. Dogs usually at these trade days have been in a number of different hands.

Tr. 158-59.

[APHIS] investigator Kent Permentier also testified that in his experience [many people] sell dogs that [are] not good hunting dogs to research facilities

rather than having them killed (Tr. 146).

As for the cats [Respondent] acquires, [Respondent] describe[s] them as mostly "barn" cats, which have never been handled . . .[,] which are sometimes so wild they cannot be handled . . .[, and which are bought from] people who . . . will have over a hundred such cats around their homes and barns (Tr. 271).

[Respondent] has bought dogs and cats from 1,156 different people [(Tr. 207; RX 1). Respondent] knows and remembers some [sellers]; others [Respondent] does not [know or remember].

When [Respondent] bought the animals in the past, [Respondent] asked the seller for his or her name, address, driver's license number, and [vehicle] license number [(Tr. 197)], which is information [Respondent] is required to maintain by [section 2.75(a)(1) of] the Regulations (9 C.F.R. § 2.75(a)(1)). [Respondent] recorded the information at the time of the transaction by writing it on a yellow pad and then later transferring it to [Respondent's] computer [(Tr. 197). Respondent testified that he] did not verify the information by asking to see the seller's driver's license and . . . that he was never told that he had to look at the license [(Tr. 287). Respondent] also did not ask if the seller had bred and raised the animals and took the word of any person who said he or she had raised them [(Tr. 268, 278, 286).

The Regulations and Standards provide, with respect to a class "B" dealer's acquisition of dogs and cats, as follows:

> (a) A class "B" dealer may obtain live random source dogs and cats only from:]
>
> (1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;
>
> (2) State, county, or city owned and operated animal pounds or shelters; and
>
> (3) A legal entity organized and operated under the laws of the State in which it is located as an animal pound or shelter, such as a humane shelter or contract pound.
>
> (b) A class "B" dealer shall not obtain live random source dogs and cats from individuals who have not bred and raised the dogs and cats on their own premises.

(c) Live nonrandom source dogs and cats may be obtained from persons who have bred and raised the dogs and cats on their own premises, such as hobby breeders.

(d) No person shall obtain live random source dogs or cats by use of false pretenses, misrepresentation, or deception.

[9 C.F.R. § 2.132(a)-(d).]

Respondent testified that] he was aware [that] the . . . [R]egulations [and Standards require] that dogs he bought from [persons (other than licensed dealers and pounds or shelters as described in 9 C.F.R. § 2.132(a))] had to have been bred and raised by the seller, but contended that the regulation restricting the acquisition of random source animals was not enforced by USDA until 1993 [(Tr. 269, 284)]. However, [Respondent testified that] he never knowingly bought an animal from anyone who had not raised it [(Tr. 286). Respondent] testified that he had discussed the matter with Dr. Gregory Gaj, an APHIS investigator, who was familiar with [Respondent's] dog-buying practice (Tr. 282-83, 289).

Dr. Gaj's testimony tends to support [Respondent's] contention concerning the non-enforcement of the random-source regulation, although Dr. Gaj said he had advised [Respondent] that [Respondent] would be held accountable if the regulation was enforced in the future[, as follows]:

[BY MR. ERTMAN:]

Q. Dr. Gaj, did you ever tell Mr. Baird that it was okay if he bought random source dogs from individuals?

[BY DR. GAJ:]

A. What I have always said to Mr. Baird is that he is responsible for the information that's in the regulations. I've always said that it does not matter what other people do in other States, what other inspectors might do in Missouri, or somebody else in some other State for that matter, that he is going to be held responsible for what is in the regulations, and I cannot vouch for whether or not they will enforce a particular regulation or not. That's not up to me to do.

That's, to the best of my recollection, what we had referred to as I guess not being held responsible before he buys the animals.

. . . . [Footnote omitted.]

Tr. 334.

. . . .

[Moreover, Respondent confessed to Dr. Gaj that Respondent was acquiring random source dogs from unauthorized sources, yet Dr. Gaj did not cite Respondent. Therefore, it was not unreasonable for Respondent to believe that 9 C.F.R. § 2.132 was not being enforced.]

. . . APHIS, in the fall of 1993, created a "task force" to examine the records of dealers to check the persons from whom the dealers were buying dogs [(Tr. 28, 41)]. Nine investigators ([each of whom testified:] Clifton Long [(Tr. 39)], Mark Kurland [(Tr. 17)], Lonnie Leavell [(Tr. 27)], Gary Pettway [(Tr. 109)], Michael Ray [(Tr. 120)], David Green [(Tr. 141)], Kent Permentier [(Tr. 143)], Rodney Walker [(Tr.146)], and Daniel Hutchings [(Tr. 149)]) were assigned to [examine Respondent's] records [(Tr. 28, 41-42)]. One of the team members, Mr. Leavell, testified that [Respondent] was cooperative and that he believed that [Respondent] was trying to be honest about [Respondent's] operation and records (Tr. . . . [35-]36 . . .).

The nine investigators were given names to check that were randomly selected from the list of 1,156 persons from whom [Respondent] acquired dogs and cats [(Tr. 207; RX 1)]. Most of the acquisitions were in 1992, but some were in 1993 and a few in 1994. Mr. Long was given the names of 32 persons to trace, while Mr. Leavell was given 56 names (Tr. 74, 136). The record does not disclose the number of names given to the other investigators.

The investigators could not find [at least] 23 of the persons they tried to trace at the addresses that [Respondent] had obtained from . . . driver['s] licenses (or the addresses did not exist) and often could not even find any records of driver['s] licenses that matched the license numbers that these persons had given [Respondent].[2] Two other persons on the list had died, with one dying before he purportedly sold dogs to [Respondent (CX 103, 105). Eighteen] persons who were traced gave statements to investigators indicating that they had sold random source dogs . . . . [Of those 18, 11 persons signed affidavits that they sold random source dogs to Respondent (CX 152, 165, 171, 175, 179, 187, 192, 196, 198, 211, 218), 2 persons gave unsigned statements that they sold random source dogs to Respondent (CX 183, 205), 1 person signed an affidavit that he sold random

[2][Addresses on driver's l]icenses . . . [are] not necessarily . . . accurate. Kevin Burton, Chief Deputy Sheriff for Sharp County, Arkansas, where [Respondent's] kennel is located, testified that his office is unable to locate about 20 percent of persons at the addresses given on their driver's licenses (Tr. 317).

source dogs at Popular Bluff, Arkansas, and that his son sold random source dogs to Respondent (CX 167), 3 persons gave signed affidavits that they sold random source dogs to someone other than Respondent (CX 132, 151, 208), and 1 person gave an unsigned statement that he sold one random source dog to someone other than Respondent (CX 158)]. However, none of these persons w[as] called by Complainant to testify at the hearing concerning the statements they gave to the investigators. . . . Another person, Dustin Roach[e], was found to be a "fugitive from justice" who apparently sold dogs under an assumed name [(Tr. 171-72, 195-97, 266)]. Two others denied selling any animals to [Respondent], while another admitted to Respondent that he had three different driver['s] licenses [(Tr. 210)]. . . . Finally, one individual contacted by the investigators, Mark Yardley, did testify (as [Respondent's] witness) and said that he had used the various names of his relatives when he sold dogs to [Respondent (Tr. 170). Mr. Yardley] said of the dogs that "[s]ome we raised, some were just dumped, some we traded for." [(Tr. 176.) Mr. Yardley] also testified that he was told by investigator [Randy Walker] that if he obtained a license he would not be penalized. (Tr. 17[8]-79.)

Investigator Kent Permentier described one of the persons he had contacted[, Mr. Michael Seets,] as [follows:

BY MR. PERMENTIER:

> . . . Mr. Michael Seets was] a field man and he had trophies all over his house. The dogs that didn't work out and he bred that didn't work out, he sold those or traded them. And then the other ones, I guess they were just drop-offs from neighbors in the community who knew that he had a place to dispose of those dogs, so they just dropped them off there. Rather than kill them, he just loaded them up. I did issue him a warning notice for selling these dogs who were not being home-raised as far as that goes.

Tr. 145-46. No investigator reported that any of the random source dogs had been stolen.

[Respondent testified] that after the investigators reported their results . . . [Respondent] revised his procedures and prepared a form which [Respondent] now requires each dog owner to complete containing the owner's name, address, phone number, driver's license number, vehicle number, and description of the animals. [Respondent] also requires that the seller display his or her driver's license. The sellers are then asked to sign a statement that they understand that the animals may be sold for research or educational purposes and that they certify that they had bred and raised the animals. (Tr. 199-202.)

Finally, Dr. Gaj testified that he had inspected [Respondent's] facility on July [12,] 1994 (Tr. 159). His inspection report indicates he found a rusty gate, chewed and rotted wood, and poor water drainage (CX 223). [Respondent testified that] he corrected the problems by replacing the wood, painting the metal, and filling the "mudhole" with concrete (Tr. 248-49).

B. **Discussion.**

Section 2.75(a)(1) of the Regulations requires[, *inter alia*,] dealers to "make, keep, and maintain records or forms which fully and correctly disclose" such information as the name and address of the person from whom the dealer acquires dogs or cats and "[t]he vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act" (9 C.F.R. § 2.75(a)(1)(iii)).

Complainant contends that [Respondent's] responsibility as a dealer to maintain correct records required him to verify the information an animal owner gave him by looking at the person's driver's license. Considering the circumstances, particularly that some animal owners, many of whom [Respondent] did not know, lied or were otherwise deceptive about their driver['s] licenses and addresses, I find that [Respondent], to maintain his records "fully and correctly," was required to verify the information he received by looking at the person's driver's license. [Respondent's failure to make, keep, and maintain records which fully and correctly disclose the required information] constitutes a violation of section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

As for his acquisition of random source dogs, the evidence showing that [Respondent] acquired such animals from unauthorized sources is largely based on hearsay . . . that investigators . . . obtained from persons who did not testify. . . . ["However, USDA proceedings are not bound by traditional hearsay rules" and] hearsay evidence can be considered in these proceedings. *In re Micheal McCall*, 52 Agric. Dec. 986, 1003 (1993).

The record, apart from the hearsay evidence, does indicate a practice among owners of hunting dogs in the area, where [Respondent] acquired animals, of selling to dealers dogs that they had obtained through trades and "drop offs." One seller . . . testified that he had sold random source dogs to [Respondent]. Thus, considering the hearsay evidence in the light of this evidence, the deception discussed in this Decision and Order, *supra*, and the large number of persons, some strangers, from whom [Respondent] acquired dogs, it can be inferred that [Respondent] acquired some random source dogs from unauthorized sources. As [Respondent] had been in the business long enough to have become familiar with

the practice of some persons to sell random source dogs, [Respondent] had the responsibility to guard against it by asking the owners, particularly those [Respondent] did not know, whether they had bred and raised the animals [on their own premises].

Respondent contends that in 1992, . . . APHIS was not enforcing [the] random source regulation [9 C.F.R. § 2.132]. While, as discussed in this Decision and Order, *infra*, this non-enforcement may affect the penalty, [Respondent] cites no authority for the proposition that non-enforcement affects the validity of the regulation or estops APHIS from later enforcing it. Dr. Gaj, while [not enforcing 9 C.F.R. § 2.132 and] agreeing with [Respondent] that the regulation was not being enforced [by others at APHIS], had also advised [Respondent] that it might be enforced in the future. I accordingly find that [Respondent's] acquisition of random source dogs, without specifically asking the persons from whom [Respondent] acquired the animals whether they had bred and raised the animals [on their own premises, is] a violation of section 2.132 of the Regulations (9 C.F.R. § 2.132) regardless of whether the regulation was being enforced at the time and whether [Respondent] actually knew whether the animals were random source or not.

As for [Respondent's] alleged violations of the Regulations and Standards for the care of animals, Complainant has failed to show by a preponderance of the evidence that the rust . . . found by Dr. Gaj was, as required by 9 C.F.R. § 3.1(c)[(1)](I), "excessive," so as to prevent cleaning or sanitization or affect structural strength[; or, that chewed and rotted wood found by Dr. Gaj was such that it could not "be readily cleaned and sanitized, and must be replaced when worn or soiled," as required by 9 C.F.R. § 3.1(c)(2)]. The standing water, however, is . . . a violation of 9 C.F.R. § 3.1(f), as it was a potential source for contamination resulting from, as found by Dr. Gaj, flies and bugs. Although the [violative condition] was promptly corrected by Respondent, a [subsequent correction of a condition that is not in compliance with the Animal Welfare Act or the Regulations and Standards has no bearing on the fact that the violation has occurred]. *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996).

As for the penalty for [Respondent's] violations, the Secretary's policy is that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose." *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited

as precedent under 9th Circuit Rule 36–3).

Two relevant factors to consider are that [Respondent] has no . . . previous violations and there is no evidence that the animals at his kennel are provided with less than humane care. Another factor is that he has taken steps to remedy the violations of the [R]egulations [and Standards].

As for the recommendation of administrative officials, they urge the imposition of a $50,000 [civil penalty, a cease and desist order,] and the permanent revocation of [Respondent's Animal Welfare Act] license . . . [(Complainant's Brief at 14-15).] The purpose of the Animal Welfare Act, in addition to . . . [insuring] the humane care of animals, is "to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen." (7 U.S.C. § 2131(3).) [The Regulations and Standards, however, do not prohibit class "B" dealers from acquiring random source dogs and cats from other licensed dealers and from pounds or shelters as described in section 2.132(a) of the Regulations (9 C.F.R. § 2.132(a)). However, section 2.132(b) of the] . . . Regulations does prohibit [class "B"] dealers from acquiring random source dogs [and cats] from [individuals other than those identified in section 2.132(a)] as a means of preventing the sale of stolen animals [(9 C.F.R. § 2.132(b))]. [Footnote omitted.]

However, there is no evidence in this proceeding that any of the animals [acquired] by [Respondent], whether random source or not, had been stolen . . . . On the contrary, [Respondent] cooperated with the local law enforcement officials whenever he was contacted about missing animals and no stolen animals were ever found at his facility (Tr. 294-96). It is, of course, conceivable that some of the animals that [Respondent] acquired may have been stolen, considering the volume of animals that he handled. But this [conception] is too speculative to serve as a factual basis to infer that the dogs [and cats] he acquired had in fact been stolen. Rather, many of the random source animals appear to have been dogs-that-won't-hunt [culls] that could not be sold or traded [as hunting dogs] and would have been killed if not sold to [Respondent]. As for the lies and deceptions of some of the persons selling random source dogs to [Respondent], there is no evidence that they did this because they were trafficking in stolen animals. It is likely that these persons were being devious to avoid being detected by APHIS investigators and losing their obviously lucrative business of selling . . . dogs . . . to dealers. When the investigators did find them, they were either given warnings or told to get a license.

Complainant further alleges that [Respondent's] violations were willful. [The record establishes Respondent's careless disregard for the recordkeeping requirements, the prohibitions on acquisition of random source dogs from

unauthorized sources, and the requirement that Respondent make provisions for the regular and frequent collection, removal, and disposal of water in a manner that minimizes contamination and disease risks. This careless disregard of requirements under the Animal Welfare Act is sufficient to establish that Respondent's violations were willful.]

. . . . [Footnote omitted.]

C. **Findings of Fact.**

1. Respondent, C.C. Baird, d/b/a Martin Creek Kennel, is a licensed class "B" dealer in Williford, Arkansas, where, since 1989, he has operated a kennel and buys dogs and cats which he sells to research facilities. [(Compl. ¶ I; Answer ¶ I.)]

2. Respondent has committed no . . . violations of the Animal Welfare Act [previous to those which are the subject of this proceeding.] Respondent provides humane care for the animals at the kennel.

3. Respondent [willfully] acquired dogs and cats from [individuals (other than licensed dealers and pounds or shelters as described in section 2.132(a) of the Regulations (9 C.F.R. § 2.132(a)))]. When [Respondent] acquired the animals, [Respondent] did not ask the persons from whom [Respondent] acquired the animals whether they had bred and raised the animals [on their own premises] and did not ask such persons to verify their driver['s] licenses by showing [Respondent] their licenses.

4. At least 23 persons from whom Respondent acquired animals gave [Respondent] incorrect information concerning their driver[']s licenses and/or addresses [and Respondent willfully recorded the incorrect information, since Respondent failed to verify the truthfulness of the information].

5. It is the practice of some . . . animal sellers, in the area where Respondent buys dogs and cats, to acquire dogs that they had not bred and raised [on their own premises. It is also the practice of many of these animal sellers to sell these dogs to dealers licensed under the Animal Welfare Act].

6. [At least 11] . . . animal [sellers impermissibly] sold to Respondent [a minimum of 67] dogs that the [sellers] had not bred and raised [on their own premises], which dogs are known as "random source" animals.

7. . . . .

8. On July 12, 1994, Respondent did not provide for adequate drainage of water from his kennel.

D. **Conclusions of Law.**

1. Respondent [willfully] failed to "fully and correctly" maintain records which disclosed the names, addresses, and driver[']s licenses of [at least 23] persons from whom he acquired animals, in violation of section 10 of the [Animal Welfare] Act (7 U.S.C. § 2140) and [section 2.75(a)(1) of the] Regulations (9 C.F.R. § 2.[]75(a)(1)).

2. Respondent [willfully] acquired [a minimum of 67] random source dogs from unauthorized sources, in violation of [section 2.132 of] the Regulations (9 C.F.R. § 2.132).

3. Respondent failed to comply with the [Regulations and] Standards for the care of animals [by failing to make provisions for the regular and frequent collection, removal, and disposal of water, in a manner that minimizes contamination and disease risks,] in [willful] violation of [section 2.100(a) of] the Regulations [(9 C.F.R. § 2.100(a)), and section 3.1(f) of the Standards] (9 C.F.R. § 3[.1](f)).

. . . .

IV. ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER.

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.[3] An examination of the record reveals that Complainant

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[3]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 18 n.3 (Jan. 13, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 45 n.7 (Nov. 6, 1997); *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 5 n.*** (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric.

(continued...)

proved the violations alleged in paragraphs II, III, and IV(3) of the Complaint.

A. Complainant Has Proven by Much More Than a Preponderance of the Evidence the Violations in Paragraphs II and III of the Complaint.

Complainant has proven the violations in paragraphs II and III of the Complaint by much more than a preponderance of the evidence. Paragraphs II and III of the Complaint read, as follows:

> II
>
> From approximately January 1992 to approximately June 1994, the [R]espondent failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the [R]egulations (9 C.F.R. § 2.75(a)(1)).
>
> III
>
> From approximately January 1992 to approximately May 1993, the [R]espondent acquired "random source" dogs as defined in section [1].1 of the Regulations (9 C.F.R. § [1].1),[4] and the acquisition of such dogs by the [R]espondent was in willful violation of section 2.132 of the regulations (9 C.F.R. § 2.132).

Taking paragraph III first, there is no question but that Respondent acquired live random source dogs, as defined in 9 C.F.R. § 1.1, in willful violation of 9 C.F.R. § 2.132. In fact, the definition of random source dogs and the terms of the

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(...continued)
Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).]

[4]I find that the typographical error citing the definition of "random source" dogs as 9 C.F.R. § 2.1, rather than the correct citation of 9 C.F.R. § 1.1, is harmless error.

applicable regulation, when applied to the facts in this record, force this ineluctable conclusion. A random source dog is defined, as follows:

> *Random source* means dogs and cats obtained from animal pounds or shelters, auction sales, or from any person who did not breed and raise them on his or her premises.

9 C.F.R. § 1.1.

The controlling regulation incorporates the random source definition. A class "B" dealer may only obtain live random source dogs and cats from another licensed dealer, or from a pound or a shelter described in section 2.132(a) of the Regulations (9 C.F.R. § 2.132(a)). If a seller is not a licensed dealer, or a pound or a shelter described in 9 C.F.R. § 2.132(a), that seller must have bred and raised the animal on that seller's own premises, before a class "B" dealer may acquire that seller's animal.

My examination of the evidence reveals that Respondent admits impermissibly acquiring live random source dogs during the pertinent period, because Respondent routinely acquired dogs from sellers whom Respondent knew, or should have known, were not licensed dealers, and were not a pound or shelter described in section 2.132(a) of the Regulations; and, Respondent knew, or should have known, that the animals were not bred and raised on those sellers' premises. Moreover, even if Respondent had not admitted the violations, Complainant's task force evidence, the exhibits, and testimony from Respondent and other key witnesses show conclusively that Respondent impermissibly acquired random source dogs from individuals who had not bred and raised the dogs on their own premises.

Respondent's direct testimony and cross-examination testimony describe how Respondent violated 9 C.F.R. § 2.132, as follows:

DIRECT EXAMINATION

BY MR. GILDER:

Q. Mr. Baird, where do you live?

A. I live at Route 1, Williford, Arkansas.

Q. What's the name of the business you're engaged in?

A. Martin Creek Kennel.

Q. How long have you been engaged in business as Martin Creek Kennel?

A. I started, I think, in September of '89, roughly seven years, I guess it is now.

Q. Tell us a little bit about your operation there. What specifically do you do?

A. Well, we are basically buying dogs and cats from people that they're no longer any value. Mostly hunting dogs, mostly what I would call barn cats that people have raised that they're going to have to destroy. We take those dogs and cats, condition them meaning we bring them in and we give them all the shots, we deworm them, we dip them, we get them in the ultimate of health and we sell to various research institutions. That's our primary function. Sometimes we sell some to other people, but most of them go to research institutions. Recently we have begun to also raise animals for that same purpose. We built some extra buildings for the purpose of raising animals.

. . . .

Q. Let me ask you this then, Mr. Baird: What type of records did you keep when you first went in business?

A. Well, whenever -- even still we've never been given any forms or any required method. We're just told to keep records of the name, address, driver's license, truck license number of the people from whom we buy. What I did when I started, and I guess, looking back I'd have to admit I was too trusting of some folk, but what I did basically was operate with what I call a yellow pad, a note pad. I would buy dogs from someone and I'd say, "I need your driver's license information," and take it and put it on a yellow pad and transfer it into my computer. I've always kept a computer. I bought a computer when I was in the insurance business and I kept all that in the computer from day one.

Q. This Exhibit 8 that we had asked that copies be made of, is that a

copy of the type of paperwork, an example that you brought to show the Court --

A. (Interposing) That's correct --

Q. (Continuing) how you kept records?

A. That's correct. I basically recognize -- this first two pages is my wife's handwriting. Once a month they have a trade day at Joplin, Missouri. An old coon hunter by the name of Beckam puts on a day up there and a lot of guys come in and trade dogs, and at that trade day it was very hectic, and I always take my wife with me, and she kept the paperwork for us, so this is her handwriting here which is more legible than mine. But, it basically shows the dogs I bought and, you know, the driver's license information. And the last page is one of my notes, I'm sure, from Poplar Bluff where my handwriting is not nearly as good as hers, and the information appears to be less complete on some of that because some of these people were repeat people that I had bought from before and I kept their driver's license information in a file. Like, for instance, I've got Tom Barker down here on some dogs and I don't have any information on this sheet which means I had him in the computer and I went back and pulled that back up and brought it forward again. I don't do that anymore, but that's what I did then. Dr. Gaj and I had discussed this several times and he was basically in approval of our record-keeping method at that time.

(The document was identified as Respondent Exhibit 8.)

Q. Now, do you have a different type of record that you keep today?

A. Yes, sir. Basically, when the task force made their -- did their work and they picked up my forms which I gladly supplied and had them in great shape -- I printed out all the computer things and, you know, gave them to them in great shape, and I thought, totally impeccable, and they came back to me and basically said, "We've got people here we can't find," and I realized that possibly I had been had by some folks that had given me that information. And also, some people that said, "Hey, we didn't sell him any dogs," when I knew that they had. Then I got on the ball and made up a form of my own and it has all the blanks on there for the name, address, city, driver's license, state, vehicle number and all the information for the

dogs, and then at the bottom there is a statement that says: "I understand that the above listed animals might be sold for research or educational purposes. I certify that I am the legal owner of the above listed animals. The animals were bred and raised by me and I have every right to sell them to Martin Creek Kennels." I have a place for them to sign that and a place for the number of animals that were sold and the date on that. The one I'm operating with now I revised just in the last few months and it also has a place for the phone number. We aren't asked to take phone numbers, we aren't asked to take signatures, but I saw as the trace-backs started, I saw some people they were trying to locate [people] that I knew and they were saying, "We can't locate these people." Some of the universities are beginning to do their own trace-backs and I had a university call me one day and there was some people they hadn't been able to trace back and it was causing them concern. These were people I knew. For whatever reason, their number wasn't listed. So, now I ask for phone numbers and I include that with every animal that I sell. I've done that since day one. It's required now. It wasn't until about a year or so ago. But, I've always included with every animal I've sold the source from which I bought the animal.

Q. Let me ask you this question: Have you ever yourself falsified or made up records on the people that you bought --

A. (Interposing) No, sir, I haven't, for several reasons. I'd like to explain myself there. Number one, it would be wrong and I just don't intend to do that. I preach every Sunday at a little place. I just won't do that.

Q. You literally preach?

A. Yes, sir. I've preach[ed] at the same church since 1965. Two, I would be very foolish to do it. The whole purpose of the record-keeping -- as I understand it, the whole purpose of the record-keeping is to avoid the so-called stolen dog, the possibility of a dog being stolen. So, where's the logic if I falsified the records and I make a name up which is basically, I guess, what I'm being accused of, and the dog comes up stolen and somebody comes and says, "That's my dog," and I give the Sheriff the information knowing when I ha[n]d it to him he can't find the guy, you know, I'm hung with a potentially stolen dog. So, I want impeccable

records. There would be no reason to. And, you know, beyond that, I don't need to buy from anyone who won't give me their information. So, I've never intentionally falsified any records. I'm going to admit that very possibly I've been naive enough to accept some information that was not correct, but I've never intentionally falsified anything.

Q. Do you feel like what we've previously marked as Respondent's Exhibit No. 4 there as your new records you're referring to, how are they superior to what you were using, the older type records that we've marked as Exhibit No. 8?

(The document was identified as Respondent Exhibit 4.)

A. Well, I think these are basically going to be impeccable. Number one, I will not buy from anyone now who does not literally show me his driver's license. Now, in the older days I was big hand to trust people and I know there were some cases where somebody came to me and said, "Look" -- you know, when I said, "I need your driver's license," I would hear the story sometimes, "Well, I lost my wallet. I left it at home. I've got on a free pair of coveralls," or whatever, "but I know my number," and he rattled it off. And I am guilty of copying down such information without literally seeing that. I won't do that -- I don't care what the man's story is now, I just do not and will not do that. That accounts, I think, for some people who were able to give me some false information. I wasn't aware when I went into the business that there were some people out there who would have reason to want to give me false information. I wasn't aware that some of those coon hunters that I would meet at Joplin were guys who had already been issued a warning letter from USDA that "You guy[s] have sold too many dogs, therefore we can get you in big trouble." Guys have told me that they've had some very strong warnings about potential incrimination. I went to Joplin and I noticed that so many of these names that they're having trouble with are centered in and around the Joplin, Missouri area there. Either in Oklahoma or Kansas or Missouri. When I'd go to Joplin there would be sometimes as many as five buyers there. One out of Minnesota, two out of Missouri, one out of Kansas, myself. Sometimes the guy from Iowa would be there. It was very competitive to buy dogs there. And as I look back, I expect that of all the guys that sold too many animals knew they could be in a problem and they probably picked on the new buyer that was a little bit green and they came at me

with their dogs and again, you know, "I've lost my wallet," or this type thing. Sometimes the story -- and as I look back -- and it's again something I don't allow at all anymore, but sometimes the old concept of "My neighbor couldn't come in today and he asked me to haul these dogs, and here's his driver's license information." You know, I had no reason to question him. His neighbor is in the hospital, his wife wants me to -- you know, whatever this type of thing is. That doesn't happen anymore. If the man wants to sell me a dog, he's going to be here.

. . . .

[BY MR. ERTMAN:]

Q. I'd like you to look at Complainant's Exhibit 123 please.

I'd like you to look at the list of the breeds of dogs on this.

[BY MR. BAIRD:]

A. Okay.

Q. Now, we have an airedale, and a dalmatian, and a lab cross, a July, a couple of shepherd crosses, a lab cross, and a pointer. Does this look to you more like a person selling their cull hunting dogs, or a person gathering dogs from various sources to sell to you?

A. Number one, I never said that I only buy cull hunting dogs. Lots of people in the country have lots of dogs.

What you're asking me to do basically is to make a judgment that if a man tells me these are his dogs and that he raised them, I don't know that I have any right or any responsibility to question his word or call him a liar.

Now, these don't look like hunting dogs, for the most part. The July is a hunting dog, the pointer is a hunting dog, the walker is a hunting dog. The others primarily are not. But when you go to some of these places that live back in the woods, lots of them have lots of old mongrel dogs in their yard. I have no idea what his place looked like or what he had.

Q. I would like for you to look at Complainant's Exhibit 119, please.

A. Okay.

Q. And I would like for you to look at the mix of breeds on this.

A. Okay.

Q. We have a shepherd cross and a pointer and a German shepherd, another shepherd cross, another pointer, and two walker hounds.

Does this look like a person selling their cull dogs to you, or does this look like a person bunching dogs for the purpose of selling them to you?

A. I don't have any way of responding to that, other than what the man tells me.

Q. And you will accept whatever they tell you.

A. If he tells me they are his dogs, that he raised the dogs, and he signs the statement with me that he raised the dogs, I have no right to question that.

If I have a strong reason to think the man is less than honest, I would not, but if he's willing to show me his driver's license and sign in front of witnesses that, "Yes, I sold the dogs and I bred and raised them," I don't understand how I can be asked to do anymore than that.

Q. But what have you asked him here? What is shown by this form that you asked him?

A. Well, at this time, the form itself did not carry the statement that "were bred and raised."

Q. But you asked them whether they were the legal owner of these dogs and cats.

A. That's right.

Q. But you weren't even asking them whether they were bred and raised, or born and raised, on the form.

A. I[t] wasn't on the form, at that time, no, sir. At that time, the USDA had made basically an open statement that they were not enforcing it and it wasn't a big issue, and that's the reason I wasn't putting it on my form.

I thought that the statement that I made that he had every right to sell the animals to Martin Creek Kennels, I thought that covered that issue, because by the regulation, if it were being enforced of the "bred and raised," he would not have the right to sell the animal if he had not bred and raised it, and that's one of the reasons why I put that statement in.

Since it became a controversial issue, I went back and revised my statement and had it to read that they were bred and raised on their premises.

Tr. 190-91, 197-204, 267-70.

Respondent describes participating in "trade" days at Joplin, Missouri, and Poplar Bluff, Arkansas, where Respondent bought hunting dog culls, for the most part. Respondent's testimony does not claim that the trade day sellers were licensed dealers, authorized pounds, or authorized shelters, and I infer that they were not. Thus, a seller would have to have bred and raised the dog on the seller's premises, or Respondent would be impermissibly acquiring random source dogs.

I find that it is not credible that Respondent would go to a "trade" day believing that the seasoned dog traders Respondent describes would always only have dogs bred and raised on their own premises when dealing with Respondent. Respondent admits to buying dogs in Joplin, Missouri, in hectic competition, with up to five other regional buyers like himself. The descriptions of these trade days are that the more likely scenario at any trade day is that the dogs offered Respondent had already traded hands several times before reaching Respondent. The ALJ used the testimony of APHIS investigators Kent Permentier (Tr. 145-46) and Daniel Hutchings (Tr. 158-59) to describe that the operations of the "field" men and "trade" days were such that the dogs changed hands many times (Initial Decision and Order at 2, 7).

The record is conclusive in that Respondent admittedly made no genuine effort to determine whether a dog was random source, because Respondent believed that USDA was not enforcing the regulation, of which regulation Respondent nonetheless was well aware. In response to a question by the ALJ at the hearing,

Respondent denied *knowingly* acquiring animals from people who did not breed and raise them, but admitted purposely not asking for the information and just assuming that the people had bred and raised the animals on their own premises:

> JUDGE HUNT: Now, are you saying then that you bought animals from people who did not breed and raise them themselves? Did you know that they did not breed and raise them?
>
> [BY MR. BAIRD:]
>
> THE WITNESS: No, sir, I'm not going to say that I knowingly did that.
>
> I, basically, in the '92 timeframe, I was taking an approach of, I guess that our government calls "Don't ask, don't tell," situation. I did not openly ask them, "Did you raise this animal?"
>
> I knew that since there was a vague regulation back there, that might or might not ever be enforced, I did not approach the question. I did not openly ask them, at that time, you know, "Did you raise this animal." I bought it with the assumption that they had raised the animal.

Tr. 286.

I conclude that Respondent did knowingly acquire random source dogs, but expected no enforcement. Despite Respondent's beliefs, 9 C.F.R. § 2.132 is clear that Respondent is required to determine that the dogs were bred and raised on the seller's premises. Therefore, Respondent's own testimony is conclusive that Respondent made no genuine effort to determine if a trade day seller's dog was bred and raised on the seller's premises, because Respondent admits that Respondent did not ask this question and did not put it on any of the various forms prepared by Respondent. I find that Respondent knew, or should have known, that dogs trading hands at "hectic" trade days, as Respondent characterizes them, would have a high likelihood of being random source. It was incumbent upon Respondent to be punctilious in questioning a seller to determine if dogs were bred and raised on the seller's premises.

Respondent admitted that the reason that Respondent did not put the question of "bred and raised" on the form--and I infer the reason that Respondent did not also ask if the animals were bred and raised on the premises--was because Respondent believed that USDA had made an open statement of nonenforcement

(Tr. 269). Also, Dr. Gaj testified that Respondent told him that Respondent's reasons for not putting on the form the question of whether the dogs were raised on the premises was because Respondent "did not want people to have to lie" and that leaving that question off the form would give Respondent some "waiver over liability in the case that the animal was sold to him." (Tr. 333-34).

As the above analysis clearly shows, Respondent admits in his testimony that Respondent knowingly, systematically, and impermissibly acquired random source dogs from individuals who had not bred and raised the dogs on their own premises. However, this record would dictate the same conclusion, even without Respondent's many admissions to that effect, because Complainant's "task force" evidence, the exhibits, and testimony from other key witnesses show the violations by much more than a preponderance of the evidence.

The ALJ found that 16 sellers who were traced by the task force gave statements admitting the sale of random source dogs (Initial Decision and Order at 6). My examination of the record reveals that 18 persons who were traced by the task force gave statements to investigators indicating that they had sold random source dogs. Of those 18, 11 persons signed affidavits that they sold random source dogs to Respondent (CX 152, 163, 171, 175, 179, 187, 192, 196, 198, 211, 218), 2 persons gave unsigned statements that they sold random source dogs to Respondent (CX 183, 205), 1 person signed an affidavit that he sold random source dogs at Popular Bluff, Arkansas, and that his son sold random source dogs to Respondent (CX 167), 3 persons gave signed affidavits that they sold random source dogs to someone other than Respondent (CX 132, 151, 208), and 1 person gave an unsigned statement that he sold one random source dog to someone other than Respondent (CX 158). The ALJ discounts the weight of these documents, both because the affiants did not testify, making the affidavits only admissible hearsay, and because some (unnamed) affiants had "misrepresented the information they gave to investigators. (Tr. 132-33.)" (Initial Decision and Order at 7-9). I disagree with the diminished weight the ALJ accorded the affidavits and with the ALJ's conclusion that some affiants (I am not counting the unsigned statements at all) had misrepresented information to investigators.

First, whether the affiants misrepresented facts remains an open question because the section of the hearing transcript cited by the ALJ (Tr. 132-33) does not establish misrepresentation, it only discusses motivations for it. In fact, the specific question of whether the affiants misrepresented information to the inspectors was answered by APHIS inspector Michael Ray that "I don't know that they misrepresented facts." (Tr. 133.) Second, if Respondent had wanted to question the affiants, he presumably could have called them as witnesses. Moreover, the affidavits do not stand alone in the record, but in each instance are

buttressed by documents from Respondent's records corroborating pertinent portions of the affidavits. I conclude that sellers who admit in affidavits to selling random source dogs to Respondent are persuasive that these events happened, and the affidavits are entitled to considerable weight, at least, to establish that a minimum of 67 random source dogs were acquired by Respondent.

Turning now to paragraph II of the Complaint, Complainant has shown by much more than a preponderance of the evidence that Respondent violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140), which mandates that dealers make and retain records, by Respondent's failure to fulfill the requirements in the recordkeeping regulations (9 C.F.R. § 2.75(a)(1)).

The ALJ concluded that Respondent had violated the recordkeeping requirements. The extent of the ALJ's analysis of this alleged violation is set forth in the Initial Decision and Order at 3, 8.

I agree with the ALJ that Respondent violated the recordkeeping regulations. As was shown in great detail in the proof for paragraph III of the Complaint, Respondent made no genuine effort to fully and correctly verify the sellers from whom he acquired animals. His expressly-stated reason, which he told the ALJ in the hearing, was that he believed that the random source regulations were not being enforced. Conversely, Respondent believes that his recordkeeping on other matters was "totally impeccable" and expressed surprise that the APHIS investigators informed him that many of his sellers could not be located (Tr. 199). Respondent's expressed belief in the integrity of his records is not credible. I find that Respondent was going through the motions of complying with 9 C.F.R. § 2.75(a)(1), but that Respondent did not make, keep, and maintain records which fully and correctly disclose the information concerning dogs and cats required by 9 C.F.R. § 2.75(a)(1).

B. Complainant Failed to Prove the Violations in Paragraphs IV(1), IV(2), and V of the Complaint by a Preponderance of the Evidence.

Paragraphs IV and V of the Complaint allege violations of the Regulations and Standards for the humane handling, housing, and transportation of animals. The alleged violations in paragraph IV are, as follows:

IV

> On July 12, 1994, APHIS inspected the [R]espondent's facility and found the following willful violations of section 2.100(a) of the [R]egulations (9 C.F.R. § 2.100(a)) and the [S]tandards specified below:

1. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of excessive rust that prevents the required cleaning and sanitization and that affects the structural strength of the surface (9 C.F.R. § 3.1(c)(1)(I));

2. The surfaces of housing facilities were not maintained on a regular basis (9 C.F.R. § 3.1(c)(2)); and

3. Provisions were not made for the regular and frequent collection, removal, and disposal of water in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f)).

Compl. ¶ IV.

However, the only record evidence supporting paragraph IV of the Complaint consists of the Animal Care Inspection Report, APHIS Form 7008 (CX 223) [hereinafter Inspection Report], which is the record of the July 12, 1994, inspection of Respondent's premises conducted by Dr. Gregory Gaj, and Dr. Gaj's sparse testimony merely identifying the Inspection Report, before it was introduced. Dr. Gaj testified as follows:

BY MR. ERTMAN:

Q. Dr. Gaj, would you turn to what's marked Complainant's Exhibit 223.

[BY DR. GAJ:]

A. 223.

Q. And tell us what it is, please.

A. That is an Animal Care inspection report which I conducted an inspection at C.C. Baird's kennel on 7/12/94.

(The document was identified as Complainant Exhibit 223.)

Q. And what is the second page of it?

A. The second page is the continuation sheet of the same inspection

and it lists the non-complying items that I identified during that particular inspection.

MR. ERTMAN: Thank you. That's all on direct.

. . . .

JUDGE HUNT: 223 will be received.

Tr. 159-61.

Therefore, Complainant's sole evidence supporting these alleged violations is in the Inspection Report, and on these alleged violations the inspection report reads, in its entirety, as follows:

7. **NARRATIVE**: . . . III. Non-compliant item(s) identified this inspection . . .:

This inspection was conducted with Mr. C.C. Baird and Dr. Gregory S. Gaj

III Non-compliant items identified this inspection

item 12 Section 3.1(c) Surfaces: Rusted gates and metal framework within the cinderblock building need to have rust removed to allow proper sanitizing. Chewed wooden frames and areas of rotted wood in the cinderblock building shall be repaired when worn and soiled. Correct by 8/12/94

item 14 Section 3.1(f) Drainage: Buildup of water in front of the south side dog runs shall be drained to keep bug and fly problems down. To be corrected by 8/1/94

CX 223 at 2.

I conclude that there is not sufficient evidence to disturb the ALJ's conclusions on either the rusty gates, or the rotted and chewed wood, or the poor water drainage violations. The ALJ correctly points out that the pertinent regulation, 9 C.F.R. § 3.1(c)(1)(i), requires "excessive rust" for the rusty gates and metalwork for there to be a violation. Although the Complaint alleges "excessive rust," there is no evidence of "excessive rust" in the record. Therefore, I agree with the ALJ

that this violation was not proven.

However, I must quibble with the ALJ's inclusion of the "chewed wood" alleged violation under the "excessive" requirement of 9 C.F.R. § 3.1(c)(1)(i). Clearly, worn or soiled housing surfaces are covered by section 3.1(c)(2) of the Standards; and, the Complaint states that housing surfaces "were not maintained on a regular basis," as required by 9 C.F.R. § 3.1(c)(2) (Compl. ¶ IV(2)). A reading of 9 C.F.R. § 3.1(c)(2) reveals no "excessive" requirement. Despite this discrepancy, however, there is still not sufficient record evidence to reverse the ALJ. In fact, the entirety of the evidence is from the July 12, 1994, Inspection Report, which merely states that chewed wooden frames and rotted wood "shall be repaired when worn and soiled." (CX 223 at 2.) These words do not actually state a violation, which violation must be otherwise understood from the marking of the section 3.1 box on line 12 on page 1 of the Inspection Form, and the inclusion of the words "[correct by 8/12/94" on page 2 of the Inspection Form (CX 223 at 1-2). I agree with the ALJ that the violation of 9 C.F.R. § 3.1(c)(2) was not proven.

I also concur with the ALJ's conclusion that Respondent violated 9 C.F.R. § 3.1(f). Respondent does not contest that there was a poorly drained area near one of the dog runs, described as a "methal" (Tr. 247). Although Respondent promptly covered the area with a cement sidewalk, the ALJ is correct that it is still a violation (Tr. 248).

Paragraph V of the Complaint alleges violations of the Regulations and Standards governing the handling and care of dogs during transportation, as follows:

V

A. On August 17, 1994, [Respondent handled an animal in a manner which caused trauma, behavioral stress, physical harm, and unnecessary discomfort to the animal, in willful violation of sections 2.100(a) and 2.131(a)(1) of the [Regulations (9 C.F.R. §§ 2.100(a) and 2.131(a)(1)).

B. On August 17, 1994, APHIS inspected a ground transportation shipment of dogs by the [Respondent and found the following willful violations of section 2.100(a) of the [Regulations (9 C.F.R. § 2.100(a) and the [Standards specified below:

1. Primary enclosures were stacked in a manner that may reasonably be expected to result in their falling (9 C.F.R. § 3.19(b)(2); and

2. The interior of the animal cargo space was not kept clean

(9 C.F.R. § 3.15(g)).

The file relevant to this proceeding contains an APHIS Form 7008 Inspection Report filed by a Veterinary Medical Officer (CX 224), that Veterinary Medical Officer's Affidavit (CX 225), and photographs (CX 226) in support of the alleged violations in paragraph V. However, these exhibits were not admitted into evidence. The transcript is clear that the ALJ and the parties expected that an additional evidentiary hearing would be arranged, as follows:

> MR. ERTMAN: Your Honor, subject to the possibility of a hearing session for testimony by telephone, if there is one, we move that Dr. Garland's inspection and her affidavit and the photographs marked on the back, being Exhibits 24, 25 and 26 be received. I'm sorry, 224, 225 and 226.
>
> (The documents were identified as Complainant Exhibits 224, 225 and 226.)
>
> JUDGE HUNT: Did you give me copies of these?
>
> MR. ERTMAN: Yes, Your Honor.
>
> JUDGE HUNT: I guess they got mixed up. Oh, wait a second. Mr. Gilder?
>
> MR. GILDER: Your Honor, our position as far as Dr. Garland's report is that we -- two witnesses that we had wanted to take telephonic depositions of before the hearings were closed. One was Dr. Steven Young and the other was Michael Darwin. They're both in California also. And we would not object to Dr. Garland's reports if we were permitted to use Dr. Young and Michael Darwin in [sic] impeach part of the reports. So, I understand Mr. Ertman may want to -- if the Court allows us to take those telephonic depositions, to also take the telephonic deposition of Dr. Garland. But, we would object to the report unless we're able to get in some impeachment testimony.
>
> JUDGE HUNT: Would that be the burden of your two witnesses, just concerning Dr. Garland's report?

MR. GILDER: Yes.

JUDGE HUNT: Response to her report?

MR. GILDER: Yes, sir, Your Honor. Essentially that's what it would be. They might have testimony that would be favorable to Mr. Baird, but essentially it would be for the purpose of refuting some of the things contained in Dr. Garland's report.

JUDGE HUNT: I think under the circumstance I'm not going to admit 224, 225 and 226. I think they should all be subject to subsequent hearings since it is disputed and he says he'll respond to it. So, we could do it a number of ways. One would be a subsequent telephone hearing. We could do it separately. I mean, have Dr. Garland, get her testimony and then have another telephone hearing, or three if necessary to take the testimony of the witnesses. That is if you're moving for the admission of those documents, I would reserve on ruling on their admissibility until we have her testimony.

MR. ERTMAN: Your Honor, I think this is something we could probably arrange -- I'm not sure what your schedule is in the next couple of weeks. If you're in Washington, it's unlikely that the whole thing would take more than a couple of hours.

JUDGE HUNT: I don't have any hearings next week. I'll be out the following three weeks. So, if we could do it sometime next week except Monday, or it would have to be about a month from now. I'm flexible, so if you want to work it out and let me know what days except Monday of next week if you want to do it next week. Just get together, agree and let me know.

MR. ERTMAN: All right, sir.

JUDGE HUNT: I can virtually do it any time or I can work it in. Let's put it that way. Why don't you do that. You don't have to look now. Get together and then just let me know what day next week. I'd like to do it all on one day if we could, preferably one half day if we can do it. If you can't, then I'll work with you. Just leave that for the moment and I'll wait to hear from you gentlemen as to your schedule.

MR. GILDER: Thank you, Your Honor.

JUDGE HUNT: All right. So, on 224, 225 and 226, they've been identified and they've been offered. I'll wait to rule on the admissibility later.

MR. ERTMAN: Thank you. Subject to that, the Complainant rests.

Tr. 161-64.

Notwithstanding these plans for an additional hearing, the record does not contain additional hearings on the violations alleged in paragraph V of the Complaint, and Complainant's exhibits covering these alleged violations were never admitted. No mention of paragraph V is made by the ALJ or Complainant after the above exchange at the hearing.

Therefore, Complainant has not proven the violations in paragraphs IV(1), IV(2), and V of the Complaint. Respondent has no violations previous to those alleged in paragraphs II, III, and IV(3) of the Complaint. Dr. Gaj performed a routine inspection on February 21, 1995, and Respondent's facility was found to be in compliance (*see* Amended Answer, Ex. B, Animal Care Inspection Report for routine inspection of February 21, 1995). Moreover, Dr. Gaj's routine inspection report of February 21, 1995, lists the date of the last inspection as November 21, 1994, but there are listed on the February 21, 1995, inspection report no non-compliant items to have been corrected from the last inspection.

C. **Complainant's Appeal.**

Complainant raises two major issues on appeal, arguing that the ALJ erred both by not finding Respondent's violations willful, and by understating Respondent's recordkeeping violations, as follows:

I. THE ALJ ERRED IN FINDING THAT THE VIOLATIONS WERE NOT WILLFUL.

A. THE ALJ ERRED IN FINDING THAT THE VIOLATIONS OF THE RECORDKEEPING REQUIREMENTS OF THE ACT AND REGULATIONS, REQUIRING DEALERS TO RECORD THE NAME, ADDRESS, DRIVER'S LICENSE NUMBER, AND VEHICLE TAG NUMBER OF PERSONS FROM WHOM DOGS AND CATS ARE ACQUIRED, WERE NOT WILLFUL.

. . . .

B. THE ALJ ERRED IN FINDING THAT THE RESPONDENT'S ACQUISITIONS OF RANDOM SOURCE DOGS WERE NOT WILLFUL VIOLATIONS.

. . . .

II. THE ALJ ERRED IN UNDERSTATING THE NUMBER OF RECORDKEEPING VIOLATIONS.

Complainant's Appeal at 2, 4, 15.

I agree with Complainant's Appeal, paragraph I, that the ALJ erred in not finding Respondent's violations willful, both as to the recordkeeping violations and as to Respondent's impermissible acquisition of random source dogs. An action 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.[5] Concerning the recordkeeping

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[5]*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 31 (Jan. 13, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 43 n.4 (Nov. 6, 1997); *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 143-44 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for

(continued...)

violations, Complainant argues that willfulness in the case, *sub judice*, includes not only intent to do a prohibited act but also careless disregard of statutory requirements (Complainant's Appeal at 3). The United States Court of Appeals for the Eighth Circuit expressed the same view of willfulness, citing *Cox,* when it issued the opinion in another Animal Welfare Act case deciding similar issues, *Toney v. Glickman,* 101 F.3d 1236, 1241 (8th Cir. 1996): "'Willfulness . . . includes not only intent to do a prohibited act but also careless disregard of statutory requirements.' *Cox v. United States Dept. of Agriculture*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 141 (1991)."

Complainant argues that it is established precedent in the Department that failure of a dealer to verify the name, address, and driver's license number (Complainant inadvertently left out that vehicle license numbers are also required) of each person providing dogs constitutes a willful violation of the recordkeeping requirements. The Department's position on this issue was specifically affirmed in *Toney*, where the United States Court of Appeals for the Eighth Circuit expressly upheld the Judicial Officer's finding of willfulness--where respondents falsified their records to conceal their failure to obtain required information--by stating that "[respondents] at the very least acted with careless disregard for the regulations by not verifying what turned out to be inaccurate names and addresses." *Toney*, *supra*, 101 F.3d at 1241.

Respondent freely admits throughout his testimony that he accepted whatever names, addresses, and licenses information his sellers provided (Tr. 201-03, 262, 268-69, 277-78, 286). Respondent expressed frustration that he would be expected to do more than just take down the information, testifying at one point that "I don't understand how I can be asked to do anymore than that." (Tr. 269.) It is not helpful to Respondent's case that after Respondent became fearful of what Respondent perceived to be increasing enforcement, Respondent asked increasingly more information of his sellers and devised forms specifically to protect Respondent, if Respondent were later prosecuted by USDA. Examples of these forms, used from February to June of 1994, are CX 120-126. Seriatim, Respondent asked if sellers were the legal owners, and then Respondent asked if

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(...continued)
the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations would still be found willful.

sellers had the right to sell the animals, and then Respondent revealed to sellers that the animals would be subsequently sold to research institutions, and later asked if the sellers had bred and raised the animals (Tr. 269-70). Finally, but after the pertinent violations had occurred, Respondent devised a form with the question whether the seller had bred and raised the animal on the seller's premises (Tr. 270). In this context, Complainant implies that the ALJ was, at least, sympathetic to Respondent's arguments that Respondent's sellers deceived him (Complainant's Appeal at 4). I agree with Complainant that it is error for the ALJ to allow any mitigation based upon Respondent's trust in his sellers to provide accurate names, addresses, and license numbers, because it is well-settled that the legal duties imposed by the Animal Welfare Act are personal and nondelegable. *See In re James & Julia Stuekerjuergen*, 44 Agric. Dec. 186, 191 (1985).

Concerning Respondent's acquisition of random source dogs, I have already set out in my analysis of paragraph III of the Complaint, *supra*, that Respondent willfully acquired random source dogs from prohibited sources. Complainant argues that Respondent deliberately avoided knowing the source of the animals, which is more than a careless disregard of the statutory and regulatory requirements, and more than a gross neglect of a known duty--it amounts to intentional misdeeds (Complainant's Appeal at 5). Therefore, Complainant argues that Respondent's violations would still be found willful, even under the more stringent definition of willful, which obtains in the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit, which define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). I agree. Moreover, I also agree with Complainant that a more stringent definition of willfulness is not in effect, because Respondent resides and has his place of business in Arkansas, which is in the Eighth Circuit.

Complainant argues that the primary reason that the ALJ concluded that Respondent's violations were not willful was the ALJ's erroneous finding that USDA was not enforcing the regulation prohibiting class "B" dealers from acquiring random source dogs from persons other than licensed dealers and from pounds or shelters as described in 9 C.F.R. § 2.132(a). Complainant makes a number of arguments based on the difficulty of "enforcement" of the regulation against class "B" dealers acquiring random source dogs and states that "[i]t is inaccurate and unfair to conclude that the agency was not enforcing the regulations between times of [USDA efforts to enforce the random-source

regulation]." (Complainant's Appeal at 6-7.) I agree with Complainant that the record does not support a finding that USDA was not enforcing the random-source-dog regulation.

More specifically, Complainant argues that there is no support in Dr. Gaj's testimony for the ALJ's conclusion that Dr. Gaj's testimony supports Respondent's contention that the random-source-dog provision was not being enforced. Complainant argues that Respondent was clearly informed of the regulatory requirements and told he was to be held responsible, regardless of enforcement in other states. Although I agree with Complainant's argument that Dr. Gaj clearly informed Respondent of the regulatory requirements, and that Dr. Gaj told Respondent that he would be held responsible, regardless of the enforcement or non-enforcement in other states (Tr. 334), this argument by itself does not rebut the ALJ's conclusion that Dr. Gaj's testimony supports Respondent's contention that the random-source-dog regulation was not being enforced.

First, the ALJ's and Complainant's positions are not mutually exclusive. Dr. Gaj informed Respondent of susceptibility to prosecution, regardless of prosecutions of others. The Department is neither prevented from prosecuting Respondent under a valid statute when not prosecuting others, nor is the Department constrained to prosecute all offenders, so that Respondent must be prosecuted if any others are prosecuted. The question at issue here is really the question of selective enforcement. The courts have long recognized broad discretion in agencies like USDA to decide against whom to initiate disciplinary proceedings, even allowing selective enforcement, as long as the selective enforcement is not arbitrary:

> But even if a particular violator were singled out for selective enforcement of the Act, such action would be legal so long as the administrative determination was not arbitrary (see *Moog Industries, Inc., v. F.T.C.*, 355 U.S. 411, 413-414; *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-252; see, also *Union Stock Yard Co. v. United States*, 308 U.S. 213, 222-224).

In re American Fruit Purveyors, Inc., 38 Agric. Dec. 1372, 1385 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981). More recently, I restated this principle, as follows:

> However, even if Respondent could show that it was singled out for a disciplinary action under the PACA, such selection would be lawful so long as the administrative determination to selectively enforce the PACA was

> not arbitrary (footnote omitted). Respondent has no right to have the PACA go unenforced against it, even if it is the first firm against whom the PACA is enforced and even if Respondent can demonstrate that it is not as culpable as some others that have not had disciplinary proceedings instituted against them. PACA does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to institute disciplinary proceedings for violations of the PACA.

In re Allred's Produce, 56 Agric. Dec.___, slip op. at 30 (Dec. 5, 1997).

Thus, I conclude that what USDA is doing vis-a-vis other violators is immaterial to prosecution of Respondent.

Second, it is axiomatic that Respondent can reasonably argue that the random-source-dog regulation was not being enforced at all times material to this proceeding, because Dr. Gregory Gaj did not enforce the regulation against Respondent. While I have found it immaterial to this case whether USDA enforced the random-source-dog regulation against others, it is certainly material that Respondent confessed his systematic violation of 9 C.F.R. § 2.132 to Dr. Gaj, and Dr. Gaj did not cite Respondent for the violation. Moreover, Dr. Gaj testified that he began conducting trace backs on Respondent sometime in 1993 after the task force completed its work, but not before the task force was formed, which is convincing testimony that Dr. Gaj could have enforced these regulations, but did not (Tr. 341-42). Thus, the ALJ could properly rely upon Dr. Gaj's testimony for the proposition that USDA was not enforcing the regulation, at least, against Respondent. Moreover, as an obstacle to enforcement, Complainant's argument that investigating this kind of violation is difficult does not apply here because Respondent confessed to Dr. Gaj just what kind of dog-buying operation Respondent was conducting. Dr. Gaj could have cited Respondent for Respondent's admitted violations, or he could have forwarded the information to his superiors. Nevertheless, I find that the fact that the ALJ found significant that Respondent was not prosecuted, or the fact that others were not prosecuted, are both immaterial to a finding that Respondent willfully acquired random source dogs from impermissible sources.

Complainant includes a list of 11 "random source" disciplinary cases to rebut the ALJ's seeming conclusion that the random source regulation is not being enforced (Complainant's Appeal at 10-12). However, I have found that this record cannot support a conclusion that USDA is not enforcing 9 C.F.R. § 2.132 against other respondents. In any event, such a determination would not exculpate Respondent from violation of that valid regulation.

Complainant argues that one of the reasons that the ALJ gave for (erroneously) concluding that Respondent's violations were not willful is that the ALJ's finding that Respondent acquired random source dogs is based on hearsay evidence. However, it is not clear that the ALJ based his determination of willfulness on the fact that hearsay evidence was introduced to prove that Respondent violated 9 C.F.R. § 2.132. In any event, Respondent's willfulness is not determined by whether the violation of 9 C.F.R. § 2.132 is proven by hearsay evidence.

Complainant argues that "the ALJ erred in finding that the violations were not willful because the random source animals were not stolen family pets." (Complainant's Appeal at 14.) Finding of Fact 7 merely states that the random source animals Respondent acquired were not stolen. Nevertheless, Complainant is correct that Finding of Fact 7 is unsupported in this record, which does not reveal the sources of the dogs Respondent acquired from the many persons whose identities are not even established in Respondent's records. The task force could find no trace of a large number of sellers at the addresses or under the license numbers provided by Respondent. Likewise, the affidavits and unsigned statements of those sellers providing dogs to Respondent do not reveal that any of the dogs were stolen. This record provides no way of knowing whether the dogs were stolen.

Therefore, the ALJ committed error by finding that the dogs were not stolen. The most that the ALJ could have found in this record is that there is no evidence that any of the dogs acquired by Respondent were stolen. Complainant's argument that the ALJ erred in linking a finding of willfulness with dogs being stolen is correct. Willfulness is not determined by whether the dogs were, or were not, stolen.

Concerning paragraph II of Complainant's Appeal, I agree with Complainant that "[a]lthough the findings of fact as to the number of violations are sufficiently detailed for the sanctions which the ALJ imposed, . . . the findings should be more explicit as to numbers" (Complainant's Appeal at 15). I infer that Complainant means here that more detail would be needed to support Complainant's recommended sanction of revocation and a $50,000 civil penalty.

To that end, Complainant argues the evidence shows that Respondent's records do not correctly show the name, address, and driver's license number of at least 26 persons from whom Respondent acquired at least 238 dogs and cats and that the records fail to show the correct address and driver's license number of least two more individuals and at least 142 more dogs and cats. Complainant does not show the source of this "evidence" but the context ("[w]hether the complainant's detailed proposed [sic] are used or whether or whether [sic] the numbers are summarized" (Complainant's Appeal at 15)) seems to reference

Complainant's Brief, in which Proposed Findings of Fact 2-26 approximate the 26 persons and 238 dogs and cats, and Proposed Findings of Fact 27 and 28 approximate the additional two individuals and 142 more dogs and cats. Moreover, Complainant argues that the evidence shows that Respondent obtained at least 29 random source dogs or cats from at least 16 individuals (Complainant's Appeal at 15-16).

All that the ALJ found on these issues are in the ALJ's Findings of Fact 3 through 6, as follows:

> 3. Respondent acquired dogs and cats from unlicensed persons. When he acquired the animals he did not ask the persons from whom he acquired the animals whether they had bred and raised the animals and did not ask such persons to verify their driver['s] licenses by showing him their licenses.
>
> 4. At least 23 persons from whom respondent acquired animals gave him incorrect information concerning their driver's licenses and/or addresses.
>
> 5. It is the practice of some unlicensed animal sellers in the area where respondent buys dogs and cats to acquire dogs that they had not bred and raised which they sold to licensed dealers.
>
> 6. An undetermined number of unlicensed animal owners sold to respondent an undetermined number of dogs that the owners had not bred and raised, which dogs are known as "random source" animals.

Initial Decision and Order at 13, Findings of Fact 3-6. If Complainant's numbers, for those sellers whose names, addresses, and driver's license numbers were not fully and correctly shown by Respondent's records, are used instead of the ALJ's number, there would be an increase from 23 to 28. Also, Complainant would list actual numbers of allegedly random source dogs and cats provided to Respondent, whereas the ALJ does not give any numbers. Since Complainant concedes that the ALJ's Findings of Fact are appropriate for the ALJ's sanction, Complainant would be expected to, but does not, explain or demonstrate how Complainant's modest increase in information supports either a tenfold increase in the civil penalty to $50,000 from the ALJ's $5,000, or how the inclusion of the extra information supports revocation of Respondent's license, where the ALJ did not even impose a period of suspension.

As for Complainant's argument that there is evidence to support a Finding of Fact that 29 random source dogs or cats were impermissibly acquired by Respondent from 16 sellers, I must reject it. However, I do find, based on 11 sworn affidavits (CX 152, 163, 171, 175, 179, 187, 192, 196, 198, 211, 218), that Respondent acquired at least 67 random source dogs from at least 11 individuals, in violation of section 2.132 of the Regulations (9 C.F.R. § 2.132).

Complainant concludes by seeking a civil penalty of $50,000 and license revocation for Respondent's willful violations in acquiring random source dogs from prohibited sources, and failing to fully and correctly ascertain the identity of persons from whom Respondent acquired animals.

D. **Respondent's Reply.**

Respondent seeks to have the ALJ's Initial Decision and Order affirmed.

Respondent divides the Reply into paragraphs I and II to correlate to Complainant's Appeal format. In paragraph I of Respondent's Reply, Respondent argues that the ALJ properly decided the case and that the sanction the ALJ chose fits the Department's current sanction policy. Respondent argues that Respondent had no prior violations, that there is no evidence that Respondent provided less than humane care to the animals, that Respondent took steps to remedy the violations, and that there is no evidence that any of the animals handled by Respondent were stolen (Respondent's Reply at 5).

Respondent argues that "[t]he record supports that at all times Respondent's actions were in good faith under the circumstances with which he had to deal." (Respondent's Reply at 6.) Respondent argues that Respondent is not like the dealers in *Toney*, cited by Complainant, as dealers who falsified and concealed records; but, rather, Respondent was the victim of deception by Respondent's sellers, and Respondent acted immediately to rectify Respondent's procedures when Respondent learned of the deception (Respondent's Reply at 6-7). Respondent denies that Respondent relied upon Respondent's sellers to the extent that he delegated his duties, and argues instead that he is without the necessary resources to investigate the authenticity of the seller's documentation and representations (Respondent's Reply at 8). I reject these arguments.

Respondent admits to making no effort to fully and correctly determine and record sellers' proper information. It takes no resources, beyond those usually expended, to ask the proper questions of sellers. Respondent admitted that in the 1992 timeframe he "was taking an approach of, I guess what our government calls `Don't ask, don't tell'" (Tr. 286) and, by saying that, Respondent admits he was making no effort to comply.

In paragraph II of Respondent's Reply, Respondent argues against Complainant's contention that the ALJ understated the recordkeeping violations. Respondent restates arguments already raised, considered, and decided in Respondent's favor on the issues of the number of sellers not fully and correctly reported in Respondent's records.

Respondent concludes by asking that Complainant's Appeal be denied. Respondent argues that Respondent's violations have all been corrected; that Respondent has a history of compliance with the Animal Welfare Act; that Respondent has a history of good faith dealings with USDA and USDA inspectors and investigators; that Respondent never falsified his records; that Respondent recognizes his operational problems as revealed by the work of the task force and is candid about efforts to prevent future problems; that Respondent never knowingly purchased stolen animals; that Respondent has shown the utmost cooperation with law enforcement officials attempting to locate missing pets; that Respondent recognizes that the random source regulation is to prevent stolen pets; that Respondent has implemented safeguards to protect himself from deceptive practices by some sellers; that there is no evidence that Respondent harmed his animals or treated his animals less than humanely; that Respondent has an excellent animal husbandry program; that Respondent should not be assessed the severe civil penalty Complainant seeks to impose; that Respondent was assessed a civil penalty that Complainant admitted was appropriate for the violations found by the ALJ; and that Respondent's license should not be revoked based upon hearsay evidence collected to support a case for violations that did not result in the harm that compliance was designed to prevent (Respondent's Reply at 12-13).

V. SANCTION.

Turning to the sanction, the Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36–3), as follows:

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

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed, and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[6]

The Secretary has many discretionary sanctions for remedial purposes in enforcing the Animal Welfare Act, including temporary license suspensions without a hearing; lengthier suspensions or revocations after notice and hearing; civil penalties; and cease and desist orders, as set forth in section 19 of the Animal Welfare Act (7 U.S.C. § 2149).

For the nature of the violations, which are the subject of this proceeding, Complainant recommends revocation of Respondent's Animal Welfare Act license and a $50,000 civil penalty. Certainly, such a penalty would be appropriate, if Respondent was shown to have committed all the violations alleged in the Complaint. However, Complainant failed even to put on a case for paragraph V of the Complaint, which charged Respondent with very serious violations of the Regulations and Standards governing the handling and transportation of animals. Moreover, Complainant did not prove by a preponderance of the evidence the violations alleged in paragraphs IV(1) and IV(2) of the Complaint. I agree with the ALJ that it is relevant that Respondent has no prior violations, that there is no evidence that Respondent's animals received less than humane care, and that Respondent promptly remedied all conditions found by the APHIS inspector to be in violation of the Regulations and Standards.

Concerning paragraphs II and III of the Complaint, Complainant proved that Respondent willfully committed at least 23 recordkeeping violations and that Respondent willfully acquired from impermissible sources at least 67 random source dogs from 11 individuals.

The ALJ concludes that the reason that Complainant seeks permanent revocation of Respondent's license and a $50,000 civil penalty is because

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[6]*In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 62-63 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 43 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

Complainant accuses Respondent of "despicable traffic in stolen family pets." (Initial Decision and Order at 10.) Specifically, Complainant (correctly) argues in its Brief that "[o]ne of the purposes of the Animal Welfare Act is to prevent the 'despicable traffic in stolen family pets.'" (Complainant's Brief at 15.) Perhaps, the ALJ overstates Complainant's reliance on the stolen pet argument, but Complainant does nonetheless make that argument. However, there is not one scintilla of evidence in this record of even one stolen dog. To the contrary, Respondent had a local animal control officer and a local deputy sheriff attest to Respondent's assistance in locating lost and possibly stolen animals. Moreover, these witnesses had never known Respondent to have, or to traffic in, stolen animals. Nevertheless, the Animal Welfare Act does much more than prohibit trafficking in stolen dogs and cats. The Animal Welfare Act also penalizes those who violate the regulations designed to make dog and cat stealing more difficult, as the *Toney* court said:

V. Conclusion

> The Toneys repeatedly point out that there is no evidence that they have dealt in stolen dogs, and no one has argued to the contrary. The Animal Welfare Act does not penalize only those who steal dogs or who purchase stolen dogs. It also penalizes those who violate the regulations that are designed to make dog stealing more difficult. It may seem unfair to the Toneys that they are being punished when they have not helped to steal any dogs, but that does not change the fact that they repeatedly, and, in some cases, flagrantly violated the law. The law may or may not be overly harsh, but it is our job to uphold it.

Toney v. Glickman, supra, 101 F.3d at 1243.

Complainant's sanction recommendation is well within the range of sanctions in these kinds of cases. The Department consistently imposes significant sanctions for violations of the Animal Welfare Act and the Regulations and Standards.[7] The

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[7]*See, e.g., In re Peter A. Lang*, 57 Agric. Dec. ___, (Jan. 13, 1998) (imposing a $1,500 civil penalty for one violation of the Regulations); *In re Samuel Zimmerman*, 56 Agric. Dec. ___ (Dec. 22, 1997) (imposing a $7,500 civil penalty and a 40-day suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards) (Order Denying Pet. for Recons.); *In re James J. Everhart*, 56 Agric. Dec. ___ (Oct. 2, 1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. ___ (July 21, 1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a

(continued...)

Department in the past has permanently disqualified or revoked dealers' licenses for less serious and fewer violations than are found in this proceeding.[8] As to the civil penalty, the Animal Welfare Act authorizes up to $2,500 *per violation per day*. "Each violation and each day during which a violation continues shall be a separate offense" (7 U.S.C. § 2149(b)). As stated in *In re James Petersen*, 53 Agric. Dec. 80, 94 (1994):

(...continued)
license for 13 violations of the Regulations and the Standards) (Modified Order); *In re Fred Hodgins*, 56 Agric. Dec. ___ (July 11, 1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. ___ (July 11, 1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Lifting Stay Order and Decision and Order); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 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).

[8]*See, e.g., In re James J. Everhart*, 56 Agric. Dec. ___ (Oct. 2, 1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 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).

"The sale of each animal constitutes a separate violation." *In re Bradshaw*, 50 Agric. Dec. 499, 504 (1991). "The purchase or sale of each animal constitutes a separate violation." *In re Johnson*, 51 Agric. Dec. 209, 212 (1992). *See also In re Hickey*, 47 Agric. Dec. 840, 848 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989) (Table) (text in WESTLAW) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989), in which the false recording of the purchase of each dog was held to be a separate violation and the civil penalty was calculated accordingly.

As for the sanction policy requirement for examining the violations in light of the remedial purposes of the Animal Welfare Act, hundreds of thousands of dogs, cats, and other animals are used by research facilities each year. Originally, Federal regulation was deemed necessary because state authorities were unable (i) to apprehend and convict the thieves who operate in this field, and (ii) to ensure humane treatment of the animals. As stated in the Senate Report on the bill which became the Animal Welfare Act:

BACKGROUND AND NEED FOR THE LEGISLATION

This bill recognizes the need for Federal legislation to deal with the abuses that have developed as a result of the Nation's vast program of medical research. Much of this medical research involves experiments and tests with animals. The demand for research animals has risen to such proportions that a system of unregulated dealers is now supplying hundreds of thousands of dogs, cats, and other animals to research facilities each year.

The committee held 3 days of hearings on the subject of regulating those who sell, transport, or handle animals intended for use in medical research. During these hearings, shocking testimony was received concerning the existence of pet stealing operations which supply some animals eventually used by many research institutions. Stolen pets are quickly transported across State lines, changing hands rapidly, and often passing through animal auctions. While in the hands of dealers, these animals are faced with inhumane conditions. Quarters are cramped, uncomfortable, and unsanitary, with inadequate provisions for food and water.

> The public has been aroused by exposés of pet theft and the treatment encountered by many of these animals on their way to the medical laboratory. Yet, State laws have proved inadequate both in the apprehending and conviction of the thieves who operate in this interstate operation, and in providing for adequate conditions within dealer premises.
>
> Much of the responsibility for creating this huge demand for medical research animals rests with the Federal Government. Grants to research institutions for biomedical research have multiplied twelve-fold since the early 1950's. H.R. 13881 provides a mechanism that will block the existing interstate trade in stolen pets and at the same time will insure humane treatment of those animals which are destined for use in research facilities.

S. Rep. No. 89-1281, at 5 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2636.

The Department is constantly attempting to achieve these congressional purposes partly through improving recordkeeping regulations (9 C.F.R. § 2.75(a)(1)). A notice of proposed rulemaking, which preceded the amendment of the recordkeeping requirements, states:

> *Records*
>
> Section 2.75 deals with records for dealers and exhibitors. This section has been revised in both format and content. In addition to the information presently required to be maintained for all dogs and cats purchased or otherwise acquired, the Department proposes to require that the vehicle license number and State and the driver's license number and State also be recorded in the records. This proposal is being made due to several recent instances where unscrupulous dealers were deliberately obtaining dogs and cats either by fraudulent means or that were known to have been stolen. By requiring a vehicle license number and driver's license number, such individuals can be traced and the source of the animals better determined. Only editorial or format changes were made in the rest of § 2.75.

52 Fed. Reg. 10,298, 10,305 (1987)

Another notice of proposed rulemaking, as to the recordkeeping requirements, states:

Subpart G—Records

Dealers and exhibitors

We received 5 comments (1 from the research community, 1 from an exhibitor, and 3 from the general public) noting the need for stricter recordkeeping requirements in general. We believe that the additional recordkeeping requirements proposed in Subpart G will assist the Department by enhancing traceability of the animals, which is one of the prime objectives of the recordkeeping requirements, and will be a valuable tool in combatting the sale of animals obtained unlawfully.

We are clarifying § 2.75 in this revised rule to reflect that it applies to dealers other than operators of auction sales and brokers, and to exhibitors. . . .

Proposed § 2.75 would impose recordkeeping requirements upon dealers and exhibitors that are substantially similar to those required under current § 2.75, except that dealers and exhibitors would also be required to maintain in their records the vehicle license number and state, and the driver's license number and state of anyone not licensed or registered under the Act from whom a dog or cat is acquired. This requirement was not included in proposed § 2.75(b) and we have determined that it is equally appropriate to include it for animals other than dogs and cats. This requirement was proposed to facilitate tracing the seller and the source of the animals, particularly when the source or origin of the animals is in question. Five commenters from the general public stated their approval of this requirement.

54 Fed. Reg. 10,835, 10,873 (1989).

The other part of the Department's response to Congress' charge to stop the trafficking in stolen pets was to limit the sources from which class "B" dealers can acquire live random source dogs and cats. The purpose of the regulations dealing with the procurement of random source dogs and cats is stated in the notice of proposed rulemaking, as follows:

Section 2.132 Procurement of random source dogs and cats, dealers

In order to carry out the intent of Congress and to "protect the owners

of animals from the theft of their animals by preventing the sale or use of animals which have been stolen" (7 U.S.C. 2131(b)(3)), we proposed to limit the sources from which class "B" dealers can acquire live random source dogs and cats. We proposed to limit those sources to State, county, or city owned and operated pounds or shelters. Under the proposed regulation, class "B" dealers would not be able to obtain random source dogs and cats from nongovernment pounds or shelters or from individuals who did not breed and raise the dogs and cats on their own premises. Nonrandom source dogs and cats could be obtained from persons who bred and raised the dogs and cats on their own premises.

. . . .

We received 2,865 comments from members of the general public supporting the proposed limitation of sources from which class "B" dealers can obtain random source dogs and cats. We also received 21 comments from members of the research community and 3 comments from dealers expressing support for proposed § 2.132.

54 Fed. Reg. 10,835, 10,880 (1989).

As for the criteria for civil penalties in 7 U.S.C. § 2149(b), Respondent operates a large facility, but has had no previous violations. Respondent's violations are very serious because they go to the heart of the Animal Welfare Act, especially USDA's efforts to enforce regulations designed to prevent stolen pets.

After examining all relevant circumstances in light of the Department's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendation of the administrative officials, I conclude that a 14-day suspension of Respondent's Animal Welfare Act license and a $9,250 civil penalty is appropriate.

I agree with Respondent that Respondent had no prior violations; that there is no evidence that Respondent provided less than humane care to the animals; that Respondent promptly remedied deficiencies; that there is no evidence that any animals handled by Respondent were stolen; that Respondent has a history of compliance with the Animal Welfare Act (except as found in this Decision and Order); that Respondent recognizes the operational problems revealed by the task force and candidly seeks prevention of future problems; that Respondent cooperates with law enforcement in locating stolen pets; that Respondent recognizes that the random source regulation is to prevent stolen pets; that Respondent has implemented changes to prevent receiving deceptive information

from sellers; and that Respondent has an excellent animal husbandry program.

I disagree with Respondent that the record supports that at all times Respondent's actions were in good faith; that Respondent was the victim of deception by Respondent's sellers; that Respondent acted immediately to rectify procedures to stop seller deception; that Respondent did not rely on sellers to the point of delegating Respondent's regulatory duties; that Respondent is without the necessary resources to authenticate the seller's representations; that Respondent has a history of good faith dealings with USDA; and that Respondent never falsified its records. Moreover, unlike the ALJ, I found that Respondent's violations were willful, and I found that Respondent committed at least 67 violations of the random source regulation (9 C.F.R. § 2.132).

As a final matter, Respondent, by letter filed May 1, 1997, requests that Respondent be permitted to retain the civil penalty for "better care for the animals." I am aware of no provision in the Animal Welfare Act, the Rules of Practice, or the Regulations and Standards for a respondent's retention of a civil penalty for such purposes, and Respondent cites no authority for his request. Respondent's request to retain the civil penalty for animal care purposes is denied.

For the foregoing reasons, the following Order should be issued.

VI. ORDER.

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act and, in particular, shall cease and desist from:

A. Failing to make, keep, and maintain records which fully disclose all required information;

B. Acquiring random source dogs from unauthorized sources; and

C. Failing to make provision for the regular and frequent collection, removal, and disposal of water in a manner that minimizes contamination and disease risks.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $9,250. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and sent to: Robert A. Ertman, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, 1400 Independence Avenue, S.W., Washington, D.C. 20250-1417. Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman

within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 95-0017.

3. Respondent's Animal Welfare Act license is suspended for 14 days and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 14-day license suspension period.

The Animal Welfare Act license suspension provisions in this Order shall become effective on the 90th day after service of this Order on Respondent.

In re: STEVEN M. SAMEK AND TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek filed May 12, 1998.

The Judicial Officer ruled that, while the Administrative Procedure Act (5 U.S.C. § 555(b)) provides that a party may appear by or with counsel in agency proceedings, Respondent has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice (7 C.F.R. §§ 1.130-.151) to have counsel provided by the government in disciplinary administrative proceedings such as those conducted under the Animal Welfare Act.

Colleen A. Carroll, for Complainant.
Respondent, pro se.
Default Decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142)

[hereinafter the Regulations and Standards; [1]and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 18, 1996.

The Complaint alleges that Steven M. Samek and Trina JoAnn Samek violated the Animal Welfare Act and the Regulations and Standards.[1] Mr. Kent A. Permentier, Senior Investigator with the Animal and Plant Health Inspection Service, personally served a copy of the Complaint on Steven M. Samek [hereinafter Respondent] on February 21, 1997 (United States Department of Agriculture, Certificate of Personal Service of Kent A. Permentier, filed June 25, 1997).

Respondent failed to answer the Complaint within 20 days as required by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). On August 22, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a Proposed Decision and Order Upon Admission of Facts by Reason of Default as to Steven M. Samek [hereinafter Default Decision] in which the Chief ALJ found that Respondent violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; assessed a civil penalty of $15,000 against Respondent; suspended Respondent's Animal Welfare Act license for 30 days; and ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On April 6, 1998, Respondent was served with the Default Decision, and on April 10, 1998, Respondent filed a motion requesting appointment of a public defender to appeal the Default Decision [hereinafter Respondent's Motion]. Respondent's Motion reads in its entirety, as follows:

> To the Honorable Judge Victor W. Palmer
>
> Upon receipt of the decision of my case[,] I respectfully request to have a public defender appointed to me to appeal this decision[.]
>
> I am [i]ncarcerated an [sic] unable to afford legal representation[.]

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[1]On March 26, 1998, Complainant filed a motion to dismiss the Complaint as to Trina JoAnn Samek (Motion to Dismiss Without Prejudice as to Trina JoAnn Samek), which Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] granted on March 31, 1998 (Dismissal of Complaint Against Trina JoAnn Samek).

On May 4, 1998, Complainant filed Complainant's Response to Appeal of Decision and Order [hereinafter Complainant's Response], and on May 6, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion.

Before ruling on Respondent's Motion, there are two general matters which must be addressed. First, Respondent improperly addressed Respondent's Motion to the Chief ALJ. Section 1.143(a) of the Rules of Practice provides that motions relating to an appeal shall be ruled on by the Judicial Officer, as follows:

§ 1.143 Motions and requests.

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147, (2) requests for subpoenas pursuant to § 1.149, and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

7 C.F.R. § 1.143(a).

Respondent's Motion, which requests appointment of a public defender "to appeal" the Default Decision, directly relates to the appeal and should properly be submitted to the Judicial Officer for a ruling.

Second, Complainant responds to Respondent's Motion as if it is an appeal of the Default Decision (Complainant's Response). However, Respondent's April 10, 1998, filing does not indicate that Respondent disagrees with the Default Decision, any part of the Default Decision, or any ruling by the Chief ALJ. Further, Respondent's April 10, 1998, filing does not allege any deprivation of Respondent's rights. Section 1.145(a) of the Rules of Practice describes the purpose and contents of an appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition

> with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

I do not find that Respondent's April 10, 1998, filing is an appeal of the Default Decision, but rather is a request for the appointment of a public defender to represent Respondent for the purposes of a contemplated appeal of the Default Decision.

The Administrative Procedure Act provides that a party in an agency proceeding may appear by or with counsel, as follows:

> **§ 555. Ancillary matters**
>
> . . . .
>
> (b) . . . A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

5 U.S.C. § 555(b).

However, a respondent who is unable to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary administrative proceedings such as those conducted under the Animal Welfare Act.[2] Therefore, Respondent's Motion is denied.

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[2]*See generally Elliott v. SEC*, 36 F.3d 86, 88 (11th Cir. 1994) (per curiam) (rejecting petitioner's assertion of prejudice due to his lack of representation in an administrative proceeding before the Securities and Exchange Commission and stating that there is no statutory or constitutional right to counsel in disciplinary administrative proceedings before the Securities and Exchange Commission); *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993) (stating that it is well settled that deportation hearings are in the nature of civil proceedings and that aliens therefore have no constitutional right to counsel under the Sixth Amendment); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (stating that a deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st

(continued...)

In re: JOHN D. DAVENPORT, d/b/a KING ROYAL CIRCUS.
AWA Docket No. 97-0046.
Decision and Order filed May 18, 1998.

Cease and desist order — Civil penalty — License revocation — Debarment from animal exhibition industry — Recordkeeping violations — Failing to provide adequate veterinary care — Failure to properly transport animals — Failure to provide food appropriate to species — Preponderance of evidence.

The Judicial Officer affirmed the decision by Chief Judge Palmer (Chief ALJ) that Respondent willfully failed to provide urgent veterinary care to an elephant (9 C.F.R. § 2.40); that Respondent willfully failed to provide routine skin care and routine foot care to two elephants (9 C.F.R. § 2.40); that Respondent willfully handled eight llamas and two elephants in a manner that caused trauma, overheating, behavioral stress, and physical harm and discomfort to the animals (9 C.F.R. §§ 2.100(a), .131(a)(1)); that Respondent willfully failed to keep and maintain complete records on his animals (7 U.S.C. § 2140; 9 C.F.R. § 2.75(b)(1)); that Respondent willfully transported 11 animals in a primary conveyance, which conveyance did not have a properly designed and constructed cargo space (9 C.F.R. §§ 2.100, 3.138(a)); that Respondent willfully transported an elephant while she was in obvious physical distress (9 C.F.R. §§ 2.100(a), 3.140(a)); that Respondent willfully transported eight llamas in a primary enclosure which did not provide sufficient space (9 C.F.R. §§ 2.100(a), 3.128); that Respondent willfully transported animals in a primary conveyance without sufficient clean, suitably absorbent litter to absorb and cover excreta (9 C.F.R. §§ 2.100(a), 3.137(d)); and that Respondent willfully failed to provide three elephants with food appropriate to that species (9 C.F.R. §§ 2.100(a), 3.129(a)) as required by the Animal Welfare Act and the

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(...continued)
Cir. 1988) (stating that because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979) (per curiam) (stating that 5 U.S.C. § 555(b) and due process assure petitioner the right to obtain independent counsel and have counsel represent him in a civil administrative proceeding before the Securities and Exchange Commission, but the Securities and Exchange Commission is not obliged to provide petitioner with counsel); *Feeney v. SEC*, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners' argument that the Securities and Exchange Commission erred in not providing appointed counsel for them and stating that, assuming petitioners are indigent, the Constitution, the statutes, and prior case law do not require appointment of counsel at public expense in administrative proceedings of the type brought by the Securities and Exchange Commission), *cert. denied*, 435 U.S. 969 (1978); *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969) (stating that petitioner has a right under 5 U.S.C. § 555(b) to employ counsel to represent him in an administrative proceeding, but the government is not obligated to provide him with counsel); *Boruski v. SEC*, 340 F.2d 991, 992 (2nd Cir.) (stating that in administrative proceedings for revocation of registration of a broker-dealer, expulsion from membership in the National Association of Securities Dealers, Inc., and denial of registration as an investment advisor, there is no requirement that counsel be appointed because the administrative proceedings are not criminal), *cert. denied*, 381 U.S. 943 (1965); *Alvarez v. Bowen*, 704 F. Supp. 49, 52 (S.D.N.Y. 1989) (stating that the Secretary of Health and Human Services is not obligated to furnish a claimant with an attorney to represent the claimant in a social security disability proceeding); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 442 (1984) (stating that a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, is not a criminal proceeding and respondent, even if he cannot afford counsel, has no constitutional right to have counsel provided by the government), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984).

Regulations and Standards. The Judicial Officer also affirmed the sanction, which was the same as that recommended by the administrative officials, in which the Chief ALJ assessed Respondent a civil penalty of $200,000; permanently revoked Respondent's license and permanently disqualified Respondent from obtaining a license under the Animal Welfare Act and the Regulations; and barred Respondent, directly or indirectly through any corporate entity, agent, or other device, from engaging in any activity as an exhibitor or dealer within the meaning of the Animal Welfare Act and the Regulations; in particular, and without limitation of the preceding clause, barred Respondent from operating as an independent contractor in conjunction with any exhibitor or dealer, or from leasing, renting, or otherwise providing animals to any person or entity or undertaking engaged in business as an exhibitor or dealer. The Department's sanction policy places great weight on the sanction recommendations of administrative officials. Burden of proof in Animal Welfare Act cases is a preponderance of the evidence. An action is willful if done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Individuals are bound by federal laws and regulations, irrespective of bad advice by federal employees. The Regulations and Standards are not an instruction manual, but require that licensees maintain an acceptable level of husbandry as set forth in 9 C.F.R. §§ 3.125-.142. It is not an unreasonable interpretation of 9 C.F.R. § 2.75(b)(1) for Respondent to be expected to carry copies of animals' records when the animals are being transported or the regulation would be ineffective for its purpose. The act of a person employed by or acting on behalf of an exhibitor within the scope of the employee's office is deemed the act of the exhibitor (7 U.S.C. § 2139).

Robert A. Ertman, Esq., Frank Martin, Jr., Esq., and Kenneth H. Vail, Esq., for Complainant.
Ron Koch, Esq., Albuquerque, New Mexico, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on August 22, 1997.

The Complaint, in pertinent part, alleges that:

I

A. John D. Davenport, doing business as King Royal Circus, hereinafter referred to as [R]espondent, is an individual whose address is Post Office Box 683, Von Ormy, Texas 78073.

B. The [R]espondent, at all times material hereto, was licensed and operating as an exhibitor as defined in the [Animal Welfare] Act and the [R]egulations.

II

On August 6, 1997, police officers in Albuquerque, New Mexico, discovered a trailer in a hotel parking lot that held two live elephants, one dead elephant, and eight live llamas. The temperature inside the trailer was about 130 degrees Fahrenheit. The attendants, employed by the [R]espondent, were arrested and charged with animal cruelty, and the animals were seized. The animals were transported from Las Vegas, Nevada[,] to Dillon, Colorado, beginning on or about August 3, 1997, and were being transported from Dillon, Colorado[,] to Von Ormy, Texas.

A. From on or about August 3, 1997, to on or about August 6, 1997, the [R]espondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide urgently needed veterinary care to animals in immediate need of care, in willful violation of section 2.40 of the [R]egulations (9 C.F.R. § 2.40), resulting in the death of an elephant known as "Heather." Respondent also failed to provide routine veterinary care for animals in need of care for an unknown period of time, in willful violation of section 2.40 of the [R]egulations (9 C.F.R. § 2.40).

B. From on or about August 3, 1997, to on or about August 6, 1997, the [R]espondent handled animals (elephants and llamas) in a manner which caused trauma, overheating, behavioral stress, physical harm, and unnecessary discomfort to the animals, in willful violation of section 2.100(a) of the [R]egulations (9 C.F.R. [§] 2.100(a)) and section 2.131(a)(1) of the [Regulations] (9 C.F.R. § 2.131(a)(1)).

C. From on or about August 3, 1997, to on or about August 6, 1997, the [R]espondent failed to keep and maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the [Animal Welfare] Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the [R]egulations (9 C.F.R. § 2.75(b)(1)).

D. From on or about August 3, 1997, to on or about August 6, 1997, the [R]espondent willfully violated section 2.100(a) of the [R]egulations (9 C.F.R. [§] 2.100(a)) and the [S]tandards specified below:

1. The animal cargo space of a primary conveyance used in transporting live animals was not designed, constructed, and maintained in good repair so as to provide necessary ventilation and to otherwise protect the health and ensure the safety and comfort of the animals contained therein at all times (9 C.F.R. § 3.138(a));

2. Respondent transported animals that were in obvious physical distress (9 C.F.R. § 3.140(a));

3. Primary enclosures for animals were not 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 (9 C.F.R. § 3.128); and

4. Primary enclosures for animals did not contain clean litter of a suitable absorbent material, in sufficient quantity to absorb and cover excreta (9 C.F.R. § 3.137(d)).

E. For an unknown period of time prior to August 6, 1997, the [R]espondent failed to provide elephants with food appropriate for that species, in willful violation of section 2.100(a) of the [R]egulations (9 C.F.R. [§] 2.100(a)) and section 3.129(a) of the [S]tandards (9 C.F.R. § 3.129(a)).

Complaint ¶¶ I, II.

On September 18, 1997, Respondent filed an Answer admitting the allegations in paragraph I of the Complaint, but denying all other material allegations of the Complaint. Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing in Albuquerque, New Mexico, from October 6, 1997, through October 8, 1997. Frank Martin, Jr., Esq., Robert A. Ertman, Esq., and Kenneth H. Vail, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Ron Koch, Esq., Albuquerque, New Mexico, represented Respondent.

On October 30, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof; and on November 17, 1997, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof.

On December 11, 1997, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) ordered

Respondent to cease and desist from: (a) failing to maintain complete records showing the acquisition, disposition, and identification of animals; (b) failing to maintain a current, written program of veterinary care under the supervision of a veterinarian; (c) failing to provide veterinary care to animals as needed; (d) failing to handle animals in a manner which does not cause trauma, overheating, behavioral stress, physical harm, and unnecessary discomfort to the animals; (e) failing to use for the transportation of animals a primary conveyance which has an animal cargo space designed and constructed to provide necessary ventilation and to otherwise protect the health and ensure the safety and comfort of the animals contained in the cargo space at all times; (f) transporting animals which are in obvious physical distress; (g) transporting animals in primary enclosures which do not provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement; (h) transporting animals in primary enclosures which do not contain clean litter of a suitable absorbent material in sufficient quantity to absorb and cover excreta; and (i) failing to provide animals with food appropriate for that species; (2) assessed Respondent a civil penalty of $200,000; (3) permanently revoked Respondent's license and permanently disqualified Respondent from obtaining a license under the Animal Welfare Act and the Regulations; and (4) barred Respondent, directly and indirectly through any corporate entity, agent, or other device, from engaging in any activity as an exhibitor or dealer within the meaning of the Animal Welfare Act and the Regulations; in particular, and without limitation of the preceding clause, barred Respondent from operating as an independent contractor in conjunction with any exhibitor, and from leasing, renting, or otherwise providing animals to any person or entity or undertaking engaged in business as an exhibitor or dealer.

On January 20, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).*

Complainant filed Complainant's Response to Appeal on February 10, 1998. On February 11, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree

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*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

with the Chief ALJ that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Complaint, and I agree with the sanction imposed by the Chief ALJ against Respondent (Initial Decision and Order at 9-10, 27-29). Therefore, pursuant to the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion of sanctions.

Complainant's exhibits are designated by the letters "CX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2140, 2149(a)-(b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

Exotic animal means any animal not identified in the definition of "animal" provided in this part that is native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad. This term specifically includes animals such as, but not limited to, lions, tigers, leopards, elephants, camels, antelope, anteaters, kangaroos, and water buffalo, and species of foreign domestic

cattle, such as Ankole, Gayal, and Yak.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinarian care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of

animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

(a)(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.

. . . .

PART 3—STANDARDS

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.128 Space requirements.

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.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

. . . .

TRANSPORTATION STANDARDS

. . . .

§ 3.137 Primary enclosures used to transport live animals.

. . . .

(d) Primary enclosures used to transport live animals as provided in this section shall have solid bottoms to prevent leakage in shipment and still be cleaned and sanitized in a manner prescribed in § 3.131 of the standards, if previously used. Such primary enclosures shall contain clean litter of a suitable absorbant material, which is safe and nontoxic to the live animals contained therein, in sufficient quantity to absorb and cover excreta, unless the animals are on wire or other nonsolid floors.

. . . .

§ 3.138 Primary conveyances (motor vehicle, rail, air, and marine).

(a) The animal cargo space of primary conveyances used in transporting live animals shall be designed and constructed to protect the health, and ensure the safety and comfort of the live animals contained therein at all times.

. . . .

§ 3.140 Care in transit.

(a) During surface transportation, it shall be the responsibility of the driver or other employee to visually observe the live animals as frequently as circumstances may dictate, but not less than once every 4 hours, to assure that they are receiving sufficient air for normal breathing, their ambient temperatures are within the prescribed limits, all other applicable standards are being complied with and to determine whether any of the live animals are in obvious physical distress and to provide any needed veterinary care as soon as possible. . . . No animal in obvious physical

distress shall be transported in commerce.

9 C.F.R. §§ 1.1; 2.40, .75(b)(1), .100(a), .131(a)(1); 3.128, .129(a), .137(d), .138(a), .140(a).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . All proposed findings, conclusions, and arguments have been considered. To the extent indicated, they have been adopted; otherwise they have been rejected as not relevant or not supported by the evidence.

. . . .

For the reasons . . . stated [in this Decision and Order, *infra*], an Order is being issued requiring Respondent to cease and desist from violating the [Animal Welfare] Act, revoking his license as an animal exhibitor, and assessing a civil penalty against him of $200,000.

Findings of Fact

1. Respondent, John D. Davenport, doing business as King Royal Circus, is an individual whose address is Post Office Box 683, Von Ormy, Texas 780[7]3. Respondent, at all times material to this proceeding, was licensed and operating as a [Class C] exhibitor as defined in the [Animal Welfare] Act and the Regulations. (Answer.)

2. At all times material to this proceeding, Ben Davenport, Respondent's son, was employed by the Respondent. His duties included caring for the animals involved in this case. Ben Davenport does not have any formal training in animal care. (Tr. 581-82.)

3. On or about July 18, 1997, through July 28, 1997, Respondent, through his employee and [other] son, John J. "Chewy" Davenport, exhibited three elephants—two African and one Asian—and eight llamas at a circus in Las Vegas, Nevada (CX 124 [at 2], CX 128 [at 2-5]).

4. On July 24, 1997, APHIS Animal Care Inspector, Gregory Wallen, conducted, at the Cashman Event Center in Las Vegas, an inspection of Respondent's animals, his records, and the trailer used to transport the animals. Mr. Wallen cited Respondent for recordkeeping and veterinary care violations. Specifically, records pertaining to the acquisition and disposition of the animals were not available for inspection; and the program of veterinary care had not been

reviewed by the attending veterinarian since February 1996. (RX 1 [at 2].) Mr. Wallen questioned Chewy Davenport about the lack of ventilation in the trailer used to transport the animals and was told that the doors were left open when the animals were inside [(Tr. 180-83)]. Mr. Wallen accepted Mr. Davenport's explanation and decided not to record a violation. Mr. Wallen admitted at the hearing that . . . [he did not cite Respondent for numerous, serious violations, for which Respondent should have been cited,] which [Mr. Wallen] deeply regrets. (Tr. 157-58[, 573].) Mr. Wallen also did not cite any veterinary care or skin and foot care violations; however, the elephants had been bathed and coated with ["a heavy coat of oil, a thick coat of oil"] immediately prior to his arrival, possibly obscuring the condition of their skin (Tr. 155).

5. On or about July 28, 1997, the animals were moved from Las Vegas, Nevada, to Pahrump, Nevada. The animals were held in Pahrump for approximately one week, until August 3, 1997. (Tr. 51-58, 151-53; CX 124, CX 128.) While in Nevada, Chewy Davenport did not have the appropriate food available for the elephants and instead fed them alfalfa hay and rabbit pellets (CX 124 [at 2]).

6. While in Pahrump, Nevada, the African elephant named Heather began experiencing diarrhea. She lost weight and stopped eating and drinking. Chewy Davenport treated the elephant by feeding her [plain white] bread and walking her. She did not receive any veterinary care, but began to show some improvement. (Tr. 53-58, 151-53; CX 128.)

7. On August 3, 1997, Ben Davenport picked up the animals in Pahrump in order to transport them to Dillon, Colorado. He was accompanied by John Davis. When he arrived in Dillon, Colorado, on August 5, 1997, Ben Davenport noticed that Heather was not eating. He called his father who advised him to return to Texas as quickly as possible. (Tr. 614-15, 631; CX 124.)

8. On August 6, 1997, Ben Davenport arrived in Albuquerque, New Mexico. At approximately 5:00 p.m., Ben Davenport checked the animals and noticed that Heather was down. He did not contact a veterinarian or his father. Instead, he had a tire changed and then traveled to the airport to pick up John Boling, who was to accompany him on the remainder of the trip. Ben Davenport parked the trailer at the Wyndham Hotel while he walked to the airport to meet Mr. Boling. John Davis remained with the trailer. ([CX 115 at 2,] CX 124 [at 1-2].)

9. At approximately 6:54 p.m. on August 6, 1997, Albuquerque police officers John Guilmette, Duffy Ryan, and John Corvino entered the parking lot of the Wyndham Hotel while on bicycle patrol. The officers spotted the trailer and noticed that it was swaying back and forth despite the absence of any strong wind. They observed urine and fecal matter leaking from the [trailer], which was

accompanied by a strong odor. In addition, they noticed that the [trailer] did not have ventilation except for two small vents at the front of the [trailer]. (Tr. 78-80; CX 115-117.)

10. The officers approached the truck and asked John Davis what was in the trailer. Mr. Davis was evasive and refused to open the doors of the trailer; however, the officers could see animals through the vents. When Ben Davenport returned, he was advised of his [Miranda] rights [under the United States Constitution not to answer the officers' questions, but that anything that Ben Davenport said might be used against him in a court of law (CX 18 at 3, CX 117 at 2)]. Ben Davenport was also evasive about the contents of the trailer, first stating that it contained only two elephants, then that there were also six llamas. The officers instructed Ben Davenport to open the trailer. (Tr. 80-89; CX 115-117.)

11. When the trailer was opened, [the officers] discovered that [it contained] eight llamas, two live elephants, and one dead elephant. All eight llamas were contained in the "gooseneck" portion of the trailer. The trailer also contained circus equipment in the area with the elephants. There was very little room for the animals to move. The bedding was full of urine and feces, which was leaking out of the trailer. (CX 115-117.)

12. Heat was emanating from the trailer, which was parked on asphalt, in the sun, and had virtually no ventilation (Tr. 78-80; CX 115-117). The official temperature in Albuquerque at 7:00 p.m. was 8[6] degrees [and 20 percent humidity (CX 18 at 3, CX 117 at 2-3)]. At 5:00 p.m., when the trailer arrived in Albuquerque, the official temperature was 88 degrees (CX 4).

13. The [surviving] animals were transported to the Albuquerque Biological Park. They were accompanied by Ben Davenport who continued to care for them until the City [of Albuquerque] was awarded temporary custody and the animals were moved to the Rio Grande Zoological Park . . . [where $20,000 in modifications were made to the brand new, never used, rhino barn facility, to accommodate the two elephants, Irene and Donna] (Tr. [310-11,] 315-16).

14. The care given by Ben Davenport was observed and supervised by [Rio Grande Zoological P]ark personnel. The [Rio Grande Zoological P]ark took over responsibility for feeding the animals after Ben [Davenport] reported being unable to get the elephants to eat nutritional supplements. [Rio Grande Zoological] Park personnel found that the elephants took the supplements readily. Ben [Davenport] did not possess the equipment necessary for skin and foot care[, which skin and foot care had been long neglected]. The [Rio Grande Zoological P]ark provided the appropriate tools, and allowed [Ben Davenport] to provide the needed care. However, when Ben [Davenport] attempted to trim . . . Donna's feet on his own,

he cut too far, causing redness [and risking disease and lameness]. (Tr. 362-6[5]; CX 110[-111].)

15. A necropsy performed on Heather revealed that she died as a result of salmonellosis—an infection caused by the bacteri[um], salmonella typhi[murium]. The infection caused septicemia (the spread of the infection through the blood stream), gastritis (inflammation of the stomach), and colitis (inflammation of the colon). (Tr. 406, 425-26; CX 51 [at 3].) [Carcass weight on the truck by tare weight scales at the landfill where the necropsy occurred was determined to be 2,400 pounds, which is over 1,000 pounds below the International Species Inventory System (ISIS) minimum weight range of 3,500 to 4,000 pounds for an elephant of her age and species (CX 51 at 4).]

16. Salmonella is a common pathogen found in soil, feces, and carried by animals. Infection, however, is not common, as healthy animals are generally resistant to the bacteria. [Animals in the wild do not often contract salmonellosis.] Susceptibility can be increased by a number of factors, including stress of [overheating, stress of overcrowding, stress of] transportation, previous illnesses, immuno-incompetence, nutritional inadequacy, or age. (Tr. 240[-42], 28[3]-88, 353.)

17. Death from salmonell[osis] can be very painful, and [salmonellosis] can cause death in 1 to 2 days. Feces and urine stains on Heather's stomach, as well as abrasions and contusions on her face, indicate that she struggled before her death. [The other two elephants, behaving as a family unit, could have tried to lift Heather, but it is nevertheless clear that Heather was paddling her legs, attempting to get up.] (Tr. 348-49[, 352], 368, 421, 444-45; CX 5, CX 12, CX 51.)

18. The infection may have caused the diarrhea Heather was suffering prior to her death. Diarrhea is a serious illness in elephants, almost to the point of being a medical emergency, due in part to the fact that it can be an indication of salmonella[, which is potentially life-threatening to a massive animal like an elephant]. Veterinary attention should almost always be sought when an elephant experiences diarrhea. [Physiologically, elephants are similar to horses, emitting hard, dry, and formed feces, because they both pull a large quantity of water from the lower gut, both animals being "hind gut fermentors."] (Tr. 243, 439.)

19. The other African elephant, Donna, also had the salmonella [typhimurium infection] and was suffering from diarrhea. Additionally, Donna was also undernourished. She [also] weighed more than 1,000 pounds less than [the minimum weight of] an average African elephant of her age [according to the International Species Inventory System (ISIS)]. The prominence of her spine indicated poor nutrition [over a long duration], and angular deformities of her legs indicated a possible calcium [or other mineral] deficiency. [Donna is poorly

muscled around the hips, head, and shoulders, which is another long-standing condition.] (Tr. 248-49, 378, 453-59; CX 76.) Blood work done on both Donna and the Asian elephant, Irene, indicated that they were suffering from anemia and poor nutrition. (Tr. 456-61; CX 72, CX 73.)

20. Both of the African elephants, Donna and Heather, had skin that was in poor condition. Their skin was overgrown and contained deep cracks indicative of years of improper skin care that had allowed an excessive build up of skin which made it difficult for the animals to move and prevented adequate dissipation of heat [by transpiration]. The feet of both elephants were uneven and deeply creviced, with dirt and fecal matter lodged in the cracks, which could eventually lead to lameness or infection. (Tr. 239-40, 248, 250, 256, 356-61, 364-73, 376; CX 8-13, CX 22-26, CX 28 . . ., CX 39, CX 40, CX 42, CX 76, CX 78, CX 79.)

21. The Asian elephant, Irene, had some flaky skin which should have been scrubbed off, but was not seriously affecting the health of the animal (Tr. 376[-77] . . .).

22. On August 7, 1997, Warren Striplin, an APHIS animal care inspector, conducted in Albuquerque, an inspection of Respondent's animals, records, and transport trailer, and he recorded the following violations:

A. Eight llamas were transported in an area which measured approximately 8 feet by 8 feet, which was insufficient space for the animals to make normal postural and social adjustments [(9 C.F.R. § 3.128).]

B. All eight llamas and two elephants were allowed to eat green vegetation, which has not had its nutritive value assessed [(9 C.F.R. § 3.129(a)).]

C. The trailer used to transport the animals was filled with wet hay, feces, and urine, and smelled of ammonia [(9 C.F.R. § 3.137(d)).]

D. The brake cable from the truck to the trailer was severed [(9 C.F.R. § 3.138(a)).]

E. Records pertaining to the acquisition and disposition of animals, and records of animals on hand were not available for inspection [(9 C.F.R. § 2.75(b)).]

F. .Animals were not handled in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort in that they were transported in conditions of extreme heat [(9 C.F.R. § 2.131(a)(1)).]

G. A written program of veterinary care could not be located for inspection [(9 C.F.R. § 2.40).]

H. Veterinary medical records could not be located for inspection [(9 C.F.R. § 2.40).]

I. Veterinary care was not obtained for Heather after ascertaining that she was ill in Dillon, Colorado [(9 C.F.R. § 2.40).]

J. The left hind foot of the African elephant, Donna, showed extensive cracks and fissures that required foot maintenance or veterinary care [(9 C.F.R. § 2.40).]

K. The skin of both surviving elephants was excessively dry and scabby, with the appearance that there had been very infrequent or non-existent bathing or skin care of the elephants [(9 C.F.R. § 2.40).]

L. Donna was suffering from profuse diarrhea [(9 C.F.R. § 2.40).]

M. The openings in the primary enclosure used to transport the animals did not provide adequate ventilation. The upper restraining bar between the animals and the door was missing, leaving only a single, lower bar to contain the animals if the door was left open during transit. [(9 C.F.R. § 3.137(a).)] CX 75 [at 2-5].

23. Warren Striplin conducted three follow-up inspections on August 8, 9, and 10, 1997. In his inspection reports, he noted that the following conditions were corrected:

A. On August 8, 1997, the trailer was cleared of all wet hay, feces, and urine [(9 C.F.R. § 3.137(d))]; and the brake cable was repaired [(9 C.F.R. § 3.138(a))]. (CX 101 [at 2].)

B. On August 9, 1997, there was sufficient nutritive food for the animals [(9 C.F.R. § 3.129(a))]; Donna's left hind foot was treated [(9 C.F.R. § 2.40)]; and both elephants were bathed [(9 C.F.R. § 2.40)]. (CX 102 [at 2].)

C. On August 10, 1997, the restraining bars were repaired; records of acquisition and disposition were made available for inspection [(9 C.F.R. § 2.75(b))]; and a written program of veterinary care was provided [(9 C.F.R. § 2.40).] (CX 103 [at 2].)

All other violations remained uncorrected. In addition, on August 10, 1997, the following new violations were noted:

A. The sheet metal on the top of the trailer over the gooseneck area where the llamas were transported was torn. There was an attempt to repair the damage with a sheet metal patch on the roof of the trailer; however, portions of the metal were loose. [(9 C.F.R. § 3.137(a)(1).)]

B. Two areas inside the trailer had long bolts protruding into the trailer [(9 C.F.R. § 3.137(a)(2)).]

C. The floor of the . . . trailer was showing evidence of moderate to severe wear. The top laminated layers of the plywood [were] peeling and wrinkling. [(9 C.F.R. § 3.138(a).)]

D. Donna's right hind foot was in need of trimming as it had a deep

wrinkle in the middle of the foot and the edges around the foot were uneven [(9 C.F.R. § 2.40).]
CX 103 [at 2-3].

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) on August 3, 4, 5, and 6, 1997, by failing to provide urgent veterinary care for the African elephant named Heather.

3. Respondent willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide routine skin and foot care to the elephants known as Donna and Heather.

4. Respondent willfully violated sections 2.100(a) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.100(a), .131(a)(1)) on August 6, 1997, by handling eight llamas and two elephants in a manner that caused trauma, overheating, behavioral stress, physical harm, and unnecessary discomfort to the animals, in that he confined them in an [inadequately] ventilated trailer in conditions of excessive heat, with a dead elephant.

5. Respondent willfully violated section 10 of the [Animal Welfare] Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) on August 7, 8, and 9, 1997, by failing to keep and maintain complete records showing the acquisition, disposition, and identification of eight llamas and three elephants.

6. Respondent willfully violated section 2.100(a) of the Regulations . . . (9 C.F.R. § 2.100(a)) and section 3.138(a) of the Standards (9 C.F.R. § 3.138(a)) on August 3, 4, 5, [and] 6, 1997, by using, for the transportation of 11 animals, a primary conveyance, which did not have an animal cargo space designed and constructed to provide necessary ventilation and to otherwise protect the health and ensure the safety and comfort of the animals contained [in the cargo space].

7. Respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.140(a) of the Standards (9 C.F.R. § 3.140(a)) on August 3, 4, 5, and 6, 1997, by transporting the elephant, Heather, while she was in obvious physical distress.

8. Respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.128 of the Standards (9 C.F.R. § 3.128) on August 3, 4, 5, and 6, 1997, by transporting eight llamas in a primary enclosure which did not provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement.

9. Respondent willfully violated section 2.100(a) of the Regulations (9

C.F.R. § 2.100(a)) and section 3.137[(d)] of the Standards (9 C.F.R. § [3].137(d)) on August 6, 1997, by transporting three elephants and eight llamas in a primary enclosure which did not contain clean litter of a suitable absorbent material in sufficient quantity to absorb and cover excreta.

10. Respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.129(a) of the Standards (9 C.F.R. § 3.129(a)) by failing to provide three elephants with food appropriate for that species.

Discussion

A. Transport of the animals

Between August 3, 1997, and August 6, 1997, Respondent transported three elephants and eight llamas from Pahrump, Nevada, to Albuquerque, New Mexico. The animals were transported in conditions which did not comply with the Standards.

1. Ventilation.

Section 3.138(a) of the Standards requires that:

> (a) The animal cargo space of primary conveyances used in transporting live animals shall be designed and constructed to protect the health, and ensure the safety and comfort of the live animals contained therein at all times.

9 C.F.R. § 3.138(a).

Respondent transported animals in a trailer which was not properly constructed for the purpose[] of transporting animals. The trailer had only two small ventilation panels on the front wall. According to the police officers who discovered the animals at the Wyndham Hotel, heat was escaping through the panels, which did not permit sufficient fresh air to enter the trailer.

Ben Davenport admitted that there was insufficient ventilation in the trailer when the doors were closed (Tr. 608). He claims, however, that the trailer doors were left open whenever they were in transit. If so, the trailer was not constructed so as to ensure the safety of the animals when the doors were open. Although the elephants were tethered and there was one restraining bar, the elephants could still reach their heads out through the open doors. Therefore, although opening the doors would improve the comfort of the animals, it would also reduce their safety.

Consequently, traveling with the doors open did not bring the trailer into compliance with the Standards.

Respondent asserts that the trailer was "approved" by USDA and, therefore, cannot be deemed to violate the Standards. The trailer was inspected on July 24, 1997, by APHIS inspector, Gregory Wallen, while Respondent was exhibiting the animals in Las Vegas, Nevada [(RX 1)]. Mr. Wallen did not cite any violations with respect to the transport facilities. This omission was an error on the part of Mr. Wallen. Mr. Wallen's error, however, does not absolve Respondent of his duty to comply with the [Animal Welfare] Act [and] the Regulations and Standards.

Respondent's assertion that he should be able to rely on Mr. Wallen's advice that the [trailer] was appropriate to transport the animals is without merit. First, the evidence indicates that Mr. Wallen expressed concern about the ventilation, and in fact told Chewy Davenport that the trailer did not have adequate ventilation with closed doors. Chewy Davenport assured him that the animals would never be in the trailer with the doors closed. (Tr. [181-83].) Based upon this information, Mr. Wallen decided not to cite the trailer as noncompliant. Due to Mr. Wallen's concerns, however, Respondent should not be surprised that the trailer was found to provide insufficient ventilation when the animals were later discovered in the trailer with the doors closed.

In addition, it is the Respondent's duty to be in compliance with the [Animal Welfare] Act, and the Regulations and Standards at all times. It is not the duty of APHIS inspectors to instruct licensees as to the details of meeting those requirements. Inspectors do not certify or otherwise approve facilities, and conveyances are not required to be inspected or approved before they can be used. While Respondent escaped a citation for noncompliance on July 24, 1997, he cannot use the mistake of one inspector to avoid being held accountable for violations which he and his employees should have known would cause his animals to suffer extreme discomfort.

Respondent further argues that he should not be held liable because the Standards fail to provide specific requirements for the amount of ventilation necessary. Respondent's [trailer] had virtually no ventilation at all. [The number and size of the ventilation panels] should have made it obvious to Respondent that . . . [the trailer was not constructed in a manner so that the animals could be provided with] sufficient fresh air and [kept cool].

2. Care in transit.

Section 3.140[(a)] of the Standards provides that:

> (a) During surface transportation, it shall be the responsibility of the driver or other employee to visually observe the live animals as frequently as circumstances may dictate, but not less than once every 4 hours, to assure that they are receiving sufficient air for normal breathing, their ambient temperatures are within the prescribed limits, all other applicable standards are being complied with and to determine whether any of the live animals are in obvious physical distress and to provide any needed veterinary care as soon as possible. . . . The carrier shall provide any needed veterinary care as soon as possible. No animal in obvious physical distress shall be transported in commerce.

9 C.F.R. § 3.140(a).

Heather was transported in obvious physical distress. She suffered from profuse diarrhea while in Pahrump, Nevada, and although she may have shown some improvement after a change in diet, she still was experiencing loose stools when Ben Davenport loaded her on the trailer and left for Dillon, Colorado [(Tr. 53-58).] In addition, Ben Davenport did not provide veterinary care as soon as possible after discovering that her condition had worsened [(Tr. 639-40).] Instead, he continued to transport her while [she was] in obvious physical distress, in violation of the Standards. He claims that his actions were based on instructions from Dr. Tate [(Tr. 640-42; CX 124 at 1).] However, the only person to whom he spoke was his father [(Tr. 615)]. Dr. Tate testified that he was not informed that Heather's condition had deteriorated and that he did not give instructions to return her to Texas [(Tr. 135-36)].

Ben Davenport further claims that he did not know Heather was in serious physical distress. His lack of knowledge, however, does not excuse the violation. If he had been in direct contact with Dr. Tate, or if he had been properly trained in elephant care, he would have realized the seriousness of the condition.

3. Space.

Section 3.12[8 of the Standards] provides that:

> 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. . . .

9 C.F.R. § 3.12[8].

Respondent transported eight llamas in the gooseneck portion of the trailer

which measured approximately 8 feet by 8 feet (CX 75 at 2). This amount of space for eight large animals cannot be said to be sufficient to allow for normal postural and social adjustments (CX 75 at 2). In addition, the space was only about 6 feet high. Since llamas are almost 6 feet tall, an enclosure of that height was insufficient for the animals to stretch and move comfortably. (Tr. 257-58.)

Respondent again argues that the trailer was approved and that the Regulations regarding space are not specific enough. Ben Davenport testified, however, that Mr. Wallen stated that there was not enough room for all eight llamas in the gooseneck (Tr. 613). Accordingly, Respondent cannot claim that the trailer was approved to transport eight llamas. Furthermore, although it might be possible, and even desirable, to develop more specific guidelines with respect to space requirements, the Standards are not so broad as to make them unenforceable. Respondent was still subject to the Standards as written, and he failed to comply with those requirements.

4. Sanitization.

Section 3.137(d) of the [S]tandards relating to the transport of live animals requires that:

> (d) Primary enclosures used to transport live animals as provided in this section shall have solid bottoms to prevent leakage in shipment and still be cleaned and sanitized in a manner prescribed in § 3.131 of the standards, if previously used. Such primary enclosures shall contain clean litter of a suitable absorbant material, which is safe and nontoxic to the live animals contained therein, in sufficient quantity to absorb and cover excreta, unless the animals are on wire or other nonsolid floors.

[9 C.F.R. § 3.137(d).]

Witnesses testified that when they observed the trailer at the hotel, it was leaking feces and urine (Tr. 80, 330). Inside the trailer, the floor was covered with hay and feces and there was fecal material piled up around Heather (Tr. 306-07, 330). There was no testimony with respect to how often Ben Davenport cleaned the trailer during the trip; however, since feces was leaking from the trailer and [the excreta] were not completely covered with litter, the conditions were in violation of the Standards, regardless of when the trailer was last cleaned.

B. Handling

Section 2.131(a)(1) of the Regulations requires that:

> (a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

9 C.F.R. § 2.131(a)(1).

On August 6, 1997, Respondent failed to handle eight llamas and two elephants in a manner which would not cause overheating, physical harm, or unnecessary discomfort. The animals were confined in conditions of extreme heat, in a trailer with virtually no ventilation. Respondent argues that he did not commit a violation because elephants are accustomed to extreme heat. Although elephants are warm weather animals, the conditions in which they were confined on August 6[, 1997,] are not found in their natural habitat. Elephants are also more prone to overheating than some animals, because they have such a large body mass in comparison to skin available to dissipate heat. (Tr. 260.) Furthermore, llamas are cold weather animals and are, therefore, not accustomed to high temperatures under any circumstances [(Tr. 386, 610)].

In addition to the heat, the lack of ventilation, combined with the buildup of feces and urine, likely made breathing difficult, further causing discomfort and physical harm (Tr. 261-62).

The animals were also handled in a manner which was likely to cause trauma and behavioral stress. The evidence indicates that Heather tossed and turned, and was probably in a great deal of pain before dying (Tr. 347-49). Elephants have emotions and are sensitive to suffering and death. Therefore, being confined in the trailer with Heather, while she was dying and after she was dead, must have been traumatic for both of the other elephants. (Tr. 259-60, 346-4[9].)

C. Veterinary Care

Section 2.40(b)[(1)-(4)] of the Regulations requires that:

> (b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:
>
> (1) The availability of appropriate facilities, personnel, equipment, and

services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia . . . .

9 C.F.R. § 2.40(b)(1)-(4).

1. Urgent care.

The African elephant, Heather, first became ill in Pahrump, Nevada, sometime before August 3, 1997, and she remained ill until her death on August 6, 1997. There was some indication that she showed improvement after a change of diet while still in Pahrump. However, Ben Davenport stated that she still had loose stools when she was loaded for transport on August 3, 1997 (CX 124 at 3).

Respondent failed to employ a mechanism of direct and frequent communication with the attending veterinarian as required by 9 C.F.R. § 2.40(b)(3). Dr. Tate testified that on August 3, 1997, Respondent informed him that Heather had diarrhea and that she had been eating alfalfa [(Tr. 141-42)]. At that time, Dr. Tate recommended a change in diet and told Respondent to notify him if Heather's condition did not improve or worsened [(Tr. 142)]. Dr. Tate testified that Respondent did not contact him again until after Heather died [(Tr. 144)]. At no time did anyone attending the animals speak directly with Dr. Tate.

[An expert, Dr. Steven B. Snyder, head veterinarian, Albuquerque Biological Park,] testified that diarrhea is a serious condition in elephants, which requires veterinary attention [(Tr. 439, 468)]. Yet at no point was veterinary care sought for Heather, despite the fact that she suffered from diarrhea for 3 to 5 days prior to her death. As such, Respondent failed to use appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and failed to provide emergency care. Respondent claims that Heather was being brought back to Texas at the instruction of his attending veterinarian, Dr. Tate; however, Dr. Tate denies giving

these instructions [(Tr. 135)]. In fact, Dr. Tate denies that Respondent ever informed him that Heather's condition had worsened [(Tr. 143-44)].

Respondent argues that he did not violate section 2.40 [of the Regulations (9 C.F.R. § 2.40)] because he had an attending veterinarian and a written program of veterinary care; but it is not enough to have a program of care, if actual care is not provided.

Respondent further argues that the Regulations should provide more specific guidelines for what veterinary care is required. [Footnote 1 omitted.] Respondent also asserts that the veterinary care section, among others, is unconstitutionally void for vagueness. [Specifically, Respondent contends that he was not given notice of the standard of conduct to which he was held accountable "in terms of veterinary care, adequate food, shelter, housing, diet, nutritional maintenance, etc." (Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 43-44; *also see* Respondent's Appeal Petition and Brief at 44-45, which reiterates exactly the same argument).

Respondent is mistaken. A regulation is unconstitutionally vague if it is so unclear that ordinary people cannot understand what conduct is prohibited or required, or, if it is so unclear that it encourages arbitrary and discriminatory enforcement.[**] A review of each of the Regulations and Standards, which Respondent is alleged to have violated (Complaint), reveals none which is unconstitutionally vague. The difficulty arises in defining certain regulatory terms, such as "adequate veterinary care," and applying them to the facts of a given situation. However, regulations are not unconstitutionally vague merely because they are ambiguous or difficulty is found in determining whether marginal cases fall within their language.[***]] The Regulations cannot, however, possibly anticipate every situation that might arise with every animal and specify what should be done. . . .

2. Routine care.

The evidence indicates that Respondent had not provided, possibly for years,

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[**Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996); *Georgia Pacific Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004-05 (11th Cir. 1994); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992); *The Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).]

[***The Great American Houseboat Co. v. United States*, 780 F.2d 741, 747 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).]

proper skin and foot care to the elephants [(Tr. 350, 357-58, 360, 369)]. Both African elephants had deep crevices and other skin and foot afflictions. Donna's skin [and Heather's skin both were] thickened to the point of being almost an "exoskeleton" [(Heather), or almost looking like a "dinosaur" (Donna) (Tr. 367, 376)]. The Asian elephant, Irene, did not have skin problems as serious as the African elephants; however, she did have flaky skin on her face, indicating some lack of skin care [(Tr. 375-77)]. When an elephant's skin becomes thickened, it restricts motion and prevents the adequate dissipation of heat [(Tr. 367, 380)]. When stones and debris become lodged in the crevices of an elephant's feet, infections and lameness may result [(Tr. 364-65)]. Respondent, therefore, failed to use appropriate methods to prevent diseases and injuries, in violation of section 2.40(b)(2) [of the Regulations (9 C.F.R. § 2.40(b)(2)).]

Ben Davenport did not have all of the proper skin care tools with him in Albuquerque [(Tr. 362)]. It is not clear whether the circus even owned the appropriate tools. When Ben Davenport attempted to trim Donna's feet in Albuquerque, he showed that he was unskilled or unfamiliar with the proper way in which to do so [(Tr. 362)]. He cut too deeply into her foot, leaving it red and tender [(Tr. 363)]. Respondent's failure to have appropriate equipment and personnel available constitutes a violation of section 2.40[(b)](1) [of the Regulations (9 C.F.R. § 2.40(b)(1))].

Respondent maintains that the skin of each elephant was in the same condition when they were acquired, and that the condition of each was normal. The only "expert" testimony presented by Respondent was from Steven Kendall, who is principally a lobbyist with no advanced training in animal care (Tr. 66[0-62]). Mr. Kendall's opinion that the elephant's skin was normal [(Tr. 677)] is, therefore, not entitled to as much weight as the opinions of the animal care specialists who testified that the skin was in poor condition and had been neglected for an extended period of time. Furthermore, Mr. Kendall agreed that insufficient foot care had been provided (Tr. 674-75).

Respondent additionally argues that he cannot be held responsible for the violation because Mr. Wallen did not cite any skin or foot care violations in the previous inspection, and veterinarians who issued health certificates for the animals never reported any skin care problems. Again, Mr. Wallen's failure to cite violations does not excuse Respondent from compliance with the Regulations. The health certificates submitted by Respondent as RX 5, 6, and 7, indicate only that the animals were tested for tuberculosis. Veterinarians who issue health certificates typically test for communicable diseases and do not conduct extensive physical exams or attest to the general health of the animals (Tr. 569-72). Although I am troubled by the fact that no one previously reported these problems

respecting Respondent's animals, such omissions do not excuse Respondent from his responsibility to be in compliance with the Regulations.

D. Adequate Food

Section 3.129[(a) of the Standards] provides, with respect to feeding animals:

> (a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

9 C.F.R. § 3.129[(a)].

While in Nevada, the elephants were fed rabbit pellets and alfalfa, which Ben Davenport admitted was not an appropriate diet for elephants (Tr. [65, 142,] 640). There was testimony that Chewy Davenport fed the elephants alfalfa because there was no grass hay available in Nevada (Tr. 64). It is Respondent's responsibility, however, to ensure that appropriate food is available for his animals at all times.

The evidence also indicates that Donna was undernourished at the time she was discovered in Albuquerque. On August 8, 1997, she weighed 2,240 pounds. The average weight for an African elephant her age is 3,500 to 4,000 pounds. ([Tr. 456;] CX 72 at 2.) Some of her low weight can be attributed to weight loss from the diarrhea she was suffering, but it seems unlikely that more than 1,000 pounds were lost due to diarrhea. Also blood work on both Irene and Donna indicated anemia and poor nutrition (Tr. 456-61; CX 72, 73). Ben Davenport failed to give the animals nutritional supplements even after they were provided by the Albuquerque Biological Park. He claimed the elephants simply would not take them; however, the park personnel had no such difficulty when they took over the feeding [(CX 73 at 2)].

Respondent stresses that Dr. Thilstead made findings in his necropsy report that Heather had water in her stomach [(CX 51 at 1)] and was "in good nutritional condition (adequate body fat)." (CX 51 [at 1].) Dr. Thilstead explained in his testimony, however, that the statement about the nutritional condition meant only that the animal did not die of starvation [(Tr. 408)]. He also explained that it was difficult to clearly evaluate the body condition because of post-mortem decomposition (Tr. 408). Dr. Thilstead further testified that the water in Heather's

stomach indicated that she had ingested water within 12 hours prior to her death, whereas lack of food indicated that she had not eaten anything in the prior 8 to 12 hours. (Tr. 415, 426.)

Respondent again claims that the Regulations should provide specific nutritional standards. The specific dietary needs of each animal cannot be anticipated by the Regulations. Contrary to Respondent's assertions that anyone ought to be able to buy an elephant and expect the Regulations to provide all the necessary instructions for care, the Regulations are not an instruction manual, and in fact require that licensees [maintain an acceptable level] of animal husbandry (Tr. 545-4[9]). Specifically, section 3.132 of the [Standards] requires that: "A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care." [(9 C.F.R. § 3.132.)] As such, Respondent was required to [maintain an acceptable level of husbandry practices as set forth in sections 3.125-.142 of the Standards (9 C.F.R. §§ 3.125-.142)] without step-by-step instructions from USDA.

E. Records

[Section 10 of the Animal Welfare Act provides that:

> Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

7 U.S.C. § 2140.]

Section 2.75(b) of the [R]egulations provides that:

> [(b)](1) Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under

his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

(2) Record of Animals on Hand (other than dogs and cats) (APHIS form 7019/VS Form 18-19) and Record of Acquisition, Disposition, or Transport of Animals (other than dogs and cats) (APHIS Form 7020/VS Form 18-20) are forms which may be used by dealers and exhibitors to keep and maintain the information required by paragraph (b)(1) of this section concerning animals other than dogs and cats except as provided in § 2.79.

(3) One copy of the record containing the information required by paragraph (b)(1) of this section shall accompany each shipment of any animal(s) other than a dog or cat purchased or otherwise acquired by a dealer or exhibitor. One copy of the record containing the information required by paragraph (b)(1) of this section shall accompany each shipment of any animal other than a dog or cat sold or otherwise disposed of by a dealer or exhibitor; *Provided, however*, That information which indicates the source and date of acquisition of any animal other than a dog or cat need not appear on the copy of the record accompanying the shipment. The dealer or exhibitor shall retain one copy of the record containing the information required by paragraph (b)(1) of this section.

9 C.F.R. § 2.75(b).

Respondent failed to have records of . . . identification of animals [owned and transported] available for inspection, in Albuquerque, on August 7, 8, and 9, 1997.

Respondent argues that he did not violate recordkeeping requirements because he had the necessary records in his possession and that the Regulations do not clearly mandate that records must accompany animals when they are transported

between exhibitions. [However, 7 U.S.C. § 2140 requires that exhibitors make their records identifying animals available for inspection at all reasonable times. It is not unreasonable to expect that the records be with the animals as they are transported, or the regulation would be ineffective for its purpose.]

. . . Furthermore, Respondent was cited for violating [9 C.F.R. § 2.75(b)(1)] during Mr. Wallen's inspection [on July 24, 1997,] in Las Vegas (RX 1); and, therefore, Respondent was on notice of the agency's interpretation. [While it is true that inspector Wallen gave Respondent until August 15, 1997, to correct this deficiency (RX 1 at 2), it is well settled that a correction date does not exculpate Respondent from the violation. This policy was articulated in *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1997), as follows:

> This Department's policy is that the subsequent correction of a condition not in compliance with the Act or the regulations or standards issued under the Act has no bearing on the fact that a violation has occurred. *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047 (1992), *aff'd sub nom. Wilson v. USDA*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)). Each dealer, exhibitor, operator of an auction sale, and intermediate handler 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, as occurred in the instant case on a number of occasions, does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.
>
> The Department's policy regarding corrections of violations of the Act and the regulations and standards issued under the Act was clearly articulated in *In re Pet Paradise, Inc.*, *supra*, which was issued September 16, 1992.]

F. Willfulness

Respondent repeatedly maintains that Ben Davenport loved the animals and would never intentionally harm them; however, the intent to cause harm is not necessary for an act to be willful. A willful act is one which is done intentionally, irrespective of evil intent, or done with careless disregard of statutory

requirements. *See In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 13[8-39] (1996); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1067-70 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)). All of the acts resulting in violations were done intentionally or with careless disregard of [statutory requirements], and accordingly the violations resulting [from these acts] were willful.

G. Principle-Agent Relationship

Respondent further argues that even if violations did occur, he cannot be held responsible because they were not committed by him, but by his sons. Section [9] of the [Animal Welfare] Act provides that:

> When construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission, or failure of such . . . exhibitor, . . . as well as of such person.

7 U.S.C. § 2139; *see also In re Hank Post*, 47 Agric. Dec. 542, 547 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 147 (1986); *In re Marlin U. Zartman*, 44 Agric. Dec. 174, 185 n.3 (1985). Nevertheless, Respondent argues that his sons were not acting within the scope of their employment when the violations occurred, because they were not authorized to violate the [Animal Welfare] Act and the Regulations and Standards. Chewy and Ben Davenport are Respondent's employees and were transporting and caring for the animals on behalf of Respondent with his authorization. Accordingly, any violations occurring in the course of the transport and care were committed in the scope of their employment. Moreover, Respondent's direct responsibility is established by his instruction to Ben Davenport not to obtain veterinary care for Heather and by Respondent's ownership of the trailer at issue.

H. Sanctions

Complainant has recommended the issuance of a cease and desist order, a civil penalty in the amount of $200,000, and the permanent revocation of Respondent's license.

[Section 19(b) of the Animal Welfare] Act provides that sanctions shall be

imposed as follows:

> Any . . . exhibitor . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149[(b)]. The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

There was very little evidence admitted with respect to the size of Respondent's business. The January 1997 license renewal application indicates that Respondent exhibits 20 animals (CX 2). In addition, there was testimony that the elephants at issue are worth $80,000 to $100,000 each (Tr. 616). As such, the size of Respondent's business is sufficiently large that a $200,000 civil penalty [is not,] for that reason, excessive.

With the exception of the availability of records, the violations that Respondent committed were severe and directly affected the health and well-being of the animals. In the case of Heather, the failure to obtain veterinary care may have resulted in her death. Furthermore, the violations were not isolated occurrences, but were part of a long-term failure to provide adequate care.

Respondent has not shown good faith. Ben Davenport attempted to prevent discovery of the animals, lying to police about the number and type of animals in the trailer. He was resistant towards the attempt by park personnel to teach him proper methods of animal care. He refused to give nutritional supplements to the animals that were provided by the park personnel. Respondent . . . has refused to

accept any responsibility for the care of his animals, attempting instead to place blame for the violations on animal rights activists, APHIS inspectors, veterinarians, and his sons. I did not find [Respondent's] son, Ben Davenport, to be a credible witness, and neither Respondent nor his other son, "Chewy," nor any of his other employees [gave] testimony [which] explain[s] or mitigate[s] Respondent's violations.

Respondent also has a history of violations. Orders were issued against Respondent in two prior cases. . . . *In re John D. Davenport*, 55 Agric. Dec. 426 (1996); . . . *In re John D. T. Davenport*, 40 Agric. Dec. 209 (1980)

Based on the foregoing, I have concluded that the maximum penalty of $2,500 is appropriate for each of the violations except for the recordkeeping violations, for which $500 is appropriate for each of the three inspections at which records were not available. Each animal and each day during which an offense occurs shall be deemed a separate violation; however, offenses which occurred for an indefinite period (i.e., foot care, skin care, and nutrition), will be treated as a single violation for each animal due to the impossibility of determining the exact number of days involved. Based on such calculations, I have determined that Respondent committed 103 violations.[2] The [civil penalty], therefore, could amount to $251,500. Accordingly, Complainant's recommended civil penalty of $200,000 is appropriate. Although the [civil penalty] is the highest to be [assessed] in an animal welfare case to date, it is consistent with previous sanctions, as well as with Departmental policy.[3]

Furthermore, the permanent revocation of Respondent's license and the issuance of a cease and desist order are appropriate and shall be ordered.

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[2]Respondent failed to provide veterinary care to 1 elephant for 4 days (4 violations); Respondent failed to provide routine foot and skin care to 2 elephants for an indefinite period (2 violations); Respondent handled 10 animals in a manner which caused overheating, stress, and trauma on 1 day (10 violations); Respondent failed to have records available for inspection on 3 days (3 violations); Respondent transported 11 animals in a trailer that was not properly constructed to provide for the comfort and safety of the animals on 4 days (44 violations); Respondent transported 1 elephant while in obvious physical distress for 4 days (4 violations); Respondent transported 8 llamas in an area which did not provide sufficient space for 4 days (32 violations); Respondent failed to provide sufficient litter to absorb and cover excreta for 1 day (1 violation); and Respondent failed to provide adequate food to 3 elephants for an indefinite period of time (3 violations).

[3]*See, e.g., In re Julian J. Toney*, 56 Agric. Dec. [1235 (1997) (Decision and Order on Remand)] (assessing a $175,000 civil penalty against respondents); *In re Delta Air Lines, Inc.*, 53 Agric. Dec. 1076 (1994) (assessing a $140,000 civil penalty against respondent). *See also In re Julian J. Toney*, 54 Agric. Dec. 923, 1013-18 (1995).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

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.[4] Quantitatively, Complainant need only show a scintilla more than 50 percent of the evidence to prevail under the preponderance standard. Put another way, Complainant need only show that Complainant's version of the facts is more likely than not correct. I find that Complainant has met the burden of proof by much more than a preponderance of the evidence.

Concerning whether Respondent's actions were willful, an action 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.[5] Respondent argues that "this is not a case about

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[4]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 27 (Mar. 20, 1998); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 18 n.3 (Jan. 13, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455 n.7 (1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246 5 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

[5]*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491

(continued...)

intentional acts of animal abuse or maltreatment" (Respondent's Appeal Petition and Brief at 35), but willfulness includes not only intent to do a prohibited act but also careless disregard of statutory requirements. The United States Court of Appeals for the Eighth Circuit expressed the same view of willfulness, citing *Cox*, when it issued the opinion in another Animal Welfare Act case deciding similar issues, *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996): "'Willfulness . . . includes not only intent to do a prohibited act but also careless disregard of statutory requirements.' *Cox v. United States Dept. of Agriculture*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 141 (1991)." Under any legal interpretation of "willful," therefore, I find that the Chief ALJ is correct that Respondent's violations were willful.

Respondent's Appeal

I have carefully examined Respondent's 49-page appeal (Respondent's Appeal Petition and Brief). I agree with Complainant that Respondent's appeal is predominantly a repetition of Respondent's Proposed Findings of Fact,

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(...continued)
F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 48 (Mar. 20, 1998); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 31 (Jan. 13, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations would still be found willful.

Conclusions of Law, and Brief in Support Thereof, in that Respondent requests the addition to the Decision and Order of 141 of the 145 proposed findings of fact, which are set forth in Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof (Complainant's Response to Appeal at 3-4). However, I agree with Complainant that Respondent's resubmission of the same proposed findings, without assignation of error by the Chief ALJ, either for relevancy or for evidentiary support, ignores the Chief ALJ's holding, as follows:

> All proposed findings, conclusions and arguments have been considered. To the extent indicated they have been adopted; otherwise they have been rejected as not relevant or not supported by the evidence.

Initial Decision and Order at 1.

Respondent does list nine issues for appeal,[6] but, Respondent's Appeal Petition

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[6]Respondent's nine issues are as follows:

ISSUES FOR APPEAL:

1) Whether the [Initial] Decision and Order is in error when it conclude[s] that Respondent willfully violated provisions of the Act?

2) Whether the [Initial] Decision and Order is in error by assessing a [civil penalty] in the amount of $200,000.00?

3) Whether the [Initial] Decision and Order is in error by permanently revoking Respondent's license?

4) Whether the [Initial] Decision and Order is in error in entering an order prohibiting Respondent from directly or indirectly, through any corporation, agent, or other device, engage [sic] in any activity as an exhibitor or dealer within the meaning of the Act and regulations. In particular, and without limitation of the preceding sentence, Respondent shall not operate as an independent contractor in conjunction with any exhibitor, nor shall Respondent lease, rent, or otherwise provide animals to any person or entity or undertaking engaged in business as an exhibitor or dealer.

5) Whether the [Initial] Decision and Order is in error by making findings, conclusions[,] and orders which were not adequately supported by the record?

6) Whether the [Initial] Decision and Order is in error by failing to include findings which were uncontroverted and supported by the record at the hearing?

7) Whether the [Initial] Decision and Order is in error when sanctions [are] based in part on prior allegations against Respondent when there was no evidence introduced in the hearing

(continued...)

and Brief is not organized around these nine issues. Rather, Complainant is correct that Respondent's arguments follow the numbering of the Findings of Fact in the Initial Decision and Order. Since I agree with Complainant both on the format and on the substance of Respondent's Appeal Petition and Brief, I follow Complainant's responses to Respondent's arguments. (Complainant's Response to Appeal at 4.)

1. Respondent does not take issue with Finding of Fact 1, but asks that Respondent's Proposed Findings of Fact 3 through 7 be added (Respondent's Appeal Petition and Brief at 9). Respondent makes no supportive arguments. Complainant correctly argues that these requested additions are either redundant or unnecessary (Complainant's Response to Appeal at 4). I reject Respondent's request.

2. Respondent objects to the statement in Finding of Fact 2 that "Ben Davenport does not have any formal training in animal care" (Respondent's Appeal Petition and Brief at 9). Respondent contends that Ben Davenport has had considerable on the job training. However, the Chief ALJ's finding that Ben Davenport has had no formal training in animal care is amply supported by the record, and I find no basis for Respondent's objection to Finding of Fact 2. Moreover, Complainant is correct that Respondent's proposed findings 8 through 18 go beyond Ben Davenport's training levels, and address substantive issues claiming proper feeding and adequate care of the elephants. I agree with Complainant that these issues are addressed in Findings of Fact 19 and 20, which are contrary to Respondent's proposed findings (Complainant's Response to Appeal at 5).

3. Respondent does not object to Finding of Fact 3 (Respondent's Appeal Petition and Brief at 10-11).

4. Respondent argues that APHIS inspector Gregory Wallen, among other USDA inspectors, approved Respondent's equipment, care, and handling of the

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(...continued)
regarding this issue?

8) Whether the [Initial] Decision and Order is in error when it conclude[s] that Respondent acted willfully through the action of his sons and denied Respondent's contention that the boys were acting outside the course and scope of their employment and he was not liable for their acts?

9) Whether the hearing officer erred in failing to rule in Respondent'[s] favor with respect to the pre-hearing motions filed by Respondent?

Respondent's Appeal Petition and Brief at 2-3.

animals. Further, Respondent argues that Respondent was in substantial compliance with the Animal Welfare Act, which is supported by Respondent's proposed findings, which were unfairly excluded by the Chief ALJ. (Respondent's Appeal Petition and Brief at 11-12.) I infer that Respondent is making two arguments here: 1) that a licensee should be able to rely on a government inspector's compliance findings or advice to insulate the licensee from being charged with subsequent violations; and 2) that APHIS inspector Gregory Wallen actually found Respondent's operations to be in compliance on July 24, 1997. Respondent is wrong on both counts.

First, Respondent posits the question: "[d]oes not the exhibitor have the right to rely on the representation made by the [federal government] expert"? (Respondent's Appeal Petition and Brief at 12). The answer is that Respondent relies on the representations of federal employees at Respondent's peril because it is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice, findings, or compliance determinations of federal employees. *See FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 54-55 (Mar. 20, 1998); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988).

I infer that Respondent's argument is actually based upon equitable estoppel. However, this legal concept is rarely applicable against the federal government, as was described in some detail in two recent cases, as follows:

> The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct. *Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986). One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his position for the worse. *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, *supra*, 965 F.2d at 418.
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> . . . .

> Further, . . . it is well settled that the government may not be estopped on the same terms as any other litigant. *Heckler v. Community Health Services, supra*, 467 U.S. at 60; *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947). It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws. *Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981). Equitable estoppel does not generally apply to the government acting in its sovereign capacity, as it was doing in this case, *United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 416 (1991); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977), and estoppel is only available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government. *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *In re All-Airtransport, Inc.*, *supra*, 50 Agric. Dec. at 418, *citing Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971). Respondents bear a heavy burden when asserting estoppel against the government and they have fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

In re Big Bear Farm, Inc., 55 Agric. Dec. 107, 129-30 (1996). *See also In re Dean Byard*, 56 Agric. Dec. 1543, 1560-61 (1997). Moreover, an examination of the record in the case, *sub judice*, reveals that, if Respondent had made the effort to prove estoppel, Respondent would also fall far short of demonstrating that the traditional elements of estoppel are present.

Second, Respondent is mistaken that this record supports Respondent's contention that APHIS inspector Gregory Wallen's evidence helps Respondent.

As Complainant correctly argues (Complainant's Response to Appeal at 6), Respondent ignores the Chief ALJ's discussion of this issue:

> Respondent's assertion that he should be able to rely on Mr. Wallen's advice that the [trailer] was appropriate to transport the animals is without merit. First, the evidence indicates that Mr. Wallen expressed concern about the ventilation, and in fact told Chewy Davenport that the trailer did not have adequate ventilation with closed doors. Chewy Davenport assured him that the animals would never be in the trailer with the doors closed. (Tr. [181-83].) Based upon this information, Mr. Wallen decided not to cite the trailer as noncompliant. Due to Mr. Wallen's concerns, however, Respondent should not be surprised that the trailer was found to provide insufficient ventilation when the animals were later discovered in the trailer with the doors closed.

Initial Decision and Order at 12.

Respondent contends in his post-hearing brief that in Albuquerque the doors to the vehicle were only closed for a few minutes (Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 33). Respondent reiterates this statement in Respondent's appeal (Respondent's Appeal Petition and Brief at 35). The record shows this statement to be false.

Ben Davenport admitted to Kent Newton, Assistant Director of the Albuquerque Biological Park, that the vehicle arrived in Albuquerque at about 2:00 p.m. on August 6, 1997, and that the doors were closed and remained closed until the city police ordered them opened at about 7:00 p.m. (Tr. 354-55; CX 115 at 1, CX 116 at 1). Albuquerque police officers John Corvino (Tr. 114-15; CX 115 at 1), John Guilmette (Tr. 84; CX 116 at 1), and Duffy Ryan (Tr. 124; CX 117 at 3) all provided evidence of tremendous heat inside the trailer (Complainant's Response to Appeal at 7).

Therefore, I agree with Complainant that APHIS inspector Wallen's mistake was in relying on Respondent's misrepresentations that the doors would not be closed, rather than a mistake by APHIS inspector Wallen in not citing Respondent for a non-compliant trailer. Further, I agree with Complainant that Respondent's Proposed Findings of Fact 90 through 125 concerning Gregory Wallen were properly rejected as irrelevant by the Chief ALJ (Complainant's Response to Appeal at 7-8).

I agree with Complainant that the rest of Respondent's treatment of Finding of Fact 4 is to have a vehicle for arguing that Respondent is not to blame for the elephants' long-standing problems of skin care and foot care and transporting the

llamas in overcrowded conditions (Complainant's Response to Appeal at 8). I agree with Complainant that Respondent's Proposed Finding of Fact 89, having to do with how many people view elephants in the circus, is irrelevant to Respondent's responsibility for the condition of the animals.

Respondent's request to supplement Finding of Fact 4 with Respondent's Proposed Findings of Fact 126 through 137 is an attempt to establish that state veterinarians who test Respondent's animals for particular infectious diseases before allowing admittance to that particular state have also found that the animals have no maladies. This argument was properly rejected by the Chief ALJ, as follows:

> The health certificates submitted by Respondent as RX 5, 6, and 7, indicate only that the animals were tested for tuberculosis. Veterinarians who issue health certificates typically test for communicable diseases and do not conduct extensive physical exams, or attest to the general health of the animals. (Tr. 569-72).

Initial Decision and Order at 20.

Respondent next requests to add Respondent's Proposed Findings of Fact 138 through 140, to establish that Respondent had a written program of veterinary care as required by 9 C.F.R. § 2.40. However, I agree with the Chief ALJ that Respondent did not provide proper veterinary care, which the Chief ALJ concluded is crucial to compliance with 9 C.F.R. § 2.40, as follows:

> Respondent argues that he did not violate § 2.40 because he had an attending veterinarian and a written program of veterinary care; but it is not enough to have a program of care, if actual care is not provided.

Initial Decision and Order at 18. Therefore, I agree with Complainant that Respondent's Proposed Findings of Fact 138 through 140 were properly rejected as irrelevant, and will not be added to Finding of Fact 4.

Finally, Respondent seeks to supplement Finding of Fact 4 with Respondent's Proposed Findings of Fact 73 through 80, advancing the suitability of the trailer for the transport of animals, primarily as to ventilation, but also as to adequate space. Concerning ventilation, Respondent's proposed findings were properly rejected because the evidence establishes that the trailer was not adequately ventilated and the animals were kept on the trailer with the doors closed for a substantial period of time. On adequacy of space for the animals being transported at the time of the violations, it is not true that "Ben Davenport was never informed

by anyone from the United States Department of Agriculture or by any veterinarian that the space [on the trailer in question] was not sufficient for transport[ing the involved animals]." (Respondent's Appeal Petition and Brief at 17.) It is also untrue that Respondent would have made changes if told of inadequacies, because Ben Davenport was told to reduce the number of llamas aboard the trailer from eight to six, but did not do so, as follows:

> Respondent transported 8 llamas in the gooseneck portion of the trailer which measured approximately 8 feet by 8 feet. (CX 75 at 2). This amount of space for eight large animals cannot be said to be sufficient to allow for normal postural and social adjustments. In addition, the space was only about 6 feet high. (CX 75 at 2). Since llamas are almost six feet tall, an enclosure of that height was insufficient for the animals to stretch and move comfortably. (Tr. 257-58).
>
> Respondent again argues that the trailer was approved and that the regulations regarding space are not specific enough. Ben Davenport testified, however, that Mr. Wallen stated that there was not enough room for all 8 llamas in the gooseneck (Tr. 613). Accordingly, Respondent cannot claim that the trailer was approved to transport 8 llamas.

Initial Decision and Order at 15.

5. Respondent objects to Finding of Fact 5 (Respondent's Appeal Petition and Brief at 18). I completely agree with and adopt Complainant's response to Respondent's appeal on Finding of Fact 5:

> Respondent objects to [that] portion of finding of fact 5 that "Chewy Davenport did not have the appropriate food available for the elephants, and instead fed them alfalfa hay and rabbit pellets" on the grounds that "[i]t is not inappropriate to feed alfalfa hay and rabbit pellets unless they are fed too much." ([Respondent's Appeal Petition and Brief at] 18). However, Ben Davenport admitted on cross-examination that "[w]hen you give an elephant alfalfa, it's very rich in their system. It tends to give them diarrhea." (Tr. 640.) The record is clear that the elephants were fed alfalfa hay and rabbit pellets instead of, not in addition to, their regular diet (CX 124). Accordingly, Respondent's objection to this finding is without merit. It may be noted that even if the finding were modified as Respondent requests, it would still result in a conclusion that he violated the regulations.

Complainant's Response to Appeal at 9-10.

6. Respondent objects to Finding of Fact 6 because it does not include the information on Heather's condition and treatment contained in Respondent's Proposed Findings of Fact 19 through 29. Respondent requests that Findings of Fact 5 and 6 be supplemented with Respondent's Proposed Findings of Fact 19 through 29. (Respondent's Appeal Petition and Brief at 18-19.) However, Respondent neither argues the relevancy of Respondent's information nor alleges error by the Chief ALJ. I find most of the additional information irrelevant, but with respect to Respondent's request to add statements, such as Heather "appeared to be mostly recovered," and she "was in good shape except she wasn't moving much" (Respondent's Proposed Finding of Fact 23), the Chief ALJ properly excluded these proposed findings of fact. The Chief ALJ held a very different view of the facts, as follows:

> Heather was transported in obvious physical distress. She suffered from profuse diarrhea while in Pahrump, Nevada, and although she may have shown some improvement after a change in diet, she still was experiencing loose stools when Ben Davenport loaded her on the trailer and left for Dillon, Colorado. [(Tr. 53-58.)] In addition, Ben Davenport did not provide veterinary care as soon as possible after discovering that her condition had worsened. [(Tr. 639-40.)] Instead, he continued to transport her while [she was] in obvious physical distress in violation of the standards. He claims that his actions were based on instructions from Dr. Tate [(Tr. 640-42; CX 124 at 1).] However, the only person to whom he spoke was his father [(Tr. 615)]. Dr. Tate testified that he was not informed that Heather's condition had deteriorated and that he did not give instructions to return her to Texas [(Tr. 135-36)].
>
> Ben Davenport further claims that he did not know Heather was in serious physical distress. His lack of knowledge, however, does not excuse the violation. If he had been in direct contact with Dr. Tate, or if he had been properly trained in elephant care, he would have realized the seriousness of the condition.

Initial Decision and Order at 14-15. Therefore, I deny Respondent's request to add Respondent's Proposed Findings of Fact 19 through 29.

7. Respondent requests that Respondent's Proposed Findings of Fact 30 through 39 be added to Finding of Fact 7 (Respondent's Appeal Petition and Brief at 19-20). Respondent does not allege error or present any argument. Some of

Respondent's proposed findings directly contravene the Chief ALJ's conclusions. For example, Respondent's veterinarian, Dr. Glen Tate, was not fully informed of Heather's condition, and Dr. Tate did not instruct Respondent to return Heather to Texas (Initial Decision and Order at 18). I deny Respondent's request to add Respondent's Proposed Findings of Fact 30 through 39 to Finding of Fact 7.

8. Respondent's request to supplement Finding of Fact 8 (Respondent's Appeal Petition and Brief at 20-21) with extraneous, irrelevant information from Respondent's Proposed Finding of Fact 40 is denied.

9. Respondent's request to supplement Finding of Fact 9 (Respondent's Appeal Petition and Brief at 21) with extraneous, irrelevant information from Respondent's Proposed Findings of Fact 41 through 46 is denied.

10. Respondent's request to supplement Finding of Fact 10 with Respondent's Proposed Findings of Fact 81 through 85 (Respondent's Appeal Petition and Brief at 21-22) is denied. The additional information neither explains the violations nor explains the evasive and false statements given police by Respondent's employees.

11 and 12. Respondent seeks to add Respondent's Proposed Findings of Fact 47 through 49 to Findings of Fact 11 and 12 (Respondent's Appeal Petition and Brief at 22-23). Complainant argues that the purpose of adding Respondent's proposed findings is to minimize the seriousness of the animals' confinement in the inadequately ventilated trailer by emphasizing the period of time the trailer was in the hotel parking lot (Complainant's Response to Appeal at 12). I would add that Respondent is attempting to establish that the temperature in the trailer was lower than estimated by Albuquerque police. As shown in my discussion in Finding of Fact 4, the trailer arrived in Albuquerque at 2:00 p.m., August 6, 1997, the doors were closed until 7:00 p.m., when opened by the city police, one of whom estimated the temperature in the trailer at 130 °F (CX 117 at 3). The temperatures on this sunny day were up to 88 °F and then decreased slowly until dusk (CX 4). I infer that an inadequately ventilated metal trailer containing 11 large animals on asphalt on a sunny almost 90-degree afternoon will easily achieve temperatures of 130 °F or more. Animals in nature do not experience these conditions. Respondent's request to add Respondent's Proposed Findings of Fact 47 through 49 to Findings of Fact 11 and 12 is denied.

13 and 14. Respondent does not object to Findings of Fact 13 and 14 (Respondent's Appeal Petition and Brief at 23).

15. Respondent requests supplementing Finding of Fact 15 with Respondent's Proposed Findings of Fact 50 through 57 (Respondent Appeal Petition and Brief at 23-24). I deny this request because the proposed findings are not material. Additionally, the statement that Heather was "in good nutritional

condition (adequate body fat) (CX-51)," in Respondent's Proposed Finding of Fact 53 is also false. The Chief ALJ addressed this argument, as follows:

> Respondent stresses that Dr. Thilstead made findings in his necropsy report that Heather had water in her stomach [(CX 51 at 1)], and was "in good nutritional condition (adequate body fat)." (CX 51 [at 1]). Dr. Thilstead explained in his testimony, however, that the statement about the nutritional condition meant only that the animal did not die of starvation [Tr. 408)]. He also explained that it was difficult to clearly evaluate the body condition because of post-mortem decomposition. (Tr. 408). Dr. Thilstead further testified that the water in Heather's stomach indicated that she had ingested water within 12 hours prior to her death, whereas lack of food indicated that she had not eaten anything in the prior 8 to 12 hours. (Tr. 415, 426).

Initial Decision and Order at 21-22.

16, 17, and 18. Respondent does not object to Findings of Fact 16 through 18 (Respondent Appeal Petition and Brief at 24).

19. Respondent seeks to supplement Finding of Fact 19 with Respondent's Proposed Findings of Fact 65, 69, and 72 (Respondent Appeal Petition and Brief at 24-25). I reject this request. Respondent's proposal that the reason for Donna's weight loss while at the Albuquerque Biological Park, later regained, was lack of contact with Ben Davenport, is unsubstantiated and immaterial. Respondent's elephants, even after factoring in variability, were undernourished. The elephants' appearance and comparable weights of normal elephants demonstrate undernourishment. Kent Newton, Assistant Director of the Albuquerque Biological Park, testified that he had 23 years of zoo experience learning how animals should look, and that Donna was not a little bit underweight, but was in trouble (Tr. 380).

20. Respondent seeks to supplement Finding of Fact 20 with Respondent's Proposed Findings of Fact 59 through 69, because Finding of Fact 20 is "incomplete" (Respondent's Appeal Petition and Brief at 25-26). Actually, Respondent's Proposed Findings of Fact 59-69 seek to exonerate Respondent on skin and foot care, going so far as to claim that Ben Davenport did a "very good job with respect to skin care on the animals." I agree with Complainant that the record evidence, both testimony and photographs, is overwhelming that Respondent grossly neglected the elephants' skin and foot care for an extended period (Complainant's Response to Appeal at 14). Since Respondent's proposed findings seek to obscure or to ameliorate Respondent's failure to provide proper

skin and foot care, I reject Respondent's offering.

21. Respondent does not object to Finding of Fact 21 (Respondent's Appeal Petition and Brief at 26).

22 and 23. Respondent objects to various portions of Findings of Fact 22 and 23 (Respondent's Appeal Petition and Brief at 27-30). I have carefully examined the Chief ALJ's Findings of Fact 22 and 23, which are an accurate rendition of the results of the several inspections performed by APHIS inspector, Warren Striplin, on August 7-10, 1997. I have also carefully examined Respondent's comments after some of the findings, but there are no material arguments which I have not already addressed.

Respondent concludes the section on findings of fact by listing several additional requested "uncontroverted" findings to be added to the Findings of Fact, *inter alia*, the expertise of Mr. Kendall in animal care, Respondent's shows are for charities, Respondent and Respondent's employees do not mistreat animals, and Respondent was misled by non-specificity in the ventilation standards (Respondent's Appeal Petition and Brief at 30-31). These proposed findings are rejected either because they are irrelevant, or have already been correctly decided against Respondent by the Chief ALJ: Respondent's trailer had inadequate ventilation; it is irrelevant that Respondent's shows are conducted for charitable organizations; it is not uncontroverted that Respondent and Respondent's employees do not mistreat animals; and Mr. Kendall is principally a lobbyist with no advanced animal care training.

Respondent offers 14 Proposed Conclusions of Law (Respondent's Appeal Petition and Brief at 31-33), which are identical to the 14 Proposed Conclusions of Law in Respondent's post-hearing brief (Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 26-29). Respondent states that his Proposed Conclusions of Law were "wrongfully rejected" in the Initial Decision and Order, but gives no reasons for this belief. I find that the Chief ALJ's fully-reasoned opinion did not wrongfully reject Respondent's Proposed Conclusions of Law, and without argument by Respondent to show otherwise, I must reject Respondent's Proposed Conclusions of Law.

Likewise, Respondent's Proposed Order (Respondent's Appeal Petition and Brief at 33-34) is a verbatim repetition of Respondent's Proposed Order from Respondent's post-hearing brief (Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 29-30). Again, Respondent contends that the Initial Decision and Order wrongly denied Respondent's Proposed Order. However, Respondent offers no argument to support this claim, which is rejected.

Respondent's Discussion of Appeal (Respondent's Appeal Petition and Brief

at 34-45) is virtually identical to Respondent's Discussion in Respondent's post-hearing brief (Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 30-44). Consequently, Respondent presents no arguments on appeal which were not earlier presented to the Chief ALJ. I find that the Chief ALJ properly addressed and correctly disposed of all the arguments in Respondent's Discussion of Appeal. Thus, there is no reason to analyze this section further.

Respondent makes several arguments that no sanctions should be imposed upon Respondent (Respondent's Appeal Petition and Brief at 45-46); but, again, these arguments are copied verbatim from Respondent's post-hearing brief (Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 44-45). These arguments were considered by the Chief ALJ in fashioning the Initial Decision and Order, and without Respondent providing some reason to find error, I find that the Chief ALJ properly decided these issues.

Respondent reiterates verbatim Respondent's principal-agent argument from Respondent's post-hearing brief (Respondent's Appeal Petition and Brief at 46-47). There is no merit to this argument that Respondent's sons and the others working for Respondent acted outside the scope of their employment. The Chief ALJ is correct that the statute is clear that the actions of an employee or someone acting on behalf of Respondent are deemed the actions of the Respondent (Initial Decision and Order at 24-25).

Before turning to the sanction, I address the only part of Respondent's appeal not reiterated from Respondent's post-hearing brief: the Chief ALJ's denial of Respondent's numerous pre-hearing motions (Respondent's Appeal Petition and Brief at 48). Respondent contends that "denial of these [pre-trial] motions resulted in a denial of other constitutional rights as guaranteed by the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution" (Respondent's Appeal Petition and Brief at 48). However, Respondent makes no arguments to support his contention that the Chief ALJ's denial of Respondent's pre-trial motions violated Respondent's constitutional rights.

The Chief ALJ's Summary of Teleconference, filed September 24, 1997, memorializes the Chief ALJ's disposition of each of Respondent's pre-trial motions. I find no error in the Chief ALJ's disposition of these motions. My examination of the procedural due process accorded Respondent by the Chief ALJ reveals no deprivation of Respondent's constitutional due process rights.

Moreover, to the extent that denial of Respondent's pre-trial motions might violate Respondent's constitutional rights, it is incumbent upon Respondent to provide enough detail in an appeal to show how his constitutional rights may have been violated. Since Respondent makes no arguments beyond bald assertions of

deprivations of constitutional rights, I must reject this claim.

Sanction

Turning to the sanction, the Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36–3), as follows:

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

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497. The Secretary has many discretionary sanctions for remedial purposes in enforcing the Animal Welfare Act, including temporary license suspensions without a hearing; lengthier suspensions or revocations after notice and hearing; civil penalties; and cease and desist orders, as set forth in section 19 of the Animal Welfare Act (7 U.S.C. § 2149).

For the nature of the violations in this proceeding, Complainant recommends permanent revocation of Respondent's Animal Welfare Act license, a $200,000 civil penalty, a cease and desist order, and an order prohibiting Respondent from engaging in any activity as an exhibitor or dealer (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 12-13, 23-29).

Complainant's sanction recommendation is within the range of sanctions in these kinds of cases. The Department consistently imposes significant sanctions

for violations of the Animal Welfare Act and the Regulations and Standards.[7] The Department in the past has permanently disqualified persons from obtaining Animal Welfare Act licenses or revoked Animal Welfare Act licenses for less

[7]*See, e.g., In re C.C. Baird*, 57 Agric. Dec. ___ (Mar. 20, 1998) (imposing a $9,250 civil penalty and a 14-day suspension for 67 violations of the Animal Welfare Act and the Regulations); *In re Peter A. Lang*, 57 Agric. Dec. ___ (Jan. 13, 1998) (imposing a $1,500 civil penalty for one violation of the Regulations); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458 (1997) (imposing a $7,500 civil penalty and a 40-day suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards) (Order Denying Pet. for Recons.); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards) (Modified Order); *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Lifting Stay Order and Decision and Order); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 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).

serious and fewer violations than are found in this proceeding.[8] As to the civil penalty, the Animal Welfare Act authorizes up to $2,500 *per violation per day.* "Each violation and each day during which a violation continues shall be a separate offense" (7 U.S.C. § 2149(b)).

The criteria for civil penalties in 7 U.S.C. § 2149(b) are: "[t]he Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations."

As for the size of Respondent's business, the Chief ALJ found that Respondent operated with 20 animals, some worth $80,000 to $100,000, as follows:

> There was very little evidence admitted with respect to the size of Respondent's business. The January 1997 license renewal application indicates that Respondent exhibits 20 animals. (CX 2). In addition, there was testimony that the elephants at issue are worth $80,000 to $100,000 each. (Tr. 616). As such, the size of Respondent's business is sufficiently large that a $200,000 sanction cannot for that reason, be said to be excessive.

Initial Decision and Order at 25-26. I agree with the Chief ALJ that Respondent operated a large business.

I also agree with the Chief ALJ that Respondent has previous violations, as follows:

> Respondent also has a history of violations. Orders were issued against Respondent in two prior cases. A default order was entered in *In re: John D. T. Davenport and William I. Swain, d/b/a Jungle Wonder Circus*, 40 Agric. Dec. 209 (1980); and a consent decree was entered in *In re:*

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[8] *See, e.g., In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards) (Modified Order); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 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).

John D. Davenport, d/b/a/ King Royal Circus, AWA Docket No. 96-18 (Mar. 4, 1996) [(55 Agric. Dec. 426 (1996))].

Initial Decision and Order at 26. In *In re John D.T. Davenport*, *supra*, Respondent was one of two Respondents found to have violated the Regulations and Standards designed to keep the public at a safe distance from animals. Findings of Fact 2, 3, and 4, respectively, state that on or about July 29, 1979, Respondent failed to rope off the traveling cage of a black bear, resulting in the serious mauling, with permanent injuries, of an 8-year-old boy; that on or about July 24, 1979, Respondent failed to block access to a black bear, resulting in an 8-year-old girl being bitten on the finger; and that on or about September 20, 1979, USDA compliance officers detected that the feeding door on the bottom of a tiger cage, accessible to small children, was open and not secure (40 Agric. Dec. at 210-11).

Respondent's March 4, 1996, consent decision, *In re John D. Davenport*, 55 Agric. Dec. 426 (1996), does not prove a prior violation, but it can be used to determine the sanction necessary to deter Respondent from violating the Animal Welfare Act, as follows:

> I am in complete agreement with the views of the Chief ALJ. Although Respondent entered into five prior consent decisions (see note 1, *supra*), these prior consent orders do not show prior violations by Respondent [footnote omitted]. However, the fact that the five prior consent orders did not deter the violations at issue here "could be used to determine what kind of sanction is needed to *deter* [Respondent] from conduct prohibited by the statute." *Spencer Livestock Comm'n Co. v. USDA*, 841 F.2d 1451, 1458 (9th Cir. 1988).

In re Delta Air Lines, Inc., 53 Agric. Dec. 1076, 1085 (1994).

Respondent's violations are very serious because they go to the heart of the Animal Welfare Act, especially USDA's efforts to enforce regulations designed to protect the health and well-being of exhibited exotic species. For example, lack of proper feeding of the elephants, Donna and Heather, resulted in undernourishment such that the animals were grossly underweight. Inadequate nourishment, lack of veterinary care, lack of routine skin care, and lack of foot hygiene for the elephants contributed to the death of Heather, and to the poor physical condition of Donna. These are serious violations of the Animal Welfare Act and the Regulations and Standards.

On the issue of good faith, I agree with the Chief ALJ that Respondent did not

exhibit good faith. Ben Davenport lied to Albuquerque City Police about the animals in the trailer, and later refused to cooperate with Rio Grande Zoological Park personnel attempting to teach him proper animal care. Respondent John D. Davenport refused to accept responsibility for his animals, instead blaming the Department, animal rights activists, and others, for his problems.

After examining all relevant circumstances in light of the Department's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendation of the administrative officials, I conclude that a cease and desist order, a permanent revocation of Respondent's Animal Welfare Act license, a permanent ban on Respondent's engaging in activity as an exhibitor or dealer, and a $200,000 civil penalty, are appropriate.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act; in particular, Respondent shall cease and desist from:

(a) Failing to keep and maintain complete records showing the acquisition, disposition, and identification of animals;

(b) Failing to provide veterinary care to animals as needed;

(c) Failing to handle animals in a manner which does not cause trauma, overheating, behavioral stress, physical harm, and unnecessary discomfort to the animals;

(d) Failing to use for the transportation of animals a primary conveyance which has an animal cargo space designed and constructed to provide necessary ventilation and to otherwise protect the health and ensure the safety and comfort of the animals contained in the cargo space at all times;

(e) Transporting animals which are in obvious physical distress;

(f) Transporting animals in primary enclosures which do not provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement;

(g) Transporting animals in primary enclosures which do not contain clean litter of a suitable absorbent material in sufficient quantity to absorb and cover excreta; and

(h) Failing to provide animals with food appropriate for that species.

The cease and desist provisions of this Order shall become effective on the day

after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $200,000. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and sent to: Frank Martin, Jr., Esq., United States Department of Agriculture, Office of the General Counsel, 1400 Independence Avenue, SW, Room 2014-South Building, Washington, D.C. 20250-1417. Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Martin within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 97-0046.

3. Respondent's license is permanently revoked, and Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act. The Animal Welfare Act license revocation and permanent disqualification provisions of this Order shall become effective on the 65th day after service of this Order on Respondent.

4. Respondent shall not, directly or indirectly through any corporate entity, agent, or other device, engage in any activity as an exhibitor or dealer within the meaning of the Animal Welfare Act and the Regulations issued under the Animal Welfare Act. In particular, and without limitation of the preceding sentence, Respondent shall not operate as an independent contractor, in conjunction with any exhibitor or dealer, nor shall Respondent lease, rent, or otherwise provide animals to any person or entity or undertaking engaged in business as an exhibitor or dealer. The provisions of this debarment from activity as an exhibitor or a dealer under the Animal Welfare Act shall become effective on the 65th day after service of this Order on Respondent.

In re: MARILYN SHEPHERD.
AWA Docket No. 96-0084.
Decision and Order filed June 26, 1998.

Cease and desist order — Civil penalty — License suspension — Willful — Sanction policy — Disqualification order — Preponderance of the evidence — Failing to provide adequate veterinary care — Failing to identify dogs — Failing to provide adequate housing — Failing to provide clean primary enclosures — Failing to provide protection from the elements — Correction dates.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to comply with the Regulations by not providing veterinary care to an animal (9 C.F.R. § 2.40) and by failing to identify dogs (9 C.F.R. § 2.50); that Respondent failed to comply with the Standards of care for animals; that Respondent failed to maintain dog housing facilities in good repair (9 C.F.R. § 3.1(a)); that Respondent failed to provide

housing surfaces free of excessive rust (9 C.F.R. § 3.1(c)(1)(I)); that Respondent failed to dispose of waste properly (9 C.F.R. § 3.1(f)); that Respondent failed to provide outdoor dog housing facilities which protect dogs from the elements (9 C.F.R. § 3.4(b)); that Respondent failed to provide primary enclosures that were structurally sound, free of sharp points or edges, and kept clean (9 C.F.R. §§ 3.6(a)(1), .11(a)); and that Respondent failed to keep food and water receptacles clean and sanitized (9 C.F.R. §§ 3.9(b), .10), as required by the Animal Welfare Act and the Regulations and Standards. A violation is willful within the meaning of the Administrative Procedure Act if a person carelessly disregards statutory requirements. *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996). The Judicial Officer found that Respondent's violations were willful. The Department's sanction policy places great weight upon the recommendations of administrative officials, who recommended a $5,000 civil penalty, a 10-day suspension, and a cease and desist order. However, the Judicial Officer: (1) issued a cease and desist order, (2) assessed a $2,000 civil penalty, and (3) suspended Respondent's license for 7 days, or if Respondent is not licensed, disqualified Respondent from becoming licensed for 7 days.

Sharlene A. Deskins, for Complainant.
Marilyn Shepherd, pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on September 24, 1996.

The Complaint alleges that Marilyn Shepherd [hereinafter Respondent] willfully violated the Animal Welfare Act and the Regulations and Standards by failing to properly identify animals and by failing to comply with the Regulations and Standards relating to the care and housing of animals. On October 17, 1996, Respondent filed an Answer denying the material allegations of the Complaint, and on October 24, 1996, Respondent filed a Supplemental Answer, requesting a hearing.

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing on July 16, 1997, in Springfield, Missouri. Sharlene Deskins, Esq., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Respondent represented herself. On September 10, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof [hereinafter Complainant's Brief]. On September 15, 1997, Respondent filed a Brief [hereinafter Respondent's Brief]. On October 8, 1997, Respondent filed a response to Complainant's Brief [hereinafter Respondent's Response].

On October 30, 1997, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] assessing Respondent a civil penalty of $600 and ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On December 1, 1997, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* On January 14, 1998, Complainant filed Complainant's Appeal Petition, Brief in Support of Its Appeal Petition and Opposition to the Respondent's Appeal Petition [hereinafter Complainant's Appeal Petition], in which Complainant opposes Respondent's request for oral argument. Oral argument, which the Judicial Officer may grant, limit, or refuse (7 C.F.R. § 1.145(d)), is refused, since the issues have been well briefed, and no useful purpose would be served by oral argument. On March 24, 1998, Respondent filed a response to Complainant's Appeal [hereinafter Respondent's Reply]. On March 26, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ that Respondent violated** the Animal Welfare Act and the Regulations and Standards, as alleged in paragraphs II(3); III(1)-(3), (5)-(6), (9)-(11); IV(1)-(2), (4); V(1), (3); VI(B)(1)-(3); VII; and VIII(A), (B), (C) of the Complaint. Therefore, pursuant to the Rules of Practice (7 C.F.R. § 1.145(i)), I am adopting the Initial Decision and Order as the final Decision and Order, with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law.

Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

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*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

**The ALJ did not find that Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful. As discussed in this Decision and Order, *infra*, I find that Respondent's violations were willful.

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

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

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes. . . .

. . . .

§ 2141. Marking and identification of animals

All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe: *Provided*, That only live dogs and cats need be so marked or identified by a research facility.

. . . .

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2131, 2132(f), 2141, 2149(a), (b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance

with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

SUBPART E--IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

(a) A class "A" dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified

by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats [footnote omitted], or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

(2) Live puppies or kittens, less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats [footnote omitted]; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has

legibly placed thereon the information required for an official tag pursuant to § 2.51.

. . . .

(d) Unweaned puppies or kittens need not be individually identified as required by paragraphs (a) and (b) of this section while they are maintained as a litter with their dam in the same primary enclosure, provided the dam has been individually identified.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS [Footnote omitted]

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

(a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

. . . .

(c) *Surfaces*—(1) *General requirements.* The surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed

or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]

. . . .

(2) *Maintenance and replacement of surfaces.* All surfaces must be maintained on a regular basis. Surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

. . . .

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and the animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

. . . .

§ 3.3 Sheltered housing facilities.

. . . .

(e) *Surfaces.* (1) The following areas in sheltered housing facilities

must be impervious to moisture:

(i) Indoor floor areas in contact with the animals[.]

. . . .

§ 3.4 Outdoor housing facilities.

. . . .

(b) *Shelter from the elements.* Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

(1) Provide the dogs and cats with adequate protection and shelter from the cold and heat;

(2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;

(3) Be provided with a wind break and rain break at the entrance; and

(4) Contain clean, dry, bedding material if the ambient temperature is below 50 °F (10 °C). Additional clean, dry bedding is required when the temperature is 35 °F (1.7 °C) or lower.

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities—including houses, dens, etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

. . . .

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum

requirements:

(a) *General requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

(2) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the dogs and cats;

(ii) Protect the dogs and cats from injury;

. . . .

(iv) Keep other animals from entering the enclosure;

. . . .

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.8 Exercise for dogs.

Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise. In addition, the plan must be approved by the attending veterinarian. The plan must include written standard procedures to be followed in providing the opportunity for exercise. The plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding Federal agency. . . .

. . . .

§ 3.9 Feeding.

. . . .

(b) Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize

contamination by excreta and pests, and be protected from rain and snow. Feeding pans must either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Sanitization is achieved by using one of the methods described in § 3.11(b)(3) of this subpart. If the food receptacles are disposable, they must be discarded after one use. Self-feeders may be used for the feeding of dry food. If self-feeders are used, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Measures must be taken to ensure that there is no molding, deterioration, and caking of feed.

§ 3.10 Watering.

If potable water is not continually available to the dogs and cats, it must be offered to the dogs and cats as often as necessary to ensure their health and well-being, but not less than twice daily for at least 1 hour each time, unless restricted by the attending veterinarian. Water receptacles must be kept clean and sanitized in accordance with § 3.11(b) of this subpart, and before being used to water a different dog or cat or social grouping of dogs or cats.

§ 3.11 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with wire or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards[,] pests, insects[,] and odors.

(b) *Sanitization of primary enclosures and food and water receptacles.* (1) Used primary enclosures and food and water receptacles must be cleaned and sanitized in accordance with this section before they can be used to house, feed, or water another dog or cat, or social grouping of dogs or cats.

(2) Used primary enclosures and food and water receptacles for dogs and cats must be sanitized at least once every 2 weeks using one of the methods prescribed in paragraph (b)(3) of this section, and more often if necessary to prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards.

(3) Hard surfaces of primary enclosures and food and water receptacles must be sanitized using one of the following methods:

(i) Live steam under pressure;

(ii) Washing with hot water (at least 180 °F (82.2 °C)) and soap or detergent, as with a mechanical cage washer; or

(iii) Washing all soiled surfaces with appropriate detergent solutions and disinfectants, or by using a combination detergent/disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surfaces to remove organic material, so as to remove all organic material and mineral buildup, and to provide sanitization followed by a clean water rinse.

(4) Pens, runs, and outdoor housing areas using material that cannot be sanitized using the methods provided in paragraph (b)(3) of this section, such as gravel, sand, grass, earth, or absorbent bedding, must be sanitized by removing the contaminated material as necessary to prevent odors, diseases, pests, insects, and vermin infestation.

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

9 C.F.R. §§ 1.1; 2.40, .50(a), (b), (d), .100(a); 3.1(a), (c)(1)(i), (c)(2), (f), .3(e)(1)(i), .4(b), (c), .6(a)(1), (a)(2)(i), (a)(2)(ii), (a)(2)(iv), (a)(2)(xi), .8, .9(b), .10, .11(a), (b), (c).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . .

Statement of Facts

Respondent . . . has, since [January 20,] 1990[,] owned and operated a kennel in Ava, Missouri, which her father had started [(Tr. 211)]. Respondent has about 200 adult breeding dogs [(Tr. 213)] and a varying number of puppies [(CX 1 at 1, item 9 (60 puppies); CX 2 at 1, item 9 (30 puppies); CX 4 at 1, item 9 (84 puppies); CX 6 at 1, item 9 (61 puppies); CX 7 at 1, item 9 (16 puppies); CX 8 at 1, item 9 (39 puppies); CX 9 at 1, item 9 (55 puppies); and CX 10 at 1, item 9 (24 puppies))]. She sells the dogs mostly to brokers [(Tr. 212)]. Respondent was licensed by [the Animal and Plant Health Inspection Service [hereinafter APHIS]] as a dealer until June 1997, when her [class B] license[] expired [and] APHIS refused to re-license her [(Tr. 212, 217)].

Respondent is assisted in the overall operation of the kennel by Ronnie Williams [(Tr. 62, 179-80)] and has two full-time and several part-time workers [(Tr. 283)]. At approximately the center of the kennel is a mobile home that Respondent converted into an animal shelter where dogs with puppies are kept [(Tr. 279)]. The shelter is lined with fiberglass that is washable and impervious to moisture [(Tr. 279)]. The shelter has 25 separate pens with doors leading to outside runs [(Tr. 279)]. The runs in the front of the shelter are concrete, while the runs in the back, where the puppies are kept, are elevated with wire mesh to keep the puppies clean and dry [(Tr. 279-80)]. Respondent also has about 40 outdoor doghouses [(Tr. 213)]. Respondent, who says that she wants her dogs to be "happy and healthy" with room to run, provides them with runs that are 150 feet long and 50 feet wide (Tr. 226).

The pens are separated by a 6-foot chain link fence [(Tr. 280)] and an electric fence to restrain the dogs [(Tr. 50-53)]. The electric fence, which her father had installed [(Tr. 230)], has one wire 6 inches off the ground with a second wire about 2 feet above ground level [(Tr. 51-52)]. The entire facility is surrounded by a "field" fence [(Tr. 227, 230)]. In addition to the kennel dogs, Respondent also owns, as personal pets, another six dogs that are free to roam the area [(Tr. 230-31)].

Until 1994, Respondent was inspected by APHIS inspectors about once a year [(Tr. 33, 213)]. These inspections revealed no significant problems with Respondent's compliance with the Animal Welfare Act, except for [a failure to

properly identify dogs] in 1992 [(Tr. 213-14, 278). Respondent] then began tattooing her dogs to identify them individually because of problems [Respondent] encountered when [Respondent] had used tags for that purpose, i.e., dogs losing their tags [(Tr. 214-15). Respondent] tattooed a four-digit identification in a dog's ear, but, when APHIS required a five-digit code, [Respondent] found that it would not fit in the ear of a small dog or puppy. [Respondent] had to buy new and more expensive electric tattooing equipment to put the tattoo on a dog's flank. (Tr. 217-18.)

In March 1994, the regional APHIS office [in Ft. Worth, Texas,] received a call from an animal [rights] activist, [most likely] named Jim Swaine, who accused Respondent of not providing food and water to her animals [(Tr. 12-13, 19-20)]. APHIS' policy is to conduct an inspection when[ever] it receives a complaint. [APHIS officials] refer to such inspections as "complaint driven." (Tr. 20, 125-26.)

APHIS inspector Joe Johnston conducted [a "complaint driven"] inspection [on March 2, 1994 (CX 1)]. Inspector Johnston had inspected Respondent's kennel in the past and said that he had found "nothing really unusual" at these inspections: "Nothing just -- Sometimes she would -- It seemed like to me sometimes she would have a violation or two or -- and then she would correct them." [(Tr. 28.)] As for the complaint-driven inspection [inspector] Joe Johnston conducted on March 2, 1994, he testified that he found no basis for Mr. Swaine's claim that the animals were not receiving food and water. Overall, he said, the facility was a "fairly good kennel." [(Tr. 13.)] He nevertheless proceeded to inspect "every pen, [every] run, [every] dog[. . . ." (Tr. 16.)] He found that one dog was emaciated and that another had a prolapsed uterus and that both needed a "vet's" attention; that one doghouse was in poor repair; and that 12 dogs, although individually identified, did not have a kennel identification [(Respondent's USDA-assigned license number "MOBAD")]. (Tr. 13[-14], 28-29; [CX 1].) Jim Swaine, the [animal rights] activist, called [inspector] Johnston at his home several times thereafter to complain about Respondent's kennel[; and Mr. Swaine called inspector Gauthier in California, while inspector Gauthier was on assignment out of his normal territory, the territory encompassing Respondent's kennel, to complain about Respondent's kennel]. (Tr. [22-]23[, 124-25].)

Respondent testified that she had recently purchased the emaciated dog in that condition and had assumed that the condition was due to the dog being "wormy" which, in the majority of instances, is the cause of the emaciation. [Respondent testified that emaciation] . . . can usually be corrected by worming the emaciated dog. However, when the dog did not [gain] weight after being wormed, Respondent had the dog [examined] by her veterinarian who found that the dog's

condition was caused by a liver disease. Respondent had the dog euthanized. (Tr. 218-19.)

As for the dog with the prolapsed uterus, Respondent's veterinarian, Dr. J. A. Schmidt, testified that dogs with a prolapsed uterus are often seen in the breeding industry and that the condition occurs in some dogs when they are pregnant or in heat and that the condition resolves itself. The treatment he prescribes in the meantime is to keep the dog clean and safe from injury by other dogs. (Tr. 154-55.)

Respondent testified that she was aware of the dog's condition at the time of the inspection and was following Dr. Schmidt's advice to keep the dog clean and safe. She also said that the veterinarian told her that the dog would have the problem every time the dog went into heat. Rather than have the dog destroyed, Respondent found a "good home" for the dog whose new owner agreed to have her spayed. (Tr. 219-21.)

A follow-up inspection was conducted a month later, on April 1, 1994, by APHIS inspector Jim Gauthier. . . . Inspector Gauthier [found no new violations and] found that the deficient items that inspector Johnston had reported had been corrected, except that identification tags had not been put on the dogs. (CX 2 [at 2]; Tr. 36-37, 42.)

Inspector Gauthier conducted another inspection on August 30, 1994 [(Tr. 42)]. He was accompanied by a state inspector [(Tr. 43). Inspector Gauthier] noted on his inspection report that [Respondent's failure] to provide kennel identification was to be corrected by September 16, [1994 (Tr. 44; CX 4 at 2)]. He also found that the treatment being provided to a bull mastiff for a skin problem was not working [(Tr. 45-46; CX 4)]. Inspector Gauthier's inspection report states that he found that two doghouses had loose windbreaks while another three did not have windbreaks; that two [doghouses] had no floors; that three [doghouses] had loose or broken wires; and that a "few" water pans were turning green (CX 4).

Inspector Gauthier testified that he remembered that the bull mastiff had dry, rough skin. As for the other violations at the kennel, he said they were "typical" for that type of facility:

> [Respondent Marilyn Shepherd] has wooden dog houses. Any time you have wooden dog houses with the number of dogs that Marilyn has, you're going to get wood rot and you're going to have dry rot, you're going to have dogs chewing on them. They are typical wooden house problems that come with using wooden dog houses and you can't get away from it unless you get away from the wooden dog houses.

Tr. 46.

Respondent admitted that:

> You know, as Mr. Gauthier testified, any time you use a wooden dog house, it's just a matter of constant maintenance. You just have to watch them. It's virtually impossible to have every scratch painted at every second. I mean, while I'm painting one house, the dog's over there chewing the wood off another one.

Tr. 222-23. Ronnie Williams testified that in 30 minutes a dog can "chew plumb through a two by six if he gets in the mood to chew" and that one bulldog chewed all the way through a windbreak in one morning (Tr. 197).

As for cleaning the water pans, Respondent testified that she has the water pans rinsed [with fresh water and refilled with fresh water] every day (Tr. 224). Ronnie Williams, who helps Respondent operate the kennel, testified that, although the water pans are disinfected every 1 to 2 weeks with a chlorine solution, algae can form overnight in the summer, but that it is not harmful to dogs, and that a dog's water pan is going to look dirty just as soon as a dog with dirt on its muzzle puts it in a water pan to drink (Tr. 178).

As for the bull mastiff with the skin problem, Respondent testified that the dog had been examined by her veterinarian and that she had called him about the care for the dog (Tr. 224-25). The veterinarian, Dr. Schmidt, testified that there can be several causes for a dog's skin problem and that the condition can sometimes take months to heal. He said that a person could not tell whether the condition had improved just by looking at it once in the course of its treatment. (Tr. 151-52, 172.)

Inspector Gauthier conducted another inspection on September 19, 1994 (Tr. 50). However, no inspection report was presented concerning the results of that inspection.

Inspector Gauthier's next inspection was on March 27, 1995 [(CX 6)]. The inspection report states that two doghouses needed windbreaks and that the water receptacles needed to be cleaned [(CX 6 at 2, item 7, III, #23, #35)]. It also states that the electric fence needed to be changed to protect the dogs from outside animals (CX 6 [at 2, item 7, III, #29]).

The electric fence had not been previously cited as a non-compliant matter by either inspector Gauthier or inspector Johnston at any of the inspections that they had conducted of the facility over almost a 5-year period. Bruce Mammeli, an APHIS supervisor, claimed that he was unaware of the electric fence until he visited Respondent's facility in the fall of 1994. [(Tr. 140.)] He decided that it did

not meet APHIS' requirements for a primary enclosure because he did not believe that the fence would keep large dogs in and predators out. He advised [Respondent] to request a variance. (Tr. 140-142.) The request was denied in a letter from APHIS, dated May 19, 1995, which states in part:

> An electric fence, such as yours is not structurally sound, as the standards for primary enclosures require. Also there have been instances of animals escaping and or being electrocuted in facilities that have utilized electric fences for the primary enclosure. . . .
>
> The use of electric fences as primary enclosures and or perimeter fences does not comply with the standards, and has never been allowed under the AWA. Electric fences used in conjunction with a proper primary enclosure or perimeter fence, such as at the top or close to the bottom of the primary enclosure fence, may be permissible if properly constructed and operated. The use of electric fences as the sole restraining device has never been approved and does not provide proper protection and restraint for the animals. Therefore the request for a variance is denied.[1]

RX 4.

Respondent challenged APHIS' determination with a letter from the manufacturer of the fence who said that millions of its U/L [Underwriters Laboratories] approved fences had been sold for 50 years "without one single instance of injury to anyone" and had been used "worldwide for every conceivable application, from controlling livestock on farms, controlling wild animals in city zoos, protecting gardens, flower beds from small animals such as dogs, rabbits, raccoons, etc." (RX 1).

Dr. Schmidt testified that in his experience an electric fence similar to Respondent's two-wire fence protected sheep from coyotes, so "[i]f it keeps predators out, it'll keep dogs in." [(Tr. 148).] He said that U/L [Underwriters Laboratories] certified fences will not harm animals and that they are even recommended by the USDA's Extension Service to protect animals from predators. (Tr. 148-51, 164.)

[Inspector] Gauthier's next inspection was on June 5, 1995. His inspection report states "[a]ll items are in compliance this inspection." (CX 7 at 2.)

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[1]Two years after this letter, on May 6, 1997, [USDA stated] that perimeter fences for dogs are not required by the [Standards]. 62 Fed. Reg. 24,611 (1997).

However, a complaint that there were dead animals at Respondent's facility prompted another complaint-driven inspection on December 18, 1995 [(CX 8). Inspector] Gauthier did not find any dead animals at the kennel, but did find that Respondent was giving fresh bones to her dogs. [Inspector Gauthier] reported the matter as a violation because he thought [that] there were too many bones, when there should have been only one [bone] per dog, that, while the dogs could be given bones, [residual] bones had to be picked up when [the dogs] were given new bones, and that, although it was December, the bones, "in warmer weather," would be unsanitary because they would cause odors and attract flies and maggots. (Tr. 57, 61, 69.) [Inspector Gauthier's] report states "old bones in units must be picked up - there are way to [sic] many in pens." [(CX 8 at 2, item 7, III, #37.) Inspector Gauthier's] report also states that Respondent was not in compliance with APHIS' standards for animal care because some runs were not cleaned daily, holes of unspecified dimensions were present in five doghouses, wind and weather breaks were missing from three houses, and the electric fence needed a primary fence around it. (CX 8 at 2[, item 7, III, #10, #23, #29, #36].)

Respondent and Ronnie Williams testified that they fed the dogs bones with fresh meat on them for a period of about 6 months. Respondent and Ronnie Williams said that wood chewing by the dogs decreased when the dogs were given bones to chew on because they are "probably the most natural chew toy that you can give an animal. It keeps the tarter [sic] off their teeth. It gives them something to chew on besides the front of their dog houses. . . ." [(Tr. 196-97.)] Respondent and Ronnie Williams said that bones with meat are a high source of protein and, for carnivores, such as dogs, bones are superior to commercial dog food made from corn and soybean with the result that the dogs' teeth and gums were healthier, their coats shinier, and they had more milk when they had puppies (Tr. 196, 233).

Respondent and Ronnie Williams also testified that they gave meat and bones to the dogs in the evening and were careful to give them only [the amount of] meat they could consume in a few hours so that the meat would not deteriorate and become maggot infested. The bones were then picked up in the morning before giving the dogs fresh bones. However, Respondent stopped giving the bones to the dogs because of the inspectors' objections. (Tr. 196-208, 232-33.) [Respondent testified that] "I saw a lot of benefits, but I got hassled about it so much, I just chucked it in. I said to heck with it." [(Tr. 233.)]

[Inspector] Gauthier conducted his next inspection on February 15, 1996. His inspection report states that "some outdoor houses have had holes repaired but there are more that are in need of repair"; "one unit with three large dogs only have [sic] one dog house & is not large enough for all animals without

discomfort"; "3 calf huts have doorways that need to be smaller to restrict air flow"; "some wind breaks have been repaired but more are in need of repair or replacing"; "fencing around one pen is not in good repair - this unit must be replaced"; "there are broken wires in about half of the outdoor runs"; "all ground runs must be picked up daily"; "old bones in runs have not been picked up"; "wire in indoor housing is rusting & need replacing"; "all trash must be stored in a container with a lid - trash is in feed sack"; "inside building has some raw wood that needs sealing & a few boards that are chewed that need replacing so sealing may be done"; "all items in two small rooms with dogs with pups must be impervious to moisture - old sacks & other items in these rooms must be cleanable or removed"; "two calf huts used for dog houses had holes in floor"; "all outdoor dog houses must have bedding when temp is below 50° F, temp today is about 38° F, no bedding"; "four pet taxies are being used as primary housing for mid sized dogs - nowhere close to being large enough"; "no written plan for exercise for dogs in pet taxies"; "a few feed pans are rusty & need replacing"; "a few water pans are rusty and need replacing"; and the electric fence needed a primary fence around it (CX 9).

Inspector Gauthier testified that the condition of the facility at this inspection was the worst he had seen it [(Tr. 61)], but that nothing "jumps out" of his memory of the inspection except for the kennel appearing neglected, the overcrowding, and that the kennel did not have the "cleanest conditions in the world." [(Tr. 63).] However, he said he also remembered that the dogs all seemed healthy (Tr. 63).

Respondent admitted that she had "gotten behind" in the general maintenance of the kennel at the time of the February inspection. She said this was caused by her helper, Ronnie Williams, going to the hospital in December and then being "laid up for the next six months and totally unable to do anything. . . ." (Tr. 238.) Inspector Gauthier confirmed that Williams, whom he knew helped Respondent with the kennel's operation and maintenance, had been in the hospital for surgery (Tr. 61).

As for the references to "calf hutches" in the inspection report, Respondent said this refers to structures for calves made of polyethylene. She said that she began acquiring them to use as outdoor doghouses at the kennel as the answer to all the maintenance problems she had had with wooden houses. She said the calf shelters, although more expensive than wooden doghouses, are easier to clean, impervious to moisture, don't rust, and don't need to be painted and that, according to her reading of APHIS' regulations, they did not need a floor and could be put on compacted earth. (Tr. 223.) Williams also said that the calf shelters had rain and windbreaks, but that inspector Gauthier told him that the shelters had to have

smaller entrances, a floor, and additional rain and windbreaks. He said he complied and put floors and windbreaks on the shelters. (Tr. 181-86.)

Respondent testified that many of the housekeeping problems were due to a renovation taking place at that time at the kennel where the puppies were located. As for the dogs in the pet taxis, she said they had been put there to be cleaned and vaccinated and that they were held there for no more than a day. In regard to the alleged lack of bedding, she said the weather was "wet and nasty" that day and that a worker was in the process of replacing the bedding at the time of the inspection. Respondent said, concerning the citations for untreated or unpainted wood, that she treated all exposed wood surfaces with a clear sealer called Thompson's Water Seal and that one cannot determine whether a surface has been treated with [Thompson's] Water Seal just by looking at it. (Tr. 240-45.) Also, as directed by APHIS inspectors, Respondent put [chicken] wire on the field fence surrounding her facility to make it into a perimeter fence to restrain any dog who might get through the electric fence (Tr. 115).

Inspector Gauthier, who gave Respondent until March 15[, 1996,] to correct the deficiencies, returned on April 17[, 1996,] for a follow-up inspection. His report states that all the violations identified at the February [15, 1996,] inspection had been corrected except that three doghouses still needed repair. He also found two new non-compliant items, a doghouse whose new top needed to be sealed (which the report indicates was done that day) and outside runs with chicken wire that needed to be repaired or replaced. (CX 10 [at 2-3].) Respondent stated that after the inspection she looked for the doghouses that inspector Gauthier said needed repair, but "I couldn't find any houses anywhere that were in need of any kind of repair and I went through the entire kennel." (Tr. 73.) Inspector Gauthier admitted that Respondent had asked him which houses he was referring to in his report and that he said he could not remember: "I knew that there was -- there [were] three dog houses, but I can't tell you which three. That's my fault. I should have been documenting which pen they were in." (Tr. 75.)

Inspector Gauthier was accompanied at the inspection by Mark Westrich, an APHIS senior investigator, whose function is to investigate and document violations of the Animal Welfare Act that APHIS considers "habitual in nature." Mr. Westrich then prepared a confidential report that he forwarded to his superiors which in turn resulted in the Complaint being filed by Complainant against Respondent, or, as Mr. Westrich said at the hearing, "caused us to be sitting here at the table today." (Tr. 135.)

Discussion

[One of t]he principal purpose[s] of the Animal Welfare Act is to ensure the humane care and treatment of animals regulated under the [Animal Welfare] Act (7 U.S.C. § 2131). Section 2.100(a) of the . . . [R]egulations (9 C.F.R. § 2.100(a)) provides that "[e]ach [animal] dealer . . . shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals." Complainant can seek monetary penalties and the suspension or revocation of a dealer's license for a violation of the [Animal Welfare Act or the Regulations and Standards (7 U.S.C. § 2149)]. Complainant has the burden of proving a violation by a preponderance of the evidence. *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993)[, *aff'd*, 34 F.3d 1301 (7th Cir. 1994)].

Inspection on March 2, 1994 [(CX 1)]. The Complaint (¶ VIII) alleges that Respondent violated section 2.40 of the [R]egulations (9 C.F.R. § 2.40) on March 2, 1994, by failing to provide veterinary care for animals in need of care; section 2.50 of the [R]egulations (9 C.F.R. § 2.50) by failing to individually identify dogs; and section 3.1(a) of the [S]tandards (9 C.F.R. § 3.1(a)) by failing to maintain . . . housing facilities in good repair.

Inspector Johnston identified two dogs in need of veterinary care. One had a prolapsed uterus and another . . . was emaciated. Respondent, however, was providing care for the dog with a prolapsed uterus under the directions of her attending veterinarian. She was therefore in compliance with [section 2.40 of the Regulations (9 C.F.R. § 2.40) with respect to] the care of this animal. As for the emaciated dog, [Respondent] . . . violated section 2.40 of the Regulations. . . . [The dog had] a liver disease, rather than worms [as Respondent had assumed, but irrespective of her incorrect assumption,] she should have consulted her veterinarian sooner than she did for the proper treatment for the dog.

As for identifying the dogs, Respondent, contrary to the Complainant's allegations, had individually identified the dogs. However, she had not provided a kennel identification for [12] dogs. . . . Accordingly, Respondent violated section 2.50 [of the Regulations (9 C.F.R. § 2.50)] on March 2, 1994. . . .

Respondent also violated section 3.1(a) [of the Standards (9 C.F.R. § 3.1(a))] by not maintaining one doghouse in good repair.

Inspection on April 1, 1994 [(CX 2)]. The only alleged violation at this inspection (Compl. ¶ VII) was the failure, detected at the March 2, 1994, inspection, to individually identify [12] dogs. [Irrespective of the fact that Complainant had allowed Respondent until April 2, 1994, for correction, the failure to identify 12 dogs on April 1, 1994, is a violation of section 2.50 of the

Regulations (9 C.F.R. § 2.50)]. . . .

Inspection on August 30, 1994 [(CX 4)]. The Complaint (¶ VI) alleges that at this inspection Respondent violated section 2.40 of the [R]egulations [(9 C.F.R. § 2.40)] by failing to provide veterinary care for a dog; section 3.1(a) of the [S]tandards [(9 C.F.R. § 3.1(a))] by not maintaining [housing facilities] in good repair; section 3.4(b) [of the Standards (9 C.F.R. § 3.4(b))] by not providing animals with [housing facilities which adequately protect the animals] from the elements; and section 3.10 [of the Standards (9 C.F.R. § 3.10)] by not keeping water receptacles clean [and sanitized].

The dog allegedly not receiving veterinary care (a mastiff with dry skin) was under a veterinarian's care. The treating veterinarian testified that a skin condition sometimes takes a long period of time to correct and that a layman could not tell from just one observation whether the treatment was working. Complainant has therefore failed to show by a preponderance of the evidence that the dog was not receiving adequate veterinary care, in violation of section 2.40 [of the Regulations (9 C.F.R. § 2.40)].

Respondent did not challenge the inspector's findings that some housing facilities needed repair, except to point out that the problem was ongoing and typical for kennels with wooden doghouses. The inspector agreed that the problem was due to the destructive nature of dogs to chew anything made of wood. However, even though maintenance of wooden doghouses is recognized as a common problem, [a number of Respondent's doghouses were not maintained in good repair, so as to protect the animals from injury and provide the animals with adequate protection from the elements, in] violation of sections 3.1(a) and 3.4(b) [of the Standards (9 C.F.R. §§ 3.1(a), .4(b))].

Respondent argued that, although a water receptacle may have a green coloring and the water may be discolored after a dog puts his or her muzzle in [the water receptacle, green coloring and discoloration do] not make the water unsafe for animals to drink. Respondent also testified that she gives the dogs fresh water daily and follows the Standards for sanitizing the water receptacles. However, the Standard (9 C.F.R. § 3.10) does not refer to whether the water is safe to drink, but whether the receptacle for the water is kept "clean and sanitized in accordance with section 3.11(b) of this subpart . . .". Thus, a [water] receptacle with a green stain from algae is not in compliance [with section 3.10 of the Standards (9 C.F.R. § 3.10)] even though it constitutes no danger to an animal. Respondent therefore violated section 3.10 [of the Standards (9 C.F.R. § 3.10)].

Inspection on March 27, 1995 [(CX 6)]. The Complaint (¶ V) alleges that Respondent violated section 3.4(b) of the [S]tandards [(9 C.F.R. § 3.4(b))] by not providing animals with [housing facilities which adequately protect the animals]

from the elements; section 3.10 [of the Standards (9 C.F.R. § 3.10)] by not keeping water receptacles clean and sanitized; and section 3.6(a)(1) [of the Standards (9 C.F.R. § 3.6(a)(1))] by [failing to provide primary enclosures for dogs that are structurally sound and maintained in good repair].

Respondent's failure to have a windbreak on [two] doghouse[s] did not provide dogs with adequate protection from the elements and was therefore a violation of section 3.4(b) [of the Standards (9 C.F.R. § 3.4(b))]. The [failure to keep] water receptacle[s clean] was a violation of section 3.10 [of the Standards (9 C.F.R. § 3.10)].

As for the electric fence, section 3.6(a)(1) [of the Standards (9 C.F.R. § 3.6(a)(1))] provides only that primary enclosures be structurally sound and kept in good repair. . . . Complainant did not show by a preponderance of the evidence . . . that Respondent's electric fence was in poor repair or structurally unsound. . . . [Footnote 2 omitted.]

Inspection on June 5, 1995 [(CX 7)]. The Complaint does not allege any violations at this inspection and the record does not show any.

Inspection on December 18, 1995 [(CX 8)]. The Complaint (¶ IV) (which [inadvertently] gives the inspection date as December 16[, 1995,]) alleges that at this inspection Respondent violated section 3.1(a) [of the Standards (9 C.F.R. § 3.1(a))] by not maintaining [housing facilities] in good repair; section 3.4(b) [of the Standards (9 C.F.R. § 3.4(b))] by not providing the animals with [housing facilities which adequately protect the animals] from the elements; section 3.6(a)(1) [of the Standards (9 C.F.R. § 3.6(a)(1))] by not maintaining [primary enclosures for dogs] in good repair; section 3.11(a) [of the Standards (9 C.F.R. § 3.11(a))] by not keeping primary enclosures clean; and [section] 3.11(c) [of the Standards (9 C.F.R. § 3.11(c))] by not keeping the [premises] clean of [residual] bones.

The record establishes that Respondent violated sections 3.1[(a)], 3.4(b), and 3.11(a) [of the Standards (9 C.F.R. §§ 3.1(a), .4(b), and .11(a))] by failing to keep some runs clean; failing to repair holes in some doghouses; and failing to replace windbreaks on some of the doghouses at the time of the inspection.

As for the dog bones, section 3.11(c) [of the Standards (9 C.F.R. § 3.11(c))] provides that the premises must be kept free of accumulations of discarded matter and waste products. The inspector suggested that having more than one bone per dog was an excessive accumulation and that old bones were not being removed each day. However, there is no restriction in the Standards on the number of bones a dog can have and Respondent presented more credible evidence than Complainant that [residual] bones were regularly cleaned from the premises. Complainant has therefore failed to prove by a preponderance of the evidence that

Respondent violated section 3.11(c) [of the Standards (9 C.F.R. § 3.11(c)). Moreover, Complainant has failed to prove by a preponderance of the evidence that Respondent's electric fence was in poor repair or structurally unsound, in violation of section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1))].

Inspection on February 15, 1996 [(CX 9)]. The Complaint (¶ III) alleges violations of section 3.1(a) [of the Standards (9 C.F.R. § 3.1(a))] for housing not being structurally sound; section 3.1(c)(1)(i) [of the Standards (9 C.F.R. § 3.1(c)(1)(i))] for excessive rust; section 3.1(f) [of the Standards (9 C.F.R. § 3.1(f))] for improper trash storage; section 3.3(e)(1)(i) [of the Standards (9 C.F.R. § 3.3(e)(1)(i))] for surfaces not being impervious to moisture; section 3.4(b) [of the Standards (9 C.F.R. § 3.4(b))] for [not providing the animals with housing facilities which adequately protect the animals] from the elements; section 3.6(a)(1) [of the Standards (9 C.F.R. § 3.6(a)(1))] for [primary enclosures] not being structurally sound; section 3.6(a)(2)(xi) [of the Standards (9 C.F.R. § 3.6(a)(2)(xi))] for [primary enclosures for dogs which were not constructed so that they provide sufficient] space; section 3.8 [of the Standards (9 C.F.R. § 3.8)] for no exercise plan; section 3.9(b) [of the Standards (9 C.F.R. § 3.9(b))] for unclean food receptacles; section 3.10 [of the Standards (9 C.F.R. § 3.10)] for unclean water receptacles; section 3.11(a) [of the Standards (9 C.F.R. § 3.11(a))] for [primary] enclosures not being clean; and section 3.11(c) [of the Standards (9 C.F.R. § 3.11(c))] for not removing [residual] bones.

Many of these allegations, which are contained in the findings in inspector Gauthier's inspection report (CX 9), were not refuted by Respondent, such as holes in some structures; excessive rust; a trash container not having a lid; debris not being removed from an area where animals were kept (although this was a temporary occurrence because of the renovation of the kennel); windbreaks in need of repair; inadequate space for three dogs; food and water receptacles not being clean; torn wire in fencing; and inadequate cleaning of dog runs. [Inspector] Gauthier gave Respondent until March 15[, 1996,] to correct these deficiencies. [All of] the deficiencies[, except the repair of three doghouses,] were corrected [by the time of the next inspection]. . . . However[, the subsequent correction of a condition not in compliance with the Regulations and Standards has no bearing on the existence of a violation]. *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992)[, *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2))]. It is therefore found that these [conditions] did not comply with the [S]tandards in sections 3.1(a), 3.1(c)(1)(i), 3.1(f), 3.4(b), 3.6(a)(1), 3.9(b), 3.10, and 3.11(a) [(9 C.F.R. §§ 3.1(a), .1(c)(1)(i), .1(f), .4(b), .6(a)(1), .9(b), .10, .11(a))].

. . . .

[The record does not support a finding that the indoor floor areas being remodeled as sheltered housing facilities were not impervious to moisture, in violation of section 3.3(e)(1)(i) of the Standards (9 C.F.R. § 3.3(e)(1)(i)).]

For reasons discussed [in this Decision and Order, *supra*,] Complainant has not proven by a preponderance of the evidence that Respondent failed to remove [residual] bones from the [premises, in violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c))].

The absence of bedding [required by section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4))] was only temporary due to it being changed at the time of the inspection because of the weather. Respondent therefore did not fail to provide bedding to her animals, in violation of [section 3.4(b)(4)] the Standards [(9 C.F.R. § 3.4(b)(4))].

The dogs in the pet "taxis" were also being held there only temporarily to be cleaned and vaccinated. As the [pet] taxis were not the animals' primary shelter, [Respondent] did not violate section 3.6[(a)(2)(xi)] of the [S]tandards [(9 C.F.R. § 3.6(a)(2)(xi))] and likewise did not violate section 3.8 [of the Standards (9 C.F.R. § 3.8)] for not providing an exercise plan for these dogs. *Cf. In re Otto Berosini*, 54 Agric. Dec. 886, 918 (1995).

[Inspector] Gauthier found that the "calf" huts did not comply with the Standards because the openings were too large and the huts either had no floor or there were holes in the floor. As the huts were obviously designed for an animal larger than most dogs, it was not unreasonable for [inspector] Gauthier to interpret the Standards as requiring that the openings to the huts and the windbreaks on the huts should be modified depending on the size of the dog in order to provide [the dogs] with adequate protection from the elements. Respondent therefore violated section 3.4(b) [of the Standards (9 C.F.R. § 3.4(b))] by not making such modifications to the calf huts before using them as [outdoor] dog shelters.

. . . .

Inspection on April 17, 1996 [(CX 10)]. At this inspection, [inspector] Gauthier found that all the violations that he found at the February [15, 1996,] inspection had been corrected, except for repair to three doghouses. He also found two new violations, *viz.*, a need to seal the top of a doghouse (which was accomplished at that time) and a need to repair [or remove] chicken wire on the dog runs.

The Complaint (¶ II) alleges that this failure to seal the top of the doghouse was a violation of section 3.4(c) [of the Standards (9 C.F.R. § 3.4(c))]; that the torn wire was a violation of section 3.6(a)(1), (a)(2)(i), and (a)(2)(ii) [of the Standards (9 C.F.R. § 3.6(a)(1), (a)(2)(i), (a)(2)(ii))]; and that the failure to repair the doghouses was a violation of section 3.1(a) of the Standards [(9 C.F.R.

§3.1(a))].

Complainant has not shown how [inspector] Gauthier determined that the wood on the roofs needed to be sealed. . . . As this allegation was not proven, there was no violation. However, as Respondent did not refute [inspector] Gauthier's finding that the wire in the dog runs was torn, she violated section 3.6 of the [S]tandards [(9 C.F.R. § 3.6)].

With respect to the three doghouses allegedly in need of repair, [inspector] Gauthier testified that he could not remember the houses to which he was referring in his report. His report also fails to state specifically the reasons for his finding that the houses were not in compliance with the Standards. Complainant has therefore failed to prove a violation of section 3.1(a) [of the Standards (9 C.F.R. § 3.1(a))].

Sanction

The [United States Department of Agriculture's] sanction policy, as set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993), is that:

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

Section [19](b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) also commands, in determining the sanction to impose, that:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary.

Complainant recommends a [civil] penalty of $11,000 and a 30-day suspension of Respondent's [Animal Welfare Act] license.

The relevant circumstances to consider in determining the appropriateness of the penalty are that Respondent, prior to 1994, had no history of violating the Animal Welfare Act except for [failure to properly identify] dogs in 1992 and,

when deficiencies were found, she corrected them. There is no evidence that Respondent treated her animals in an inhumane manner. Indeed, at the February 15, 1996, inspection, when the most deficiencies were found, the inspector also found that the dogs were in good health. . . .

At two of the inspections in the course of frequent inspections over a 2-year period, prompted by unfounded complaints against Respondent . . ., the inspectors found no violations. . . . [A]t the last inspection of [Respondent's] facility in April 1996, [all] the deficiencies found at the previous inspection in February [1996, except for the repair of three doghouses,] had been corrected and only one . . . new [violation] was found. . . .

Considering all the circumstances, including the gravity . . . of the violations, a civil penalty of [$2,000, a cease and desist order, and a 7-day suspension of Respondent's Animal Welfare Act license, or if Respondent is not licensed, a 7-day disqualification from becoming licensed under the Animal Welfare Act, are] sufficient to achieve the remedial purposes of the [Animal Welfare] Act.

Findings of Fact

1. Respondent, Marilyn Shepherd, owns and operates a kennel in Ava, Missouri, where she breeds and raises dogs for sale.

2. Until June 1997, [Respondent] was licensed under the Animal Welfare Act as a . . . dealer.

3. On March 2, 1994, Respondent [failed to] provide timely veterinary care for a dog in need of care; [failed to] keep a doghouse in good repair; and [failed to] provide kennel identification for [12] of her dogs [(9 C.F.R. §§ 2.40, .50 .100(a); 3.1(a))].

4. On April 1, 1994, Respondent [failed to] provide kennel identification for [12] of her dogs [(9 C.F.R. § 2.50)].

5. On August 30, 1994, Respondent [failed to] keep doghouses in good repair; [failed to provide housing facilities for dogs with adequate protection from the elements;] and [failed to] keep water receptacles clean [(9 C.F.R. §§ 2.100(a); 3.1(a), .4(b), .10)].

6. On March 27, 1995, Respondent [failed to provide] . . . windbreaks on [two] doghouses and [failed to keep water receptacles clean] . . . [(9 C.F.R. §§ 2.100(a); 3.4(b), .10)].

7. On December 18, 1995, Respondent failed to keep dog runs clean; failed to repair holes in doghouses; [and] failed to replace windbreaks on doghouses . . . [(9 C.F.R. §§ 2.100(a); 3.1(a), .4(b), .11(a))].

8. On February 15, 1996, Respondent failed to remove excessive rust from

surfaces; failed to have a lid on a trash container; failed to repair windbreaks; failed to keep food and water receptacles clean; failed to repair fencing; failed to clean dog runs; and failed to provide proper windbreaks on "calf huts" [(9 C.F.R. §§ 2.100(a); 3.1(a), .1(c)(1)(i), .1(f), .4(b), .6(a)(1), .9(b), .10, .11(a))].

9. On April 17, 1996, Respondent failed to repair wire in dog runs [(9 C.F.R. §§ 2.100(a); 3.6(a)(1), (a)(2)(I), (a)(2)(ii))].

Conclusions of Law

Respondent violated the Animal Welfare Act (7 U.S.C. §§ 2131[-2159]) and the following sections of the Regulations and Standards: 9 C.F.R. §§ 2.40; 2.50; 2.100(a); 3.1(a); 3.1(c)(1)(i); 3.1(f); 3.4(b); 3.6; 3.9(b); 3.10; [and] 3.11(a). . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard.[3] The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence.[4] The

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[3]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981).

[4]*In re John D. Davenport*, 57 Agric. Dec. ___, slip op. at 44 (May 18, 1998); *In re C.C. Baird*, 57 Agric. Dec. ____, slip op. at 27 (Mar. 20, 1998); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 18 n.3 (Jan. 13, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246-47 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998) (unpublished); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec.

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ALJ found that Complainant proved 24 of the 31 violations alleged in the Complaint, as follows: paragraphs II(3); III(1)-(3), (5)-(7), (9)-(11); IV(1)-(4); V(1)-(3); VI(B)(1)-(3); VII; and VIII(A), (B), (C). With the exceptions of paragraphs III(7), IV(3), and V(2) of the Complaint, I agree with the ALJ. Also, I find that, although Complainant proved by a preponderance of the evidence the violation alleged in paragraph VII of the Complaint, the circumstances are such that no sanction, except a cease and desist order, shall apply to that violation.

Both Complainant and Respondent appealed the ALJ's Initial Decision and Order. Complainant raises two issues in Complainant's Appeal Petition.

First, Complainant contends that: "The ALJ erred in failing to find that Respondent violated [s]ection 3.3(e)(1)(i)." (Complainant's Appeal Petition at 2.)

I disagree with Complainant. Paragraph III(4) of the Complaint alleges that:

> The surfaces of indoor floor areas of sheltered housing facilities for dogs that were in contact with the animals were not impervious to moisture (9 C.F.R. § 3.3(e)(1)(i)[].]

The Animal Care Inspection Report completed by inspector Gauthier after the February 15, 1996, inspection of Respondent's facility does indicate that at least one shelter had surfaces that did not comply with "3.3" (CX 9 at 1, item 20). However, the description of the violation in the Animal Care Inspection Report does not indicate, as alleged in paragraph III(4) of the Complaint, that "indoor floor areas . . . were not impervious to moisture," but rather states as follows:

> III. Noncompliant items newly identified
>
> # 20 Surfaces 3.3e = all items in two small rooms with dogs with pups must be impervious to moisture - old sacks & other items in these rooms must be cleanible [sic] or removed - correct by 3-15-96[.]

CX 9 at 2.

Inspector Gauthier testified that he did not recall any specifics regarding the violations cited on CX 9 (Tr. 59, 62-63). Further, Complainant's Appeal Petition does not provide any basis for reversing the ALJ's conclusion that Complainant

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549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

failed to prove by a preponderance of the evidence that Respondent violated section 3.3(e)(1)(I) of the Standards (9 C.F.R. § 3.3(e)(1)(I)).

Second, Complainant requests that the language used by the ALJ, in finding that Respondent committed a violation of section 2.50 of the Regulations (9 C.F.R. § 2.50), as alleged in paragraph VIII(B) of the Complaint, be changed to indicate to a reviewing court that Respondent was not granted "an extension of time" to come into compliance with section 2.50 of the Regulations (9 C.F.R. § 2.50) (Complainant's Appeal Petition at 4-5). I agree with Complainant's position that no extension of time to comply with section 2.50 of the Regulations (9 C.F.R. § 2.50) was granted to Respondent at the March 2, 1994, inspection, which is the subject of the allegations in paragraph VIII of the Complaint. Instead, the APHIS inspector states on the March 2, 1994, Animal Care Inspection Report, that Respondent's violation of section 2.50 of the Regulations (9 C.F.R. § 2.50) was to be "corrected" by April 2, 1994 (CX 1 at 2, item 7, III, #45). It is well settled that a correction date does not exculpate a respondent from the violation, and while corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, a correction does not eliminate the fact that a violation occurred and does not provide a basis for dismissal of the alleged violation.[5] Complainant's request that I change the language used by the ALJ to indicate that Respondent was not granted an extension of time to comply with section 2.50 of the Regulations (9 C.F.R. § 2.50) is therefore granted.

Respondent raises nine issues on appeal. First, Respondent restates the arguments supporting Respondent's use of an electric fence as a primary enclosure, which was cited as a violation in paragraphs IV(3) and V(2) of the Complaint (Respondent's Appeal Petition at 1, ¶ 1). Apparently, Respondent's electric fence operated as it is designed to operate, being sound and in good repair. Thus, I do not find that the electric fence, when used as a primary enclosure, necessarily violates section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)), unless unsound

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[5]In re John D. Davenport, 57 Agric. Dec. ___, slip op. at 38-39 (May 18, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998) (unpublished); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

or in bad repair.[6]

Second, Respondent argues that the ALJ was in error to find that the openings on the calf huts were too large for dogs because there is no regulation on the size of openings of doghouses (Respondent's Appeal Petition at 1, ¶ 2). I infer that Respondent is appealing the ALJ's conclusion that Respondent violated section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)), as alleged in paragraphs III(5) and V(1) of the Complaint, by failing to provide dogs in outdoor housing facilities with adequate protection from the elements. Respondent argues that new-born calves weigh about the same as larger breed dogs. The ALJ was not persuaded by this argument, and neither am I. As Complainant correctly argues in Complainant's Appeal Petition, the Standards do not require a certain size of opening on doghouses, but windbreaks and rainbreaks are required by 9 C.F.R. § 3.4(b)(3) (Complainant's Appeal Petition at 6).

Third, Respondent argues that it was a denial of due process for Respondent not to receive a copy of APHIS Senior Investigator Mark Westrich's internal report to APHIS program officials documenting Respondent's violations (Respondent's Appeal Petition at 1, ¶ 3). Respondent argues that denial of access to Mr. Westrich's complaint-driven report interfered with Respondent's ability to defend herself in this disciplinary proceeding. Complainant argues against Respondent's position, pointing out that neither Respondent nor Complainant have the right to discovery in administrative proceedings (Complainant's Appeal Petition at 9-10). Complainant is correct that Respondent has no right to receive Mr. Westrich's report. Discovery is not available under the Rules of Practice.[7]

Fourth, Respondent argues that the Federal Government should be required to

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[6]I note that it appears that Respondent's use of the electric fence may violate section 3.6(a)(2)(iii) and (iv) of the Standards because Respondent's electric fence may not "[c]ontain the dogs . . . securely" and "[k]eep other animals from entering the enclosure." (9 C.F.R. § 3.6(a)(2)(iii), (iv).) However, the Complaint does not allege that Respondent violated section 3.6(a)(2)(iii) and (iv) of the Standards (9 C.F.R. § 3.6(a)(2)(iii), (iv)).

[7]*In re Fred Hodgins*, 56 Agric. Dec. 1242, 1301 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Simone Fruit Co.*, 53 Agric. Dec. 537 (1994) (Ruling on Certified Question); *In re A.P. Holt* (Decision as to Richard Polch & Merrie Polch), 52 Agric. Dec. 233, 242 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Lincoln Meat Co.*, 48 Agric. Dec. 166 (1989); *In re SEMA, Inc.*, 49 Agric. Dec. 176, 186-87 (1990); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 616 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Beef Nebraska, Inc.*, 44 Agric. Dec. 2786, 2834 (1985), *aff'd*, 807 F.2d 712 (8th Cir. 1986); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 143-45 (1984); *In re Miguel A. Machado* (Decision as to Respondent Cozzi) (Remand Order), 42 Agric. Dec. 820, 832-33 (1983), *final decision*, 42 Agric. Dec. 1454 (1983), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

remove all the algae from all federally-owned streams, ponds, and rivers where "federally owned wild animals" drink (Respondent's Appeal Petition at 1-2, ¶ 4). Wild animals on federal land are not relevant to these proceedings.

Fifth, Respondent argues that she did not fail to provide adequate veterinary care, in violation of section 2.40 of the Regulations (9 C.F.R. § 2.40), as alleged in paragraph VIII(A) of the Complaint, because Respondent insists that she is not guessing, but rather, it is "standard procedure" to first worm any emaciated dog of unknown background, rather than test for liver disease (Respondent's Appeal Petition at 2, ¶ 5). Complainant responds that Respondent does not deny that the dog had liver disease, that Respondent is not a veterinarian, and that the fact that Respondent tried to treat the dog herself is not a reason to overturn the ALJ (Complainant's Appeal Petition at 7). I agree with Complainant.

Section 2.40 of the Regulations (9 C.F.R. § 2.40) is designed to ensure that sick animals are provided with prompt veterinary care by a veterinarian, not by a layman. These regulated sick animals are not to be treated by laymen through trial and error, while the animals' health suffers.

Sixth, Respondent argues that she did not fail to keep housing facilities for dogs clean, in violation of (I infer) section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), as alleged in paragraph III(3) of the Complaint. Respondent states that the reason for the unclean conditions was remodeling of a kitchen, and the "debris" cited by the inspector was not debris, but rather, animal husbandry equipment (Respondent's Appeal Petition at 2, ¶ 6). Complainant proved by a preponderance of the evidence that debris, not animal husbandry equipment, had not been removed from an area where animals were kept. Although this condition was temporary because of the renovation of the kennel, Respondent's failure to remove debris constitutes a violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), as alleged in paragraph III(3) of the Complaint.

Respondent also argues that not having a lid on a trash container, as alleged in paragraph III(3) of the Complaint, should not be found to be a violation, because it is the first time Respondent violated that Standard (Respondent's Appeal Petition at 2, ¶ 6). Respondent is not accorded one free violation of the Regulations and Standards by the Animal Welfare Act, by the Regulations and Standards, or by the Rules of Practice. Respondent is required to be in compliance with the Regulations and Standards at all times (9 C.F.R. § 2.100(a)). The violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) in paragraph III(3) of the Complaint is affirmed.

Seventh, Respondent argues that the ALJ's finding that Respondent committed the violation alleged in paragraph VIII(B) of the Complaint is erroneous and denies Respondent due process, because the Complaint charges failure to identify

individual dogs, but the ALJ found failure to provide a kennel identification for some small dogs and puppies (Respondent's Appeal at 2, ¶ 7). The term "kennel identification" is another way of saying the licensee's USDA license number, which is "MOBAD" (Tr. 21). Complainant responds that Respondent is arguing lack of notice of the alleged violation, but that Respondent was provided notice of the Regulation (9 C.F.R. § 2.50), and the particular evidence (CX 1) showing that the violation was for not having a kennel identification number on these particular dogs (Complainant's Appeal Petition at 9). I agree with Complainant. It is well settled that the formalities of court pleading are not applicable in administrative proceedings.[8] Additionally, due process is satisfied when the litigant is reasonably apprised of the issues in controversy. It is only necessary that the complainant in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled.[9]

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[8]*Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. Int'l Bros. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

[9]*NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 15 (May 13, 1998) (Order Denying Pet. for Recons.); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1323 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 200 n.9 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 132 (1996); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1097-98 (1994); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53 (b)(2)); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233-32 (1987); *In re H & J Brokerage*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re Dane O. Petty*, 43

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Paragraph VIII(B) of the Complaint fully apprised Respondent that her failure to identify dogs in accordance with section 2.50 of the Regulations (9 C.F.R. § 2.50) was an issue in this proceeding and there has been no showing that Respondent was misled.

Eighth, Respondent alleges three points: (1) that one of the APHIS inspectors in this case wrote violations based upon non-existent regulations; (2) that there is another kennel 14 miles from Respondent's kennel, which was inspected and "passed" by this same inspector, even though this other kennel has obvious, egregious violations, which situation discriminates against Respondent; and (3) that the Complaint is not based upon actual violations, but rather, is based upon complaints from an animal rights activist (Respondent's Appeal Petition at 2-3, ¶ 8). I reject Respondent's allegations.

On point one, APHIS inspectors only gather and provide evidence to the fact-finder, which in the first instance is an administrative law judge. Subsequent to an administrative law judge's initial decision and order, either party may appeal to the Secretary, who has, in turn, delegated authority to act as final deciding officer to the Judicial Officer. Thus, the inspector does not decide which regulations a respondent violated; the inspector only provides evidence about alleged violations. The Regulations and Standards, which Respondent is found to have violated, were found by the ALJ and the Judicial Officer and are not "non-existent regulations."

On point two, Respondent alleges discrimination in enforcement of the Animal Welfare Act. Respondent promises to produce photographs and 30 eyewitnesses to show the alleged violative conditions at another kennel, but even if Respondent produces such evidence, it is nevertheless irrelevant to whether Respondent violated the Animal Welfare Act. Moreover, an examination of the record in this proceeding reveals no evidence that supports Respondent's contention that the Animal Welfare Act is being selectively enforced against her. However, even if Respondent could show that she was singled out for a disciplinary action under the Animal Welfare Act, such selection would be lawful so long as the administrative

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Agric. Dec. 1406, 1434 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

determination to selectively enforce the Animal Welfare Act was not arbitrary.[10] Respondent has no right to have the Animal Welfare Act go unenforced against her, even if she is the first individual against whom the Animal Welfare Act is enforced and even if Respondent can demonstrate that she is not as culpable as some others that have not had disciplinary proceedings instituted against them. The Animal Welfare Act does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to institute disciplinary proceedings for violations of the Animal Welfare Act.

Sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Respondent in this proceeding) proves that the prosecutor (Complainant in this proceeding) singled out a respondent because of membership in a protected group or exercise of a constitutionally protected right.[11]

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.[12] Respondent bears the burden of proving that she is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.[13] In order to prove her selective enforcement claim, Respondent must show one of two sets of circumstances. Respondent must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory

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[10] *See FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-52 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413-14 (1958) (*per curiam*); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 53 (Mar. 20, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1908 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

[11] *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied*, 117 S.Ct. 296 (1996).

[12] *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

[13] *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

intent.[14] Respondent has not shown that she is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Respondent must show: (1) she exercised a protected right; (2) Complainant's stake in the exercise of that protected right; (3) the unreasonableness of Complainant's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondent for exercise of the protected right.[15] Respondent has not shown any of these circumstances.

On point three, activities of animal rights activists, like the activities of Mr. Jim Swaine described in this proceeding, *sub judice,* have been found to be irrelevant to a determination whether a respondent has violated the Animal Welfare Act and the Regulations and Standards, as alleged in a particular complaint. *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1360-61 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997). I find that Mr. Swaine's activities are irrelevant here, as well.

Ninth, Respondent ascribes corruption, blackmail, extortion, and abuse of power to inspectors and investigators for writing violations based upon non-existent regulations (Respondent's Appeal Petition at 3, ¶ 9). There is a presumption of regularity with respect to the official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties.[16] There is no evidence on the record

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[14]*See Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied*, 117 S.Ct. 296 (1996).

[15]*Id.*

[16]*See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating that the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating that although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating that a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350 (1918) (stating that the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating that the presumption that the local selective service board considered appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing

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which indicates that the inspectors or investigators who were involved with the

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evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating that without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating that the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating that a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating that the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding that duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding that an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating that the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating that there is a strong presumption that public officers exercise their duties in accordance with law); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating that without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 115-16 (1997) (stating that it was error to give credence to petitioner's unsubstantiated accusations that Agricultural Marketing Service inspectors are not trustworthy with respect to official acts because, in the absence of clear evidence to the contrary, there is a presumption of regularity in the discharge of official duties of federal officers); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming that USDA attorneys and investigators warped the viewpoint of USDA veterinary medical officers, the court should have presumed that training of USDA veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating that use of USDA employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show that some USDA employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating that without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating that without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating that there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, USDA), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that USDA shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

inspection of Respondent's facility were engaged in blackmail or extortion or were corrupt or abusing power.

On March 24, 1998, Respondent filed Respondent's Reply. A careful review of the first 10 pages of Respondent's Reply reveals that Respondent merely reiterates prior arguments on several issues, which have already been examined in this Decision and Order, *supra*. The remainder of Respondent's Reply addresses the sanction, which is addressed in this Decision and Order, *infra*.

Sanction

As to the appropriate sanction, the Animal Welfare Act provides:

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall

> give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a), (b).

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[17]

Complainant originally sought: (1) a 30-day disqualification from seeking an Animal Welfare Act license, or, if Respondent is licensed at the time an order is issued, a 30-day suspension of Respondent's Animal Welfare Act license; (2) a civil penalty of $11,000; and (3) a cease and desist order (Complainant's Brief at 26). In Complainant's Appeal Petition, Complainant reduces the recommended sanction to a civil penalty of $5,000, a 10-day Animal Welfare Act license suspension, and, although a cease and desist order is not specifically mentioned,

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[17] *In re C.C. Baird*, 57 Agric. Dec.___, slip op. at 61-62 (Mar. 20, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 62-63 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

I infer from Complainant's proposed order that Complainant still seeks a cease and desist order, as well (Complainant's Appeal Petition at 13-17).

Complainant argues that the ALJ should not have reduced the recommended $11,000 civil penalty and 30-day license suspension to only a $600 civil penalty, and no suspension, since the ALJ found that the evidence supported about 80 percent of the violations in the Complaint (Complainant's Appeal Petition at 13). Complainant argues that Respondent's facility is large, if Respondent sells approximately 200 dogs annually; that some of the violations are serious because of potential harm to the animals; that Respondent's good faith efforts to correct deficiencies came after citations for the violations; and that Respondent had a warning notice in 1992, even if there are no litigated decisions against Respondent (Complainant's Appeal Petition at 13). Complainant argues that a civil penalty larger than $600, and a suspension, are necessary to ensure Respondent's compliance in the future, deter others from violating the Animal Welfare Act, and fulfill the remedial purposes of the Animal Welfare Act (Complainant's Appeal Petition at 14).

Complainant's sanction recommendation is well within the range of sanctions in these kinds of cases. The Department consistently imposes significant sanctions for violations of the Animal Welfare Act and the Regulations and Standards.[18]

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[18]*See, e.g., In re John D. Davenport*, 57 Agric. Dec. ___ (May 18, 1998) (imposing a $200,000 civil penalty, permanent revocation of respondent's license, and permanent disqualification from obtaining a license for 103 violations of the Animal Welfare Act and the Regulations and Standards); *In re C.C. Baird*, 57 Agric. Dec. ___ (Mar. 20, 1998) (imposing a $9,250 civil penalty and a 14-day suspension for 23 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Peter A. Lang*, 57 Agric. Dec. ___ (Jan. 13, 1998) (imposing a $1,500 civil penalty for one violation of the Regulations); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419 (1997) (imposing a $7,500 civil penalty and a 40-day suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards) (Modified Order); *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act, the Regulations, and the Standards), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998) (unpublished); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Lifting Stay Order and

(continued...)

The Department in the past has permanently disqualified or revoked dealers' and exhibitors' licenses for the kind of violations that are found in this proceeding.[19] As to the civil penalty, the Animal Welfare Act authorizes up to $2,500 *per violation per day*. "Each violation and each day during which a violation continues shall be a separate offense" (7 U.S.C. § 2149(b)). As stated in *In re James Petersen*, 53 Agric. Dec. 80, 94 (1994):

> "The sale of each animal constitutes a separate violation." *In re Bradshaw*, 50 Agric. Dec. 499, 504 (1991). "The purchase or sale of each animal constitutes a separate violation." *In re Johnson*, 51 Agric. Dec. 209, 212 (1992). *See also In re Hickey*, 47 Agric. Dec. 840, 848 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989) (Table) (text in WESTLAW) (not to be

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Decision and Order); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 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).

[19]*See, e.g., In re John D. Davenport*, 57 Agric. Dec. ___ (May 18, 1998) (imposing a $200,000 civil penalty, permanent revocation of respondent's license, and permanent disqualification from obtaining a license for 103 violations of the Animal Welfare Act and the Regulations and Standards); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 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).

cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989), in which the false recording of the purchase of each dog was held to be a separate violation and the civil penalty was calculated accordingly.

Respondent replies that the violations are not serious; that the violations caused no harm to the animals; that a $5,000 civil penalty would put her kennel out of business; that the violations proven cannot support a civil penalty that large; that the recommended sanction would not deter Respondent from future violations because Respondent would not be in business any longer; and that because of Respondent's good faith efforts to comply, Respondent does not deserve to have all Respondent's hard work go for naught (Respondent's Reply at 10-12).

Although not addressed specifically by the ALJ in the Initial Decision and Order, the Complaint alleges that the violations were willful. An action 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.[20] I find that Respondent's violations were willful.

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[20] *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re John D. Davenport*, 57 Agric. Dec. ___, slip op. at 39 (May 18, 1998); *In re C.C. Baird*, 57 Agric. Dec.___, slip op. at 48 (Mar. 20, 1998); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 31 (Jan. 13, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional

(continued...)

I disagree with the ALJ's conclusion in his sanction discussion that the record does not support Complainant's determination that Respondent is a "'habitual' violator" (Initial Decision and Order at 20-21). Respondent has committed repeated violations over many inspections; therefore, the record supports a determination that Respondent is a "habitual violator." Also, I disagree with the ALJ's apparent conclusion that the illness of Respondent's assistant, Ronnie Williams, is relevant to the sanction to be imposed. Respondent "must have enough employees to carry out the level of husbandry practices and care required in [9 C.F.R. §§ 3.1-.19]" (9 C.F.R. § 3.12). Moreover, the gravity of the violations are such that the ALJ's civil penalty of $600 is insufficient to fulfill the remedial purposes of the Animal Welfare Act.

Respondent sells about 200 dogs annually, for prices between $5 and $400 (Tr. 281). Normally, there are between 200 and 300 dogs and puppies resident at Respondent's kennel (CX 1, 2, 4, 6-10). I find, based on this evidence, that Respondent operates a large facility.

I agree with the ALJ that there is no evidence that Respondent treated her dogs inhumanely. Corrections were generally promptly made. Moreover, the record does not reveal that there were any injuries emanating from any of the violations. Further, the record reveals that the overwhelming majority of the violations were for minor housekeeping and housing and husbandry infractions. I also find that Respondent exhibited good faith in attempting to achieve and to maintain compliance with the Animal Welfare Act and the Regulations and Standards.

After examining all relevant circumstances in light of USDA's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendation of the administrative officials, I conclude that a $2,000 civil penalty, a cease and desist order, and a 7-day suspension of Respondent's Animal Welfare Act license, or if Respondent is not licensed, a 7-day disqualification from becoming licensed under the Animal Welfare Act, are appropriate.

For the foregoing reasons, the following Order should be issued.

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misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations would still be found willful.

Order

1. Respondent Marilyn Shepherd is assessed a civil penalty of $2,000. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Sharlene A. Deskins
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Ave., SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be forwarded to, and received by, Sharlene A. Deskins, within 120 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0084.

2. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

(a) Failing to provide adequate veterinary care to animals in need of veterinary care;

(b) Failing to individually identify dogs;

(c) Failing to maintain for dogs housing facilities that are structurally sound and in good repair in order to protect the dogs from injury;

(d) Failing to keep housing facilities surfaces free of excessive rust;

(e) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease risks;

(f) Failing to provide and maintain outdoor housing facilities which protect dogs from the elements;

(g) Failing to provide structurally sound primary enclosures;

(h) Failing to keep primary enclosures in good repair;

(i) Failing to construct and maintain primary enclosures free of sharp points or edges that could injure dogs;

(j) Failing to keep primary enclosures for dogs clean;

(k) Failing to keep food receptacles clean and sanitized; and

(*l*) Failing to keep water receptacles clean and sanitized.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

3. (a) If Respondent is licensed under the Animal Welfare Act when this Order is issued, Respondent's Animal Welfare Act license is suspended for a period of 7 days, and continuing thereafter, until Respondent demonstrates to the Animal and Plant Health Inspection Service that Respondent is in full compliance with the Animal Welfare Act, the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 7-day license suspension period. The Animal Welfare Act license suspension provisions in this Order shall become effective on the 65th day after service of this Order on Respondent.

(b) If Respondent is not licensed under the Animal Welfare Act when this Order is issued, Respondent is disqualified from becoming licensed under the Animal Welfare Act for 7 days. The disqualification period shall continue until the civil penalty assessed in this Order is paid. The Animal Welfare Act license disqualification provisions in this Order shall become effective on the day after service of this Order on Respondent.

EGG RESEARCH and CONSUMER INFORMATION ACT

DEPARTMENTAL DECISION

In re: BROMLEY FARMS, INC.
ERCIA Docket No. 96-0001.
Decision and Order filed December 17, 1997.

Admission of material allegations - Failure to pay assessments and late charges - Failure to submit complete and accurate reports - Sanction policy - Ability to pay - Civil penalty - Cease and desist order.

Respondent filed a stipulation admitting the material allegations of the Complaint, challenging only the proposed sanction. Respondent contended that Complainant's recommended civil penalty was not appropriate, because Respondent was financially unable to pay. Upon consideration of the statute, its history, as well as the relevant case law, Judge Bernstein determined that a respondent's ability to pay was not a relevant consideration under the Act. Accordingly, Judge Bernstein imposed a civil penalty in the amount of $4,000 and a cease and desist order.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Egg Research and Consumer Information Act, as amended, (7 U.S.C. § 2701 *et seq.*)("the Act" or "ERCIA"), and the Egg Research and Promotion Order, (7 C.F.R. Part 1250), instituted by a Complaint filed by the Administrator of the Agricultural Marketing Service on May 8, 1996, alleging that Respondent failed to pay assessments and submit complete and accurate reports to the American Egg Board as was required.

Respondent admitted to the Complaint's allegations in a stipulation filed on October 14, 1997, and agreed that the $4,000 civil penalty proposed by Complainant was fair during an October 30, 1997, telephone conference. On November 6, 1997, Respondent filed with the Hearing Clerk a number of documents detailing its financial condition in support of its contention that the proposed fine should not be imposed because of Respondent's inability to pay the penalty.

Findings of Fact

1. Respondent operated as a handler as defined in the Egg Research and Consumer Information Act ("ERCIA" or "the Act"), 7 U.S.C. §§ 2701-18 and the Egg Research and Promotion Order (7 C.F.R. Part 1250)("the Order") until

September 1994.

2. Respondent failed to pay assessments and late charges to the American Egg Board as required by the Act and the Order. The amount of the assessments that Respondent failed to pay is $19,338.38.

3. Respondent failed to submit complete and accurate reports from October 1993 through July 1995, in violation of section 1250.352 of the Order and section 1250.529 of the regulations promulgated thereunder (7 C.F.R. §§ 1250.352, 1250.529).

4. Respondent's assets total $425,000 and its liabilities total $2,620,980.

Discussion

Respondent has admitted to violating the Act, the Order, and regulations issued pursuant to the Act and the Order. Therefore, the sole issue is the appropriate sanction. Complainant recommended a civil penalty of $4,000, as well as a cease and desist order. Respondent does not dispute that the recommended sanction is fair, but argues that it should not be imposed because Respondent is financially unable to pay the fine. Complainant does not dispute Respondent's dire financial condition, but argues that a respondent's ability to pay is not a valid consideration in determining sanctions under the ERCIA.

After careful consideration of the statute, its history, as well as the relevant case law, I agree with Complainant that Respondent's ability to pay is not relevant.

The Department's current sanction policy is set forth in *In re S. S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

The ERCIA, unlike some statutes, does not specifically identify any factors to be considered when determining an appropriate sanction. When a statute fails to identify the appropriate criteria, great weight should be given to the congressional purpose of the civil penalty provisions. *See In re Saulsbury Enterprises*, 55 Agric. Dec. 6, 46-47 (1996); *In re Calabrese*, 51 Agric. Dec. 131, 152-53 (1992). The rationale behind the sanction provisions in the ERCIA was examined in *In re*

Hilliard, which included the following excerpt from the House Report accompanying the 1980 amendments to the Act:

> "The Department has encountered difficulty in enforcing the assessment provisions. The present [1974] Act requires the Department of resort to action in the Federal courts to enforce the provisions of the Act. The American Egg Board has referred several cases to the Department, four of which have been referred for prosecution. In one case, prosecution was declined, although partial voluntary resolution of the matter was achieved. Of the other three, one case was successfully resolved by the Justice Department, and two are still pending, more than one year after they were referred for enforcement action. During this time period, one of the two companies, which are the subjects of the still pending enforcement actions, has gone out of business leaving little possibility that the unpaid assessments will ever be collected.
>
> Authorization for agency issued civil penalties and cease and desist orders would more effectively accomplish enforcement of the Act. Department officials could deal directly with violations during the pendency of enforcement procedures, increasing the probability of gaining compliance. The Federal court system would be spared the responsibility of hearing at the trial level many cases which could be effectively resolved through an administrative procedure. An administrative remedy would also expedite the process of enforcing provisions of the Act.
>
> The American Egg Board is stepping up its efforts in the area of compliance. In 1980, a compliance unit will be set up to handle field audits to determine those individuals in violation of the Act. The compliance unit will promptly contact violators who have failed to file the required reports and assessments. This effort is expected to keep both delinquent assessment collections and handler payments to a minimum. This, coupled with authority to speed legal enforcement actions by the Department against violators who ignore the Board's voluntary compliance efforts, will certainly have a deterrent effect on potential violators of the Act."

In re Hilliard, 47 Agric. Dec. 383, 388 (1988) (citing H.R. Rep. No. 96-752, at 4, 96th Cong., 2d Sess. (1980)).

The legislative history of the Agricultural Marketing Agreement Act reveals a comparable purpose behind its sanction provision. *See* H.R. Rep. No. 100-391 (i), at 29-30, 100th Cong., 1st Sess. (1976), 1987 USCCAN 2313-1, 2313-29-30. The Judicial Officer in *In re Calabrese*, summarized the purpose as follows:

> It is the intent of Congress that the penalties assessed in this proceeding be a complement to the criminal penalties which the United States Attorneys have the authority to seek, but often do not due to their workload demands. In order to be an effective complement (or alternative) to criminal prosecution, the sanctions imposed in these proceedings should be sufficient to remedy the violations committed by the Respondents, and also sufficient to deter such conduct by Respondents and others in the future. An insufficient penalty might be seen by these Respondents or other potential violators as a tolerable cost of doing business, in light of the potential returns available for operating in violation of the Order requirements.

In re Calabrese, 51 Agric. Dec. 131, 162 (1992).

Based on that rationale, the Judicial Officer determined that the appropriate factors to consider in determining the amount of a civil penalty are: the nature of the violations, the number of the violations, the damage or potential damage to the regulatory program from the type of violations involved, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to the respondent, and any other circumstances shedding light on the degree of culpability involved. *Id.* at 155; *see also In re Saulsbury Enterprises*, 55 Agric. Dec. 6, 46-52 (1996).

The Judicial Officer identified similar considerations for determining sanctions under the Beef Research and Information Act:

> In determining the amount of the civil penalty to be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)), it is appropriate to consider the nature of Respondent's violations, the number of Respondent's violations, the damage or potential damage to the regulatory program from Respondent's violations, prior warnings or other instructions given to Respondent, and any other circumstances shedding light on the degree of Respondent's culpability.

In re Goetz, BPRA Docket No. 94-0001, Slip op. at 68 (Nov. 3, 1997).

It should be noted that the Beef Research and Consumer Information Act was patterned after the ERCIA, *see* S. Rep. No. 94-463, at 5, 94th Cong. 2d Sess. (1976), 1976 USCCAN 1051, 1975 WL 12506, and, accordingly, provides a sound analogy for determining the appropriate considerations in this case.

Although none of the above cases specifically held that ability to pay would not be considered in determining the appropriate penalty, ability to pay has been explicitly included in the criteria under several other Acts.[1] Therefore, it can be inferred that its exclusion in the marketing order and beef promotion cases was deliberate.

Based on the above considerations, I find that there is no authority for me to take Respondent's financial condition into account in determining the appropriate sanction. Although I am sympathetic to Respondent's situation, and it appears unlikely that the Government will be able to collect the assessed amount, I am obliged to impose a civil penalty in the amount of $4,000 against Respondent and to issue a cease and desist order.

Order

1. Respondent is assessed a civil penalty of $4,000. The payment shall be made by certified check or money order payable to the Treasurer of the United States, and shall be sent to Sharlene A. Deskins, Esq., Office of the General Counsel, United States Department of Agriculture, Room 2014, South Building, Washington, DC 20250-1400.

2. Respondent shall pay its past-due assessments and accrued late-payment charges to the American Egg Board. The payment shall be made by certified check or money order and shall be sent to the American Egg Board, P.O. Box 97712, Chicago, Illinois 60678. The amount of the assessments and late-payment charges is $19,338.35.

3. Respondent shall submit all past-due reports.

4. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act, the Order and the supporting regulations and, in particular, shall cease and desist from:

---

[1]Consideration of the respondent's financial conditions is statutorily mandated in the Packers and Stockyards Act, 7 U.S.C. §§ 193(b), 213(b), and the Horse Protection Act, 15 U.S.C. § 1825(b)(1). In addition, the Judicial Officer explicitly amended the Department's sanction policy in animal and plant quarantine cases to include the respondent's ability to pay as a mitigating factor, following a formal request by the agency to do so. *In re Heywood*, 52 Agric. Dec. 1315, 1321 (1993).

A. Failing to remit all assessments when due;
B. Failing to remit overdue assessments and late-payment charges; and
C. Failing to file reports in a timely manner.

This Decision and Order shall become final and effective without further procedure 35 days after its service upon Respondent, unless within 30 days of its service, Respondent files an appeal pursuant to § 1.145 of the Rules of Practice.

[This Decision and Order became final and effective February 3, 1998.-Editor]

HORSE PROTECTION ACT

COURT DECISION

In re: CARL EDWARDS & SONS STABLES, GARY R. EDWARDS, LARRY E. EDWARDS, ETTA EDWARDS AND MR. and MRS. BRENT A. BUCK v. THE UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 97-8284.
Filed March 9, 1998.

Before BLACK and BARKETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PER CURIAM:

After oral argument and a review of the record and briefs, we hold that the judicial officer applied the correct legal standards and his conclusions are supported by substantial evidence. The decision and order of the Secretary of Agriculture is affirmed and the petition for review is denied.

AFFIRMED.

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: JACK STEPP AND WILLIAM REINHART.
HPA Docket No. 94-0014.
Decision and Order filed May 6, 1998.

Entering — Altered documents — Ability to pay — Civil penalty — Disqualification.

The Judicial Officer affirmed the Decision by Judge Hunt (ALJ) in which he: (1) found that Respondent Stepp entered, for the purpose of showing or exhibiting, a horse in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); (2) found that Respondent Reinhart allowed the entry, for the purpose of showing or exhibiting, a horse in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D); and (3) assessed a civil penalty of $2,000 against each Respondent and disqualified each Respondent for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show or horse exhibition. Altered documents can be trustworthy and admitted into evidence. Respondents are precluded, by their failure to object to the admission of altered documents, from appealing the ALJ's rulings granting Complainant's motions for admission of documents into evidence (7 C.F.R. §§ 1.141(h)(2), .145(a)). The Administrative Procedure Act provides that a sanction may not be imposed or an order issued except on consideration of the whole record or those parts of the record cited by a party (5 U.S.C. § 556(d)). The record establishes that the ALJ considered the whole record including Respondents' evidence that Honey's Threat, the horse in question, was not sore and that Honey's Threat was confused with another horse. The sanction routinely imposed for the first violation of the Horse Protection Act by a respondent is the minimum 1-year disqualification period and a $2,000 civil penalty. In determining the amount of the civil penalty, the Secretary must take into account the ability to pay the civil penalty and the effect of the civil penalty on the ability to continue to conduct business. However, the burden is on a respondent against whom a civil penalty may be assessed to come forward with evidence indicating an inability to pay the civil penalty or inability to continue to conduct business if the civil penalty is assessed. Respondents did not introduce evidence indicating inability to pay or inability to continue to conduct business.

Sharlene A. Deskins, for Complainant.
Respondents, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on March 30, 1994.

The Complaint alleges that: (1) on August 3, 1991, Jack Stepp entered, for the

purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II(A)); and (2) on August 3, 1991, William Reinhart allowed the entry, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ II(B)).

On April 29, 1994, William Reinhart filed a Response [hereinafter Reinhart's Answer] in which he admitted that at all times material to this proceeding, he was the owner of Honey's Threat and that Honey's Threat was entered as Entry No. 362, in Class No. 15, on August 3, 1991, at the Wartrace Horse Show at Wartrace, Tennessee, but denied that Honey's Threat was sore when entered (Reinhart's Answer ¶¶ I(D), II(B)). On July 9, 1996, Jack Stepp filed a Response [hereinafter Stepp's Answer] in which he admitted that at all times material to this proceeding, he was the trainer of Honey's Threat and that he entered Honey's Threat as Entry No. 362, in Class No. 15, on August 3, 1991, at the Wartrace Horse Show at Wartrace, Tennessee, but denied that Honey's Threat was sore when entered (Stepp's Answer ¶¶ I(C), II(A)).

On October 8, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] conducted a hearing in Murfreesboro, Tennessee. Ms. Sharlene A. Deskins, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Mr. Jack Stepp and Mr. William Reinhart [hereinafter Respondents] appeared pro se.

On December 1, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof [hereinafter Complainant's Proposed Findings and Conclusions]. On December 2, 1997, Respondents filed Brief of Respondents. On February 6, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Jack Stepp violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Honey's Threat in the Wartrace Horse Show at Wartrace, Tennessee, on August 3, 1991, while the horse was sore; (2) concluded that William Reinhart violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Honey's Threat in the Wartrace Horse Show at Wartrace, Tennessee, on August 3, 1991, while the horse was sore; (3) assessed each Respondent a civil penalty of $2,000; and (4) disqualified each Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other

device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction (Initial Decision and Order at 12).

On March 11, 1998, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* On the same day, Respondents filed a motion requesting "the Judicial Officer to hold in abeyance any further proceedings in this case until a requested investigation by the Secretary of Agriculture is completed, or, in the alternative, to dismiss." (Motion to Hold in Abeyance.)

On April 17, 1998, Complainant filed Complainant's Opposition to the Respondents' Notice of Appeal and Appellate Brief of Respondents [hereinafter Complainant's Response], and on April 21, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondents' Motion to Hold in Abeyance** and a decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Initial Decision and Order as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

Complainant's exhibits are designated by the letters "CX" and transcript references are designated "Tr."

Applicable Statutory Provisions

15 U.S.C.:

. . . .

TITLE 15—COMMERCE AND TRADE

. . . .

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*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

**I am filing a Ruling Denying Motion to Hold in Abeyance simultaneous with the filing of this Decision and Order. *In re Jack Stepp*, 57 Agric. Dec. ___ (May 6, 1998) (Ruling Denying Motion to Hold in Abeyance).

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse

which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent

violation.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. §§ 1821(3), 1824(2), 1825(b)(1), (c), (d)(5).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . .

Statement of the Case

. . . Respondents . . . admit that [Mr. Stepp was the trainer of Honey's Threat; that Mr. Reinhart] was the owner of Honey's Threat; and that [Mr. Stepp entered Honey's Threat, as Entry No. 362, in Class No. 15,] at the Wartrace Horse Show at Wartrace, Tennessee, on August 3, 1991 [(Reinhart's Answer ¶ I(C)-(D); Stepp's Answer ¶ I(C)-(D)). [Footnote 1 omitted.] Respondents] deny that Honey's Threat was sore [when he was entered in the Wartrace Horse Show (Reinhart's Answer ¶ II(A)-(B); Stepp's Answer ¶ II(A)-(B))].

Mr. Stepp testified that sometime between 9 and 10 p.m. on August 3, [1991,] before Honey's Threat was [to be] exhibited, Honey's Threat was examined by two Animal and Plant Health Inspection Service [hereinafter APHIS] veterinarians, Dr. Ronald Zaidlicz and Dr. Hugh Hendricks. They examined between 15 and 20 horses at the [Wartrace Horse S]how and "wrote up" five. (Tr. 103, 155, 160[-61].) Neither Dr. Zaidlicz nor Dr. Hendricks could remember his inspection of Honey's Threat, but [Dr. Zaidlicz and Dr. Hendricks each] prepared [an] affidavit containing the results of [his] examination [(CX 3, 4)].

[In his affidavit, Dr. Zaidlicz described the horse that he examined as a 3-year-old dark bay stallion named "Honey's Threat" and stated, as follows]:

I then examined the horse and upon digital palpation using light to moderate pressure the horse exhibited pain when both forepasterns were examined, the horse was also reluctant to walk freely. When I examined the horse it was also reluctant to stand on only one foot, the horse also exhibited scars and was not in compliance with the SCAR RULE. Upon digital palpation of the left forepastern the horse exhibited definite pain responses on the anterior, anterior lateral, anterior medial, posterior, posterior medial and posterior lateral surfaces of the forepastern. Upon digital palpation of the right forepastern the horse exhibited definite pain responses on the anterior, anterior medial, anterior lateral, posterior, posterior medial, and posterior lateral surfaces of the forepastern. The horse would exhibit pain by withdrawing the affected limb, tensing the flank and abdominal muscles, raising the head, and shifting weight to the rear. The pain responses were consistent and repeatable each time the areas noted on APHIS FORM 7077 were palpated. After my examination Dr. Hendricks and I conferred and were in full agreement that the horse met the criteria to be called a "sore" horse as defined by the Horse Protection Act. Dr. Hendricks and I agreed that this horse was "sore" and a "bad image" horse.

CX 4.

Dr. Zaidlicz identified the horse's custodian as Jack Stepp who testified that he had held Honey's Threat while [the horse] was examined by Dr. Zaidlicz (Tr. [175-]76). Dr. Zaidlicz [originally stated in his affidavit that] the horse's exhibitor number,[***] which is the number assigned by the show's management when a horse is entered in a show, was "148" (CX 4; Tr. 122). Dr. Zaidlicz said the [exhibitor] number is used for identification purposes at the show and is placed on the saddle and the rider's back, but that he [(Dr. Zaidlicz)] also relies on an investigator to obtain the [exhibitor] number and that sometimes wrong information is obtained (Tr. 70[-72], 74-75 . . .). However, [lines are drawn through one reference to exhibitor number] "148" in Dr. Zaidlicz' affidavit and the number "362" is written [above the number "148" (CX 4)]. A second reference to "[e]xhibitor [number] 148" in [Dr. Zaidlicz'] affidavit is not changed [(CX 4)]. Dr. Zaidlicz did not initial the change [in his affidavit (CX 4)] and testified that he had not made the change[, as follows:

[***The record reveals that the terms "exhibition number" and "entry number" have a meaning identical to that of "exhibitor number."]

[BY MR. REINHART:]

Q. Okay. Go to the affidavit that you had submitted in this case [(CX 4)]. Now I notice that in your affidavit you -- and in about the fourth or fifth line from the top you use the term "I observed exhibitor #148," which is scratched out and written above that is the #362. Was there some confusion as to the number of this horse at the horse show?

[BY DR. ZAIDLICZ:]

A. I don't know anything about that. There's another spot in there too where it says #148, and that's not my correction, so --

Q. Not your correction, okay. Well, again --

JUDGE HUNT: Where it's crossed out is not your correction, your writing 362 in there?

THE WITNESS: I don't believe it is. I questioned the same thing, but I think that Mr. Eades may have an explanation for that.

JUDGE HUNT: Should put down 148?

THE WITNESS: Right.

JUDGE HUNT: Excuse me for interrupting, Mr. Reinhart.

MR. REINHART: Yes, quite alright, Judge.

BY MR. REINHART:

Q. Well, now again about the middle of the page of your affidavit you use the term -- the number again as exhibitor #148.

A. Right.

Q. And in this case it's not scratched out.

A. Right.

Q. You don't --

A. See, I have no explanation for that.

. . . .

BY MS. DESKINS:

Q. Dr. Zaidlicz, you were asked about your affidavit, about a change that was made in it.

A. Yes.

Q. Okay. Do you recall that testimony?

A. Yeah, that I didn't know anything about it.

Q. Well, are you saying someone made this change? What do you mean when you say you don't know anything about it?

A. It doesn't appear to be my handwriting, and I have the number down later in there. I don't know the reason for that. And like I say I suspect that Mr. Eades can shed some light on that.

Q. Okay. Well, you're not -- are you making any claims that John Eades changed this after you signed it or anything like that?

A. I haven't the foggiest idea. I mean it's just -- I don't know what the number is. I just question that myself. I just don't know.

Q. Well, do you review your statement before you sign it?

A. Huh-uh.

Tr. 28-29, 66-67.]

Dr. Hendricks, who has been examining horses for APHIS since 197[8 (Tr. 81)], stated in his affidavit that:

On moderate digital palpation of each forepastern the horse produced

strong and definite pain responses. The pain was evident on both the anterior and posterior aspects of each forepastern. The medial and lateral aspects of each forepastern produced strong pain responses. The horse expressed head lift and foot withdrawal along with the shifting of weight and tightened abdominal muscles in response to pain. The horse was reluctant to lead and stand on one front foot. This horse had excessive scars on both feet and was truly a bad image horse.

Dr. Ron Zaidlicz another USDA Veterinarian then examined this entry. Dr. Zaidlicz and I conferred and were in full agreement that this horse was "sore" as defined by the Horse Protection Act. The custodian was informed of our findings.

CX 3.

Dr. Hendricks had also written in his affidavit that the horse, which he identified as a 3-year-old dark bay stallion [named] "Honey's Threat," had been "entered into class 15 as exhibitor #148." However, [two lines are drawn through the reference to exhibitor number] "148" [on Dr. Hendricks' affidavit] and the number "362" is written [above the number "148" (CX 3)]. [Dr. Hendricks did not initial] the change [(CX 3)].

Dr. Hendricks, who had gone to Georgia after the [Wartrace Horse S]how, prepared his statement on August 4[, 1991 (Tr. 105, 108),] and then gave it as an affidavit to A. Lynwood Suber, an APHIS investigator in Georgia, on August 6[, 1991] ([CX 3;] Tr. [108,] 118). Dr. Hendricks testified that sometime between the time he prepared [his] statement and the time he gave it to Mr. Suber, he had changed the [reference in his statement to exhibitor number] "148" to [exhibitor number] "362" [(Tr. 108-09). Dr. Hendricks testified that the reference to exhibitor number] "148" was an error caused by John Eades, the APHIS investigator at the [Wartrace Horse S]how. He said that "Mr. Eades put . . . [148 in item 20 on APHIS FORM 7077 (CX 5)] and I guess he realized a little later that that was the wrong exhibitor's number. And we all had to change it to the right number. . . . Mr. Eades told us that when he found out he had the wrong number." (Tr. 90, 110.)

Mr. Eades . . . testified that he had accompanied Drs. Zaidlicz and Hendricks at the [Wartrace Horse S]how to prepare the documentation for any horse found in violation of the Horse Protection Act [(Tr. 113)]. When Honey's Threat was found to be sore[, Mr. Eades] prepared [items] 1 through 20 of APHIS FORM 7077 ("SUMMARY OF ALLEGED VIOLATIONS") [(CX 5). Mr. Eades wrote the number "148" in item 20, entitled "Exhibition No." However, two lines are drawn through

the reference to exhibition number "148" on APHIS FORM 7077 and the number "362" is written next to the number "148" (CX 5, item 20)]. Mr. Eades said he . . . probably got the number "148" from the horse's custodian [(Tr. 113-14)]. . . . Mr. Eades said he changed "148" to "362" "a few days after the show" when he received the class sheet [(CX 6), also known as the] entry form, from the show's officials, which states that the entry number for Honey's Threat was "362" (CX 6; Tr. 114-15, [140-42], 148-49). This entry form, however, was not signed by either Mr. Stepp or Mr. Reinhart as the form requires. [Further, the entry form does not] contain the horse's registration number, which the form also requires and which Mr. Eades said is the only authentic way of identifying a horse. (Tr. 127-31.) Mr. Eades testified that he did not attempt to verify the information on the entry form, and despite the discrepancy [between the entry number for Honey's Threat on the entry form (CX 6) and the exhibition number for Honey's Threat in item 20 on APHIS FORM 7077 (CX 5)], accepted 362[, recorded on the entry form (CX 6),] as the exhibition number for Honey's Threat (Tr. . . . 14[0-42). Mr. Eades said he changed "148" to "362" on [APHIS] FORM 7077 but did not make any changes in the affidavits of Drs. Zaidlicz and Hendricks [(Tr. 119, 143-45)]. He also said he did not contact either Dr. Zaidlicz or Dr. Hendricks about changing their affidavits [(Tr. 143-45)]. He said that by the time he discovered the apparent error he may have already turned their statements over to another [APHIS] investigator, Lon Sutton, and that he does not recall whether he told Mr. Sutton about the discrepancy (Tr. 120, 144-46). He also said that when a person changes an affidavit [the change] is acknowledged with the person's initials (Tr. 142-48). The numbers "362" on the three documents [(CX 3, 4, 5)] all appear to be in the same handwriting.

Mr. Stepp testified that he had worked for Mr. Reinhart as a horse trainer [(Tr. 152-53)]. He said Honey's Threat was the only horse that Mr. Reinhart had entered in the Wartrace [Horse S]how on August 3[, 1991,] and that, as far as he knew, [there] was only [one] horse [named Honey's Threat] in the [Wartrace Horse S]how [on August 3, 1991 (Tr. 175-77)]. He also said that Mr. Reinhart never told him to sore any horse and denied that he had sored Honey's Threat [(Tr. 162-63, 165, 185-86, 196)]. Mr. Stepp stated that [Mr. Reinhart had instructed that his horses were not to be abused in any way and] that Honey's Threat was a "string-haltered" horse that put his weight on his rear feet when he walked [(Tr. 153, 163-64)]. Louie George, who also worked for Mr. Reinhart as a trainer, testified that Mr. Reinhart never told trainers to sore a horse (Tr. [200-02])

In his Answer to the Complaint, Mr. Reinhart states:

Upon learning that this horse was turned down in pre-show inspection, I discussed this matter with Mr. Lonnie Messick, head of the DQP [Designated Qualified Person] program of the National Regulatory Commission, at the Wartrace Horse Show. I requested that Mr. Messick come to my barn and examine this horse immediately following this show. Mr. Messick agreed to this request and came to my barn on August 6 to examine this horse. He brought with him two associates who I understood were DQP inspectors under his direction. During this inspection at my barn, we led the horse under halter and Mr. Messick said he thought the horse was alright. We then placed the horse in the crossties where one or both of Mr. Messick's associates checked the horse's feet thoroughly with no show grease or any other substance on the horse's feet. There was no problem at this inspection stage. We then saddled the horse, put a bridle on with a bit and led the horse from the crossties.

At this state, Mr. Messick said, "Well, now, there's a problem," because the horse did not lead as freely as he did under halter. We led the horse two or three times with the bridle and bit and he never did lead as freely as he normally does. We then rode the horse for Mr. Messick and his associates. The horse's movements under saddle were, in my opinion, not significantly different than they were in warming the horse up at the Wartrace Horse Show. Mr. Messick's advice was that we simply had to "train" this horse to lead better for pre-show inspections. We thanked Mr. Messick for his visit and consultation.

Immediately after Mr. Messick's departure, Jack Stepp and I began to examine the horse's mouth. We discovered that his mouth was rubbed on the bars, which was caused by a new bit we had used on him for two or three days prior to the Wartrace Horse Show in an effort to get this horse to set his head better. Since walking horses are shown in a square gait as opposed to a pace, this squareness can be accomplished through the horse's mouth as well as with pads and action devices on the feet. We experimented with this horse several times after Mr. Messick left and each time the horse would lead freely while leading only with the halter; but, when the bit was put in his mouth, he led in a square fashion.

The rubs on this horse's mouth were certainly inadvertent, but do not constitute any violation of the Horse Protection Act. Based on this fact-finding and review of the matter with other knowledgeable horsemen, I am

satisfied this is the reason the horse did not respond well in the pre-show inspection at the Wartrace Horse Show; and, I, therefore, categorically deny that this horse was presented while sore under both the letter and spirit of the Horse Protection Act.

[Reinhart's Answer ¶ II(B).]

Law

. . . .

Section 6(d)(5) of the [Horse Protection] Act [(15 U.S.C. § 1825(d)(5)) provides that in any civil action to enforce the Horse Protection Act, a horse shall be presumed to be a horse which is sore if it manifests] . . . abnormal, bilateral sensitivity. . . . Section 5(2) [of the Horse Protection Act (15 U.S.C. § 1824(2))] prohibits not only the showing or exhibiting of a sore horse, but also "(B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore." Section 5(2)(D) [of the Horse Protection Act (15 U.S.C. § 1824(2)(D))] prohibits [an owner of a horse from] allowing [the activity described in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B))]. Entering, within the meaning of the [Horse Protection] Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the DQP or [APHIS] veterinarians, or both. . . .[****]

[****In re Danny Burks*, 53 Agric. Dec. 322, 334 (1994) (rejecting respondent's argument that "the mere act of submitting a horse for pre-show inspection does not constitute 'entering' as that term is [used in the Horse Protection] Act"); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 280 (1994) (rejecting respondent's argument that "entering" as used in the Horse Protection Act is limited to "doing whatever is specifically required by the management of any particular horse show to cause a horse to become listed on the class sheet for a specific class of that horse show"), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 293 (1993) (stating that entering a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1183 (1993) (stating that entry is a process that gives a status of being entered to a horse and it includes filling out forms and presenting the horse to the DQP for inspection); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1146-47 (1993) (stating that "entering" within the meaning of the Horse Protection Act is a process that begins with the payment of the entry fee); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (1992) (stating that entering, within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the DQP and/or USDA veterinarians), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).]

Discussion

The reports of the examinations of Honey's Threat by Dr. Zaidlicz and Dr. Hendricks containing their findings that the horse experienced bilateral pain in his forelimbs when palpated are sufficient to create a presumption under section 6(d)(5) of the [Horse Protection] Act [(15 U.S.C. § 1825(d)(5))] that Honey's Threat was sore. . . .[*****] Respondents contend that [an] examination of Honey's Threat by a DQP [3 days after Honey's Threat was examined by Drs. Zaidlicz and Hendricks at the Wartrace Horse Show] indicates that the horse was not sore. However, [evidence of the results of an examination conducted by a DQP 3 days after a horse show is entitled to almost no weight with respect to the condition of a horse at the time of the horse show and is not sufficient to outweigh the testimony of two disinterested APHIS veterinarians as to their examinations during the horse show].[2] *In re Jackie McConnell*, 44 Agric. Dec. 712, 726 (1985)[, *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992)].

Respondents also contend that there was confusion as to the identity of the horse, that is, that [the horse examined by Drs. Zaidlicz and Hendricks and identified in CX 3, 4, and 5] may [not] have been . . . Honey's Threat. . . . Respondents contend that Dr. Hendricks could not tell the color of the horse [(Brief of Respondents at 2)], that a DQP said the horse was black (CX 2), and that APHIS FORM 7077 states the horse was a dark bay (CX 5). Dr. Hendricks admitted that he did not know much about horse colors and that to him a "dark bay horse" was one that was lighter than a black horse and that in any event he used the color description that Mr. Eades had put on APHIS FORM 7077 [(Tr. 94)].

[*****See *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 560 (1997), *aff'd per curiam*, No. 97-8284, ___ F.3d ___ (11th Cir. Mar. 9, 1998) (Table); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 906 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 872 (1996); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 314 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994); *In re Eldon Stamper*, 42 Agric. Dec. 20, 27 (1983), *aff'd*, 722 F. 2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).]

[2]Mr. Reinhart asked at the hearing that Honey's Threat be examined [during the hearing] to determine whether the horse had ever been sored or scarred [(Tr. 6, 219)]. The request was denied [(Tr. 220). Respondents] renew the request [(Brief of Respondents at 4), which] is again denied for the reason that an examination at this time would not show the condition of Honey's Threat when he was entered [in the Wartrace Horse Show on August 3,] 1991.

The actual color of the horse was never established at the hearing. . . . It is noted that [Drs. Zaidlicz and Hendricks and Mr. Eades observed Honey's Threat] at night when many colors appear dark (Tr. 126). . . . [T]he difference between dark bay and black [does not] constitute such a variation in the description of [Honey's Threat's] color as to [evidence that there was] confusion about the horse's identity.

Respondents also contend that the discrepancy in the horse's exhibition number also [evidences] confusion about his identity. Complainant contends that the discrepancy is insignificant.

A horse's exhibition number is one of the ways of determining the identity of a horse found to be sore. In some cases, [the exhibition number] may be critical when other means do not definitely establish a horse's identification (e.g., confusion created by two horses having similar names). In this case, three documents (CX 3, 4, 5) . . . that were crucial in determining whether Respondents [violated section 5(2) of the Horse Protection Act (15 U.S.C. § 1824(2))] contain discrepancies as to Honey's Threat's exhibition number. The discrepancies occurred when, in an attempt to resolve an apparent [error relating to Honey's Threat's] exhibition number, the three documents [(CX 3, 4, 5)] . . . were altered to change the exhibitor number from "148" to "362." Even though Mr. Eades and Dr. Hendricks said they made the changes in the reports they prepared, the three changes all appear to have been made in the handwriting of the same person [(Tr. 90, 105-06, 142-44)]. Dr. Hendricks also said he made the change after being told . . . by Mr. Eades [that Honey's Threat's exhibition number was 362 and that the reference to exhibitor number 148 in Dr. Hendricks' affidavit was in error (Tr. 110)], while Mr. Eades . . . said he did not tell Dr. Hendricks [that reference to exhibitor number 148 was in error (Tr. 145)]. Dr. Hendricks also failed to initial his change, even though, after [almost] 20 years of examining horses and preparing affidavits for use in [disciplinary administrative proceedings under the Horse Protection Act], he would certainly have known that any change [to his affidavit should] be initialled, or at least he would have been reminded by any trained APHIS investigator who took his affidavit [that changes to his affidavit should be initialled]. Moreover, [Dr. Zaidlicz denies altering his affidavit and] . . . there is . . . no identification of the person who altered Dr. Zaidlicz' affidavit [(CX 4; Tr. 28-29, 66-67)].

An alteration of an official report can affect its trustworthiness as evidence. *Cf. Fayson v. Schmadl*, 126 F.R.D. 419 (D.D.C. 1988). . . . [Footnote 3 omitted]. However, I find that the three documents, despite the [alterations], are trustworthy based on my finding that the three persons who prepared them, Dr. Zaidlicz, Dr. Hendricks, and Mr. Eades, were all credible witnesses concerning their findings that Honey's Threat was sore. Disregarding Honey's Threat's exhibition number,

the evidence in the record still establishes that Honey's Threat was the horse examined by Dr. Zaidlicz and Dr. Hendricks. Honey's Threat was the only horse [owned by] Mr. Reinhart [that was] entered in the [Wartrace Horse S]how and Honey's Threat was the only horse by that name in the show. The horse's trainer, Mr. Stepp, said he was present when the horse was examined by the APHIS veterinarians and both Mr. Stepp and Mr. Eades give the same approximate time for the examination. It is clear in view of this evidence that, despite the discrepancy in the exhibition numbers, the horse found to be sore by Drs. Zaidlicz and Hendricks was Honey's Threat, which was owned by Mr. Reinhart and which was entered in the [Wartrace Horse S]how on August 3, 1991, by Mr. Stepp.

Sanction

Mr. Reinhart states that he never approved of any of his horses being sored or otherwise abused. However, it is a violation of the [Horse Protection] Act [for an owner to allow the entry of] a sore horse [in a horse show or horse exhibition for the purpose of showing or exhibiting the horse] regardless of whether an owner even knew that the horse was sore. *In re Jackie McConnell, supra*, 44 Agric. Dec. at 722. . . . If [an owner's] horse is entered when sore, the owner, as well as the person who entered the horse, is considered to have violated the [Horse Protection] Act. *In re Eldon Stamper, supra*, 42 Agric. Dec. at 44. Accordingly, Jack Stepp is found to have violated the [Horse Protection] Act by entering Honey's Threat in the Wartrace Horse Show on August 3, 1991, while the horse was sore, and William Reinhart, as the horse's owner, is found to have violated the [Horse Protection] Act by allowing Honey's Threat to be entered in the [Wartrace Horse S]how [on August 3, 1991,] while [the horse was] sore.

Complainant's proposed sanction of a $2,000 [civil] penalty and a 1-year [disqualification] is the sanction routinely imposed for [the first violation of the Horse Protection Act by a respondent.[4]]

[[4]*In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 890 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re Tracy Renee Hampton* (Decision as to Dennis Harold Jones), 53 Agric. Dec. 1357, 1390-91 (1994); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1240-41 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 317-18 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 283 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 248-50 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).]

Findings of Fact

1. Respondent Jack Stepp is an individual whose mailing address is Rutherford County Workhouse, Records Office, 1710 South Church Street, Murfreesboro, Tennessee 37130 (Tr. 169). Respondent William Reinhart is an individual whose mailing address is 6429 Manchester Highway, Murfreesboro, Tennessee 37130 [(Reinhart's Answer ¶ I(B))].

2. At all times material [to this proceeding,] Jack Stepp was the trainer and William Reinhart was the owner of a horse known as "Honey's Threat" [(Reinhart's Answer ¶ I(C); Stepp's Answer ¶ I(C)).]

3. Honey's Threat was entered by Respondent Jack Stepp [as Entry No. 362,] in Class No. 15, at the Wartrace Horse Show in Wartrace, Tennessee, on August 3, 1991 [(Reinhart's Answer ¶ I(C); Stepp's Answer ¶ I(C))].

4. Respondent William Reinhart allowed the entry of Honey's Threat in the Wartrace Horse Show on August 3, 1991 [(Reinhart's Answer ¶ I(D); Stepp's Answer ¶ I(D))].

5. APHIS veterinarians, Dr. Ronald Zaidlicz and Dr. Hugh Hendricks, examined Honey's Threat [on August 3, 1991, at the Wartrace Horse Show in Wartrace, Tennessee. Dr. Zaidlicz and Dr. Hendricks] conducted independent examinations of Honey's Threat and upon palpating the horse's forelimbs, Honey's Threat manifested bilateral pain. [(CX 3, 4, 5; Tr. 24, 89.)]

Conclusions of Law

Respondent Jack Stepp violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering a horse named "Honey's Threat" in the Wartrace Horse Show in Wartrace, Tennessee, on August 3, 1991, while the horse was sore. Respondent William Reinhart violated section 5(2)(D) of the [Horse Protection] Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of [a horse named] "Honey's Threat" in the Wartrace Horse Show [in Wartrace, Tennessee,] on August 3, 1991, while the horse was sore.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise four issues in their Notice of Appeal and Appellate Brief of Respondents [hereinafter Respondents' Appeal Petition]. First, Respondents contend that the ALJ "erred in allowing illegally altered documents and an illegally manufactured document as evidence." (Respondents' Appeal Petition at 1.) Respondents contend that all of the documents admitted into evidence (CX 1,

2, 3, 4, 5, 6) were altered, making them untrustworthy and "completely inadmissible as evidence." (Respondents' Appeal Petition at 6.)

Respondents did not object to the admission of CX 1, 2, 3, 4, and 5, as follows:

MS. DESKINS: Okay. I move for the admission of CX-3 [Affidavit of Hugh V. Hendricks].

MR. REINHART: Is that one of the exhibits that you presented prior to the --

JUDGE HUNT: Yes, this is his affidavit. She wants to make it part of the record in the case. Okay?

MR. REINHART: No objection.

JUDGE HUNT: Alright, CX-3 will be admitted into evidence.

(The document previously marked for identification as Complainant's Exhibit No. 3, was received in evidence.)

. . . .

JUDGE HUNT: . . . .

And also there are pending motions to move the exhibits of 1, 2, 4 and 5, and I reserved on that until you had an opportunity to examine.

MR. REINHART: Right.

JUDGE HUNT: Do you object to the admission of those documents?

MR. REINHART: Well, I would object to the admission of that document as an entry form from the Wartrace Horse Show.

JUDGE HUNT: Okay. That's the only one you object to then, that's No. 6, Complainant's Exhibit 6?

MR. REINHART: Yeah.

JUDGE HUNT: Okay. I'll admit 1, 2, 4 and 5. On 6 I'll admit it but not necessarily that it is a class entry form. I'll admit it and consider what weight I'll give to it.

MR. REINHART: Right.

JUDGE HUNT: So 1, 2, 4, 5 and 6 are admitted into evidence.

MR. REINHART: Okay.

(The documents previously marked for identification as Complainant's Exhibit Nos. 1, 2, 4, 5 & 6 were received in evidence.)

Tr. 87-88, 220-21.

Section 1.141(h)(2) of the Rules of Practice provides as follows:

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence*. . . .

. . . .

(2) *Objections*. (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the Judge, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge.

(ii) Only objections made before the Judge may subsequently be relied upon in the proceeding.

7 C.F.R. § 1.141(h)(2).

Further, section 1.145(a) of the Rules of Practice provides that objections regarding evidence may be relied upon in an appeal, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* . . . As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. . . .

7 C.F.R. § 1.145(a).

Therefore, Respondents are precluded, by their failure to object to the admission of CX 1, 2, 3, 4, and 5 into evidence, from appealing the ALJ's rulings granting Complainant's motions for admission of CX 1, 2, 3, 4, and 5 into evidence.

Further, while the class entry form (CX 6) does not appear to be complete, I have carefully examined CX 6, and I do not find that it has been altered, as Respondents contend. I do not find that the ALJ's ruling allowing the admission into evidence of CX 6 was error.

Second, Respondents contend that the ALJ "refused to consider evidence presented by Respondents showing the horse, Honey's Threat, was not sore and was confused with another horse." (Respondents' Appeal Petition at 7.)

The Administrative Procedure Act provides that an order may not be issued except on consideration of the whole record or those parts cited by a party, as follows:

§ 556. Hearings; presiding employees; powers and burden of proof; evidence; record as basis of decision

. . . .

(d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

The Initial Decision and Order reflects the ALJ's thorough consideration of the whole record in this proceeding. Specifically, the Initial Decision and Order establishes that the ALJ carefully examined Respondents' evidence concerning whether Honey's Threat was "sore" within the meaning of the Horse Protection Act and whether Honey's Threat was confused with another horse that was at the

Wartrace Horse Show on August 3, 1991. There is no basis for Respondents' contention that the ALJ failed to consider the evidence presented by Respondents.

Third, Respondents contend that "Complainant's counsel unduly prejudiced the [ALJ] by making statements in cross-examination of Respondents' witnesses and in her brief which improperly misstate USDA regulations." (Respondents' Appeal Petition at 9.) Specifically, Respondents contend that Complainant's counsel falsely represented that: (1) the Horse Protection Regulations (9 C.F.R. pt. 11) prohibit the use of chains on horses; (2) Mr. Reinhart had an affirmative obligation to tell his trainers not to use chains when they train a horse; (3) Drs. Zaidlicz and Hendricks testified that chains were a cause of the painful areas they found on Honey's Threat; and (4) Mr. Reinhart's trainers believe a horse is only sore when it is lame or falls down (Respondents' Appeal Petition at 9-10). Respondents contend that these false statements are found in Complainant's Proposed Findings and Conclusions at pages 6 and 14.

As an initial matter, Complainant does not state that the Horse Protection Regulations (9 C.F.R. pt. 11) prohibit the use of chains on horses or that Mr. Reinhart had an affirmative obligation to tell his trainers not to use chains when they train a horse (Complainant's Proposed Findings and Conclusions at 6, 14).

I agree with Respondents that Complainant states that Drs. Zaidlicz and Hendricks testified that chains were a cause of the painful areas they found on Honey's Threat and that Mr. Reinhart's trainers believe a horse is *only* sore when it is lame or falls down. I do not find that Drs. Zaidlicz and Hendricks testified that chains were a cause of the painful areas they found on Honey's Threat (Tr. 7-111), nor does the record support a finding that Mr. Reinhart's trainers believe a horse is *only* sore when it is lame or falls down (Tr. 171, 176, 210-11). However, the ALJ did not find that chains caused the painful areas found on Honey's Threat or that Mr. Reinhart's trainers believe a horse is only sore when it is lame or falls down. Further, there is no indication that Complainant's statements "prejudiced" or misled the ALJ, as Respondents contend.

Fourth, Respondents contend that "Complainant's counsel further prejudiced the [ALJ] by presenting statements in her brief concerning the financial capacity of Respondents not in evidence." (Respondents' Appeal Petition at 10.)

Complainant states with respect to Respondents' ability to pay the $2,000 civil penalty requested by Complainant, as follows:

> The Respondent Reinhart has sufficient resources to pay a $2,000 civil penalty. He owns 110 acre farm and many horses which shows he can afford a modest civil penalty of $2,000. The payment of the civil penalty will not affect the Respondent Reinhart's ability to continue in business

3. Respondent William Reinhart is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, and until Respondent William Reinhart has paid the civil penalty assessed in this Order. When Respondent William Reinhart demonstrates to the Animal and Plant Health Inspection Service that he has been disqualified for 1 year as provided in this Order and paid the civil penalty assessed in this Order, a supplemental order will be issued in this proceeding upon motion of Complainant, terminating the disqualification of Respondent William Reinhart imposed by this Order.

The disqualification of Respondent William Reinhart shall become effective on the 60th day after service of this Order on Respondent William Reinhart.

4. Respondent Jack Stepp is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, and until Respondent Jack Stepp has paid the civil penalty assessed in this Order. When Respondent Jack Stepp demonstrates to the Animal and Plant Health Inspection Service that he has been disqualified for 1 year as provided in this Order and paid the civil penalty assessed in this Order, a supplemental order will be issued in this proceeding upon motion of Complainant, terminating the disqualification of Respondent Jack Stepp imposed by this Order.

The disqualification of Respondent Jack Stepp shall become effective on the 60th day after service of this Order on Respondent Jack Stepp.

In re: JACK STEPP AND WILLIAM REINHART.
HPA Docket No. 94-0014.
Ruling Denying Motion to Hold in Abeyance filed May 6, 1998.

Sharlene A. Deskins, for Complainant.
Respondents, pro se.
Ruling issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings

Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151), by filing a Complaint on March 30, 1994.

The Complaint alleges that: (1) on August 3, 1991, Jack Stepp entered, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II(A)); and (2) on August 3, 1991, William Reinhart allowed the entry, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ II(B)).

On April 29, 1994, William Reinhart filed a Response [hereinafter Reinhart's Answer] in which he admitted that at all times material to this proceeding, he was the owner of Honey's Threat and that Honey's Threat was entered as Entry No. 362, in Class No. 15, on August 3, 1991, at the Wartrace Horse Show at Wartrace, Tennessee, but denied that Honey's Threat was sore when entered (Reinhart's Answer ¶¶ I(D), II(B)). On July 9, 1996, Jack Stepp filed a Response [hereinafter Stepp's Answer] in which he admitted that at all times material to this proceeding, he was the trainer of Honey's Threat and that he entered Honey's Threat as Entry No. 362, in Class No. 15, on August 3, 1991, at the Wartrace Horse Show at Wartrace, Tennessee, but denied that Honey's Threat was sore when entered (Stepp's Answer ¶¶ I(C), II(A)).

On October 8, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] conducted a hearing in Murfreesboro, Tennessee. Ms. Sharlene A. Deskins, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Mr. Jack Stepp and Mr. William Reinhart [hereinafter Respondents] appeared pro se.

On December 1, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof. On December 2, 1997, Respondents filed Brief of Respondents. On February 6, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Jack Stepp violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Honey's Threat in the Wartrace Horse Show at Wartrace, Tennessee, on August 3, 1991, while the horse was sore; (2) concluded that William Reinhart violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Honey's Threat in the Wartrace Horse Show at Wartrace, Tennessee,

on August 3, 1991, while the horse was sore; (3) assessed each Respondent a civil penalty of $2,000; and (4) disqualified each Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction (Initial Decision and Order at 12).

On March 11, 1998, Respondents filed a motion requesting "the Judicial Officer to hold in abeyance any further proceedings in this case until a requested investigation by the Secretary of Agriculture is completed, or, in the alternative, to dismiss." (Motion to Hold in Abeyance.) On the same day, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1]

On April 17, 1998, Complainant filed Complainant's Opposition to the Respondents' Notice of Appeal and Appellate Brief of Respondents, and on April 21, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondents' Motion to Hold in Abeyance and a decision.[2]

Respondents state in an attachment to their Motion to Hold in Abeyance that:

> Simultaneous to the filing of the attached Notice of Appeal and Appellate Brief in HPA Docket No. 94-0014, Respondents have filed with the Secretary of Agriculture a request that the Secretary's office conduct an investigation to determine why government documents used in the prosection of this case, to wit, CX-3, CX-4 and CX-5 were illegally altered.
>
> Specifically, we have requested the Secretary to determine who altered these documents, when they were altered and why they were altered. In addition, we have asked the Secretary to determine in his investigation why government document CX-6 was illegally manufactured

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

[2]I am filing a Decision and Order simultaneous with the filing of this Ruling Denying Motion to Hold in Abeyance. *In re Jack Stepp*, 57 Agric. Dec. ___ (May 6, 1998).

and submitted as evidence in this case. Additionally, we specifically request that the Secretary determine who manufactured this document, when the document was manufactured and why this document was manufactured.

As fully discussed in *In re Jack Stepp*, 57 Agric. Dec. ___ (May 6, 1998), the record does establish that a reference to exhibitor number "148" in CX 3 (Dr. Hendricks' affidavit) has been altered to read exhibitor number "362"; a reference to exhibitor number "148" in CX 4 (Dr. Zaidlicz' affidavit) has been altered to read exhibitor number "362"; and a reference to exhibition number "148" in CX 5 (APHIS FORM 7077, SUMMARY OF ALLEGED VIOLATIONS) has been altered to read exhibition number "362." Further, while CX 6 (an entry form) does not appear to have been altered or "manufactured," it does appear to be incomplete. However, as fully explicated in *In re Jack Stepp*, 57 Agric. Dec. ___ (May 6, 1998), the alterations of the exhibitor number in CX 3 and CX 4, the alteration of the exhibition number in CX 5, and the fact that CX 6 appears to be incomplete, do not affect either: (1) my conclusions that Respondent Jack Stepp violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Honey's Threat in the Wartrace Horse Show in Wartrace, Tennessee, on August 3, 1991, while the horse was sore and Respondent William Reinhart violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Honey's Threat in the Wartrace Horse Show in Wartrace, Tennessee, on August 3, 1991, while the horse was sore; or (2) my determination of the appropriate sanctions to be imposed on Respondents.

Therefore, I find no basis for delaying further proceedings in this disciplinary administrative proceeding pending the outcome of any investigation to answer Respondents' questions regarding the alterations of CX 3, CX 4, and CX 5, and the apparent incompleteness of CX 6. Consequently, Respondents' Motion to Hold in Abeyance is denied.

In re: JACK STEPP AND WILLIAM REINHART.
HPA Docket No. 94-0014.
Order Denying Petition for Reconsideration filed June 18, 1998.

Failure to file timely petition for reconsideration.

The Judicial Officer denied Respondents' Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

Sharlene A. Deskins, for Complainant.
Respondents, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on March 30, 1994.

The Complaint alleges that: (1) on August 3, 1991, Jack Stepp entered, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II(A)); and (2) on August 3, 1991, William Reinhart allowed the entry, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ II(B)).

On April 29, 1994, William Reinhart filed a Response [hereinafter Reinhart's Answer] in which he admitted that at all times material to this proceeding, he was the owner of Honey's Threat and that Honey's Threat was entered as Entry No. 362, in Class No. 15, on August 3, 1991, at the Wartrace Horse Show at Wartrace, Tennessee, but denied that Honey's Threat was sore when entered (Reinhart's Answer ¶¶ I(D), II(B)). On July 9, 1996, Jack Stepp filed a Response [hereinafter Stepp's Answer] in which he admitted that at all times material to this proceeding, he was the trainer of Honey's Threat and that he entered Honey's Threat as Entry No. 362, in Class No. 15, on August 3, 1991, at the Wartrace Horse Show at Wartrace, Tennessee, but denied that Honey's Threat was sore when entered (Stepp's Answer ¶¶ I(C), II(A)).

On October 8, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] conducted a hearing in Murfreesboro, Tennessee. Ms. Sharlene A. Deskins, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Mr. Jack Stepp and Mr. William Reinhart [hereinafter Respondents] appeared pro se.

On December 1, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof. On December 2, 1997, Respondents filed Brief of Respondents. On February 6, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Jack Stepp violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Honey's Threat in the Wartrace Horse Show at Wartrace, Tennessee, on August 3, 1991, while the horse was sore; (2) concluded that William Reinhart violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Honey's Threat in the Wartrace Horse Show at Wartrace, Tennessee, on August 3, 1991, while the horse was sore; (3) assessed each Respondent a civil penalty of $2,000; and (4) disqualified each Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction (Initial Decision and Order at 12).

On March 11, 1998, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On the same day, Respondents filed a motion requesting "the Judicial Officer to hold in abeyance any further proceedings in this case until a requested investigation by the Secretary of Agriculture is completed, or, in the alternative, to dismiss." (Motion to Hold in Abeyance.)

On April 17, 1998, Complainant filed Complainant's Opposition to the Respondents' Notice of Appeal and Appellate Brief of Respondents, and on April 21, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondents' Motion to Hold in Abeyance and a decision.

On May 6, 1998, I issued a Ruling Denying Motion to Hold in Abeyance. *In re Jack Stepp*, 57 Agric. Dec. ___ (May 6, 1998) (Ruling Denying Motion to Hold in Abeyance). On May 6, 1998, I also issued a Decision and Order: (1) assessing Respondent William Reinhart a civil penalty of $2,000; (2) assessing Respondent Jack Stepp a civil penalty of $2,000; (3) disqualifying Respondent William Reinhart for 1 year from showing, exhibiting, or entering any horse, directly or

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, and until Respondent William Reinhart has paid the civil penalty assessed in the Decision and Order; and (4) disqualifying Respondent Jack Stepp for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, and until Respondent Jack Stepp has paid the civil penalty assessed in the Decision and Order. *In re Jack Stepp*, 57 Agric. Dec. ___, slip op. at 28-30 (May 6, 1998). On May 11, 1998, the Hearing Clerk served Respondents with a copy of the Decision and Order and a letter dated May 7, 1998, from the Hearing Clerk.[2]

On May 27, 1998, 16 days after Respondents were served with the Decision and Order, Respondents filed a Petition for Reconsideration. On June 15, 1998, Complainant filed Complainant's Opposition to the Respondents' Petition for Reconsideration, and on June 16, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the May 6, 1998, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice provides:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite. . . .*
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

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[2]Domestic Return Receipt for Article Number P 093 143 295.

7 C.F.R. § 1.146(a)(3).

The letter dated May 7, 1998, from the Hearing Clerk expressly advises Respondents of the time for filing a petition for reconsideration, as follows:

CERTIFIED RECEIPT REQUESTED May 7, 1998

Messrs. Jack Stepp and
William J. Reinhart
3878 Murfreesboro Highway
Manchester, Tennessee 37355

Dear Gentlemen:

Subject: In re: Jack Stepp and William Reinhart, Respondents
HPA Docket No. 94-0014

Enclosed is a date-stamped copy of the decision and order issued by the Judicial Officer on the Secretary's behalf in the above-captioned proceeding.

Judicial review of this decision is available in an appropriate court if an appeal is timely filed. This office does not provide information on how to appeal. Please refer to the governing statute.

Prior to filing an appeal, you may file a petition for reconsideration of the Judicial Officer's decision within **10** days of service of the decision. An original and **three** copies of the petition for reconsideration must be filed with this office.

Sincerely,
/s/
JOYCE A. DAWSON
Hearing Clerk

Respondents' Petition for Reconsideration, which was required by section

1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after service of the Decision and Order, was filed too late, and, accordingly, Respondents' Petition for Reconsideration is denied.[3] Since Respondents' Petition for Reconsideration was not timely filed, the Decision and Order filed May 6, 1998, was not stayed in accordance with section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)). Therefore, the date by which payment of the civil penalties assessed against Respondent William Reinhart and Respondent Jack Stepp must be received by Complainant's counsel and the effective date of the disqualification of Respondent William Reinhart and the disqualification of Jack Stepp, provided in the May 6, 1998, Decision and Order, are not changed.

For the foregoing reasons, the following Order should be issued.

Order

Respondents' Petition for Reconsideration is denied.

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[3]*See In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after respondent was served with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after respondent was served with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after respondent was served with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after service of the decision and order on respondent); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after service of the decision and order on respondent); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing petition for reconsideration because it was not filed within 10 days after service of the decision and order on respondent); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after service of the decision and order on respondent).

MUSHROOM PROMOTION, RESEARCH and CONSUMER INFORMATION ACT

In re: UNITED FOODS, INC., A DELAWARE CORPORATION, d/b/a PICTSWEET MUSHROOM FARMS.
MPRCIA Docket No. 96-0001.
Decision and Order filed March 4, 1998.

Mushrooms — Dismissal of petition — Freedom of speech and association under First amendment — Motion to amend pleadings.

The Judicial Officer affirmed Judge Bernstein's (ALJ) Initial Decision and Order dismissing a Petition filed by a mushroom producer under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) (MPRCIA) seeking an exemption from or modification of the Mushroom Promotion, Research, and Consumer Information Order (7 C.F.R. §§ 1209.1-.280) (Mushroom Order) on the grounds that compelled assessments under the Mushroom Order violate Petitioner's First Amendment rights to freedom of speech and association. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising does not implicate the First Amendment, is dispositive of the First Amendment issue in the proceeding. Petitioner is not prohibited or restrained by the MPRCIA or the Mushroom Order from communicating any message to any audience; Petitioner is not compelled to speak by the MPRCIA or the Mushroom Order; the promotion program under the MPRCIA and the Mushroom Order has no political or ideological content; and Petitioner is not compelled by the MPRCIA or the Mushroom Order to endorse or finance any political or ideological views. Thus, the requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not implicate Petitioner's rights to freedom of speech or association. The Federal Rules of Civil Procedure are not applicable to the Department's administrative proceedings. When considering a motion to dismiss filed in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), allegations of material fact in a petition must be construed in the light most favorable to a petitioner. Even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, the Petition fails to state a claim upon which relief can be granted. Petitioner's statement (that "Petitioner should be entitled to amend its petition to allege factual allegations in light of *Wileman*") in Petitioner's Opposition to Respondent's Motion to Dismiss is in the form of a statement, rather than an application or request for a ruling, and is not a motion. The ALJ did not err by failing to exercise authority under 7 C.F.R. § 900.59(a)(2) to rule on Petitioner's putative motion for leave to amend its Petition.

Gregory Cooper, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

I. INTRODUCTION

United Foods, Inc., a Delaware corporation, d/b/a Pictsweet Mushroom Farms [hereinafter Petitioner], instituted this proceeding on June 25, 1996, under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as

amended (7 U.S.C. §§ 6101-6112) [hereinafter the MPRCIA]; the Mushroom Promotion, Research, and Consumer Information Order (7 C.F.R. §§ 1209.1-.77) [hereinafter the Mushroom Order]; the Rules and Regulations (7 C.F.R. §§ 1209.200-.280) [hereinafter the Mushroom Regulations]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter the Rules of Practice], by filing a Petition pursuant to 7 U.S.C. § 6106.

Petitioner alleges that the MPRCIA and assessments pursuant to the MPRCIA violate Petitioner's rights to freedom of association and freedom of speech guaranteed under the First Amendment of the Constitution of the United States (Pet. ¶ 23). Petitioner seeks an exemption from assessments imposed in connection with the Mushroom Order and a refund of any past paid assessments under the Mushroom Order (Pet. ¶ 23).

On July 25, 1996, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Answer of Respondent [hereinafter Answer] stating: (1) the Petition fails to state a claim upon which relief can be granted (Answer at 4); and (2) the MPRCIA, the Mushroom Order, and the Mushroom Regulations, as interpreted by Respondent and the Mushroom Council, are constitutional and otherwise fully in accordance with law (Answer at 4).

On November 15, 1996, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] stayed the hearing in this proceeding pending action by the Supreme Court of the United States in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879), and *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S. Ct. 1875 (1996), based on the ALJ's expectation that the Supreme Court of the United States would issue guidance in *Wileman Bros.* or *Cal-Almond*, or both *Wileman Bros.* and *Cal-Almond*, which might resolve the issue of Petitioner's First Amendment challenge in this proceeding (Summary of Teleconference--Stay Order, filed November 15, 1996).

On June 25, 1997, the Supreme Court of the United States entered its decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), holding that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter AMAA],

neither abridge First Amendment rights nor implicate the First Amendment. Moreover, on June 27, 1997, the Supreme Court of the United States granted the petition for a writ of certiorari in *Cal-Almond*, vacated the judgment of the United States Court of Appeals for the Ninth Circuit, and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim."

On October 21, 1997, Respondent, relying on, *inter alia*, *Wileman Bros.*, filed a motion to dismiss Petitioner's Petition (Respondent's Motion to Dismiss), and on November 14, 1997, Petitioner filed Petitioner's Opposition to Respondent's Motion to Dismiss. On December 9, 1997, the ALJ issued Decision and Order of Dismissal [hereinafter Initial Decision and Order] in which the ALJ concluded that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of the issues in this proceeding and dismissed the Petition with prejudice.

On January 14, 1998, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35)[1]; on February 17, 1998, Respondent filed Respondent's Response to Petitioner's Appeal to the Judicial Officer; and on February 18, 1998, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's conclusion that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the First Amendment issue in this proceeding and that Petitioner's Petition should be dismissed with prejudice. Therefore, I have adopted the ALJ's Initial Decision and Order as the final decision and order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's Initial Decision and Order.

II. APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

United States Constitution:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 90—MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION

. . . .

§ 6101. Findings and declaration of policy

(a) Findings

Congress finds that—

(1) mushrooms are an important food that is a valuable part of the human diet;

(2) the production of mushrooms plays a significant role in the Nation's economy in that mushrooms are produced by hundreds of mushroom producers, distributed through thousands of wholesale and retail outlets, and consumed by millions of people throughout the United States and foreign countries;

(3) mushroom production benefits the environment by efficiently using agricultural byproducts;

(4) mushrooms must be high quality, readily available, handled properly, and marketed efficiently to ensure that the benefits of this important product are available to the people of the United States;

(5) the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation;

(6) the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markets for mushrooms; and

(7) mushrooms move in interstate and foreign commerce, and mushrooms that do not move in such channels of commerce directly burden or affect interstate commerce in mushrooms.

(b) Policy

It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—

(1) strengthen the mushroom industry's position in the marketplace;

(2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

(c) Construction

Nothing in this chapter may be construed to provide for the control of production or otherwise limit the right of individual producers to produce mushrooms.

§ 6102. Definitions

As used in this chapter—

. . . .

(2) Consumer information

The term "consumer information" means information and programs that will assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of mushrooms.

. . . .

(5) First handler

The term "first handler" means any person, as described in an order issued under this chapter, who receives or otherwise acquires mushrooms from a producer and prepares for marketing or markets such mushrooms, or who prepares for marketing or markets mushrooms of that person's own production.

(6) Importer

The term "importer" means any person who imports, on average, over 500,000 pounds of mushrooms annually from outside the United States.

(7) Industry information

The term "industry information" means information and programs that are designed to lead to the development of new markets and marketing strategies, increased efficiency, and activities to enhance the image of the mushroom industry.

(8) Marketing

The term "marketing" means the sale or other disposition of mushrooms in any channel of commerce.

(9) Mushrooms

The term "mushrooms" means all varieties of cultivated mushrooms grown within the United States for the fresh market, or imported into the United States for the fresh market, that are marketed, except that such term shall not include mushrooms that are commercially marinated, canned,

frozen, cooked, blanched, dried, packaged in brine, or otherwise processed, as may be determined by the Secretary.

. . . .

(11) Producer

The term "producer" means any person engaged in the production of mushrooms who owns or shares the ownership and risk of loss of such mushrooms and who produces, on average, over 500,000 pounds of mushrooms per year.

(12) Promotion

The term "promotion" means any action determined by the Secretary to enhance the image or desirability of mushrooms, including paid advertising.

(13) Research

The term "research" means any type of study to advance the image, desirability, marketability, production, product development, quality, or nutritional value of mushrooms.

. . . .

§ 6103. Issuance of orders

(a) In general

To effectuate the declared policy of section 6101(b) of this title, the Secretary, subject to the procedures provided in subsection (b) of this section, shall issue orders under this chapter applicable to producers, importers, and first handlers of mushrooms. Any such order shall be national in scope. Not more than one order shall be in effect under this chapter at any one time.

(b) Procedures

(1) Issuance of an order

The Secretary may propose the issuance of an order under this chapter, or an association of mushroom producers or any other person that will be affected by this chapter may request the issuance of, and submit a proposal for, such an order.

(2) Publication of order

Not later than 60 days after the receipt of a request and proposal by an interested person for an order, or when the Secretary determines to propose an order, the Secretary shall publish the proposed order and give due notice and opportunity for public comment on the proposed order.

(3) Issuance of order

After notice and opportunity for public comment are given, as provided in paragraph (2), the Secretary shall issue the order, taking into consideration the comments received and including in the order provisions necessary to ensure that the order is in conformity with the requirements of this chapter. Such order shall be issued and, if approved by producers and importers of mushrooms as provided in section 6105(a) of this title, shall become effective not later than 180 days following publication of the proposed order.

. . . .

§ 6104. Required terms in orders

(a) In general

Each order issued under this chapter shall contain the terms and conditions prescribed in this section.

(b) Mushroom Council

(1) Establishment and membership of Council

(A) Establishment

The order shall provide for the establishment of, and selection of members to, a Mushroom Council that shall consist of at least 4 members and not more than 9 members.

. . . .

(c) Powers and duties of Council

The order shall define the powers and duties of the Council, which shall include the following powers and duties—

(1) to administer the order in accordance with its terms and provisions;

. . . .

(g) Assessments

(1) Collection and payment

(A) In general

The order shall provide that each first handler of mushrooms for the domestic fresh market produced in the United States shall collect, in the manner prescribed by the order, assessments from producers and remit the assessments to the Council.

(B) Importers

The order also shall provide that each importer of mushrooms for the domestic fresh market shall pay assessments to the Council in the manner prescribed by the order.

(C) Direct marketing

Any person marketing mushrooms of that person's own production directly to consumers shall remit the assessments on such mushrooms directly to the Council in the manner prescribed in the order.

(2) Rate of assessment

The rate of assessment shall be determined and announced by the Council and may be changed by the Council at any time. The order shall provide that the rate of assessment—

(A) for the first year of the order, may not exceed one-quarter cent per pound of mushrooms;

(B) for the second year of the order, may not exceed one-third cent per pound of mushrooms;

(C) for the third year of the order, may not exceed one-half cent per pound of mushrooms; and

(D) for the following years of the order, may not exceed one cent per pound of mushrooms.

. . . .

(4) Limitation on collection

No assessment may be collected on mushrooms that a first handler certifies will be exported as mushrooms.

. . . .

§ 6106. Petition and review

(a) Petition

(1) In general

A person subject to an order issued under this chapter may file with the Secretary a petition—

(A) stating that the order, any provision of the order, or any

obligation imposed in connection with the order, is not in accordance with law; and

(B) requesting a modification of the order or an exemption from the order.

(2) Hearings

The petitioner shall be given the opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary.

(3) Ruling

After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

7 U.S.C. §§ 6101, 6102(2), (5)-(9), (11)-(13), 6103(a), (b), 6104(a), (b)(1)(A), (c)(1), (g)(1), (g)(2), (g)(4), 6106(a).

110 Stat.:

TITLE V—AGRICULTURAL PROMOTION

Subtitle A—Commodity Promotion and Evaluation

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.—In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

. . . .

(10) subtitle B of title XIX of Public Law 101-624 (7 U.S.C. § 6101 et seq.)[.]

. . . .

(b) FINDINGS.—Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that

operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture—

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501(a)(10), (b)(1)-(9), 110 Stat. 888, 1029-31 (1996).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XI—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MISCELLANEOUS COMMODITIES), DEPARTMENT OF AGRICULTURE

. . . .

PART 1209—MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION ORDER

Subpart A—Mushroom Promotion, Research, and Consumer Information Order

DEFINITIONS

. . . .

§ 1209.3 Consumer information.

Consumer information means information and programs that will assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of mushrooms.

. . . .

§ 1209.6 First handler.

First handler means any person who receives or otherwise acquires mushrooms from a producer and prepares for marketing or markets such mushrooms, or who prepares for marketing or markets mushrooms of that person's own production.

. . . .

§ 1209.8 Importer.

Importer means any person who imports, on average, over 500,000 pounds of mushrooms annually from outside the United States.

§ 1209.9 Industry information.

Industry information means information and programs that will lead to the development of new markets and marketing strategies, increased efficiency, and activities to enhance the image of the mushroom industry.

§ 1209.10 Marketing.

(a) *Marketing* means the sale or other disposition of mushrooms in any channel of commerce.

(b) *To market* means to sell or otherwise dispose of mushrooms in any channel of commerce.

§ 1209.11 Mushrooms.

Mushrooms means all varieties of cultivated mushrooms grown within the United States and marketed for the fresh market, or imported into the United States and marketed for the fresh market, except such term shall not include mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed in such a manner as the Council, with the approval of the Secretary, may determine.

. . . .

§ 1209.17 Promotion.

Promotion means any action determined by the Secretary to enhance the image or desirability of mushrooms, including paid advertising.

. . . .

§ 1209.19 Research.

Research means any type of study to advance the image, desirability, safety, marketability, production, product development, quality, or nutritional value of mushrooms.

. . . .

EXPENSES AND ASSESSMENTS

. . . .

§ 1209.51 Assessments.

(a) Any first handler initially purchasing, or otherwise placing into the current of commerce, mushrooms produced in the United States shall, in the manner as prescribed by the Council and approved by the Secretary,

collect an assessment based upon the number of pounds of mushrooms marketed in the United States for the account of the producer, and remit the assessment to the Council.

(b) The rate of assessment effective during any fiscal year shall be the rate specified in the budget for such fiscal year approved by the Secretary, except that:

(1) The rate of assessment during the first year this subpart is in effect shall be one-quarter of one cent per pound of mushrooms marketed, or the equivalent thereof.

(2) The rate of assessment during the second year this subpart is in effect shall not exceed one-third of one cent per pound of mushrooms marketed, or the equivalent thereof.

(3) The rate of assessment during the third year this subpart is in effect shall not exceed one-half of one cent per pound of mushrooms marketed, or the equivalent thereof.

(4) The rate of assessment during each of the fourth and following years this subpart is in effect shall not exceed one cent per pound of mushrooms marketed, or the equivalent thereof.

(5) The Council may change the rate of assessment for a fiscal year at any time with the approval of the Secretary as necessary to reflect changed circumstances, except that any such changed rate may not exceed the level of assessment specified in paragraphs (b)(1), (2), (3), or (4), whichever is applicable.

(c) Any person marketing mushrooms of that person's own production to consumers in the United States, either directly or through retail or wholesale outlets, shall be considered a first handler and shall remit to the Council an assessment on such mushrooms at the rate per-pound then in effect, and in such form and manner prescribed by the Council.

(d) Only one assessment shall be paid on each unit of mushrooms marketed.

(e)(1) Each importer of mushrooms shall pay an assessment to the Council on mushrooms imported for marketing in the United States, through the U.S. Customs Service or in such other manner as may be established by rules and regulations approved by the Secretary.

(2) The per-pound assessment rate for imported mushrooms shall be the same as the rate provided for mushrooms produced in the United States.

(3) The import assessment shall be uniformly applied to imported mushrooms that are identified by the number, 0709.51.0000, in the

Harmonized Tariff Schedule of the United States or any other number used to identify fresh mushrooms.

(4) The assessments due on imported mushrooms shall be paid when the mushrooms are entered or withdrawn for consumption in the United States, or at such other time as may be established by rules and regulations prescribed by the Council and approved by the Secretary and under such procedures as are provided in such rules and regulations.

(5) Only one assessment shall be paid on each unit of mushrooms imported.

(f) The collection of assessments under this section shall commence on all mushrooms marketed in or imported into the United States on or after the date established by the Secretary, and shall continue until terminated by the Secretary. If the Council is not constituted on the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments on behalf of the Council and may hold such assessments until the Council is constituted, then remit such assessments to the Council.

(g)(1) Each person responsible for remitting assessments under paragraphs (a), (c), or (e) shall remit the amounts due from assessments to the Council on a monthly basis no later than the fifteenth day of the month following the month in which the mushrooms were marketed, in such manner as prescribed by the Council.

7 C.F.R. §§ 1209.3, .6, .8-.11, .17, .19, .51(a)-(g)(1).

III. ALJ'S DECISION AND ORDER OF DISMISSAL (AS MODIFIED)

. . . .

Petitioner contends that [*Glickman v. Wileman Bros. & Elliott, Inc., supra*,] is distinguishable [from the facts in this proceeding] because the marketing orders at issue [in *Wileman Bros.*] regulate . . . aspects of the market [that are not regulated under] the MPRCIA. This distinction has twice been rejected by the United States District Court for the Eastern District of California, in cases involving California table grapes and California cut flowers. In *Delano Farms Co. v. California Table Grape Commission*, the court held that:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech . . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc. is unconvincing. Were that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman Bros.*] indicates results should differ in "stand alone" advertising programs.

Delano Farms Co. v. California Table Grape Comm'n, CV-F-96-6053 OWW DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997).

In *Matsui Nursery, Inc. v. California Cut Flower Commission*, the court, as stated during the hearing, held that:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

Matsui Nursery, Inc. v. California Cut Flower Comm'n, Civ No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997) (Reporter's Transcript).

Furthermore, in *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___ (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997), the Judicial Officer held that *Wileman Bros.* did extend to the MPRCIA, and that it did preclude the petitioner's First Amendment claims with respect to mandatory assessments for generic advertising. *In re Donald B. Mills, Inc. supra*, slip op. at 4[3]-48.

Petitioner also argues that the Supreme Court of the United States, in *Wileman Bros.*, did not sufficiently address the freedom of association issue for the Court's decision to be binding on that issue. This argument was also rejected in *Delano Farms*, which held that:

> [*Wileman Bros.*] was decided on "First Amendment" grounds and addressed association under a federal marketing order. There is no

distinction between speech and association in the "ideologically neutral" context of a generic advertising program.

Delano Farms Co. v. California Table Grape Comm'n, supra, slip op. at 11.

The Judicial Officer also held that neither freedom of association nor freedom of speech are infringed by the MPRCIA. He held:

> [T]he requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's rights to freedom of association and speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

In re Donald B. Mills, Inc., supra, slip op. at 48.

IV. ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises four issues in Petitioner's Appeal to the Secretary [hereinafter Petitioner's Appeal Petition].

A. Motion to Dismiss

First, Petitioner contends:

> . . . [A]ll of the facts in the Complaint must be construed in the light most favorable to the Petitioner, consistent with Federal Rules of Civil Procedure Rule 12(c) or Rule 12(b)(6) with respect to motions to dismiss complaints. The dismissal occurred in this case without the benefit of a hearing. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Petitioner's Appeal Petition at 3.

Petitioner's reliance on Rule 12(b)(6) and Rule 12(c) of the Federal Rules of Civil Procedure is misplaced. Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture, under the MPRCIA, and in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52).[2] However, I agree with Petitioner's general point that, when considering a motion to dismiss filed in accordance with the Rules of Practice, allegations of material fact in a petition must be construed in the light most

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[2]See generally, *Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam) 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 12 (Feb. 20, 1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. ___, slip op. at 21 (Aug. 8, 1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure are not applicable to the Department's disciplinary proceedings conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before the Department of Agriculture).

favorable to a petitioner.[3] However, even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, I find that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of Petitioner's First Amendment claims and that the Petition fails to state a claim upon which relief can be granted. Therefore, I agree with the ALJ's Initial Decision and Order in which he granted Respondent's Motion to Dismiss and dismissed Petitioner's Petition with prejudice.

B. First Amendment

1. Freedom of Speech

Second, Petitioner contends that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), and *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997), are not dispositive of Petitioner's First Amendment challenges to compelled assessments to fund the generic promotion program under the MPRCIA (Petitioner's Appeal Petition at 3-7).

The Supreme Court of the United States held in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the AMAA, neither abridge First Amendment rights nor implicate the First Amendment.

As Petitioner correctly notes (Petitioner's Appeal Petition at 4), the Court in *Wileman Bros.* stressed the importance of the statutory context in which the First Amendment issue arises. However, the Court did not limit its holding to marketing orders issued under the AMAA. Instead, the Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the

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[3] *In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 113-14 (1997) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss filed pursuant to 7 C.F.R. § 900.52(c)); *In re Asakawa Farms, Inc.*, 50 Agric. Dec. 1144, 1149 (1991) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss for want of standing filed pursuant to 7 C.F.R. § 900.52(c)), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993).

marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders do not compel producers to endorse or finance any political or ideological views.

An examination of the MPRCIA, the Mushroom Order, and the Mushroom Regulations reveals that the MPRCIA, the Mushroom Order, and the Mushroom Regulations have the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra.*[4] First, Petitioner is not prohibited or restrained by the MPRCIA, the Mushroom Order, the Mushroom Regulations, or the Mushroom Council from promoting or advertising its brand of mushrooms or from communicating any other message to any audience. Section 501(b)(4)-(5) of the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that neither the MPRCIA, the Mushroom Order, nor the Mushroom Regulations prohibits or restricts any individual advertising or promotion or replaces the individual advertising or promotion efforts of producers or processors (110 Stat. 1030). This factor distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[5]

While the requirement that Petitioner fund generic advertising may reduce the amount of money available to Petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA, the Mushroom Order, and the Mushroom Regulations does not amount to a restriction on speech.[6]

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[4]*In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 43-44 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

[5]*See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates the First and Fourteenth Amendments)

[6]*In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 45 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (stating that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA and the Mushroom Order

(continued...)

Second, Petitioner is not compelled to speak by either the MPRCIA, the Mushroom Order, or the Mushroom Regulations. This fact distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[7] While Petitioner is compelled under the MPRCIA, the Mushroom Order, and the Mushroom Regulations to fund promotion of mushrooms, this requirement is not a requirement that Petitioner speak. Petitioner is not publicly identified or publicly associated with the Mushroom Council's promotion program, and Petitioner is not required to respond to the Mushroom Council's promotion program.[8]

Finally, on the issue of freedom of speech, the Mushroom Council's mushroom promotion program has no political or ideological content, and Petitioner is not compelled by the MPRCIA, the Mushroom Order, or the Mushroom Regulations to endorse or finance any political or ideological views. Section 501(b)(8)(B) of

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(...continued)
does not amount to a restriction on speech). *See also Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2138-39 (1997) (stating that the First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget and the fact that an economic regulation may indirectly lead to a reduction in an individual advertising budget does not itself amount to a restriction on speech); *In re Cal-Almond, Inc.*, 56 Agric. Dec. ___, slip op. at 86-87 (Dec. 24, 1997) (stating that while the requirement that petitioners fund generic advertising may reduce the amount of money available to petitioners to conduct their own advertising or communicate other messages, this incidental effect of the AMAA and the Almond Order does not amount to a restriction on speech); *In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 33 (Nov. 3, 1997) (stating that even if the requirements of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911), the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217), and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) did reduce resources available to respondent to engage in his own speech, this incidental effect would not amount to a restriction on speech).

[7]*See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

[8]*In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 46 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that the MPRCIA establishes a program to produce "nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding . . . markets . . ." (110 Stat. 1031). This fact distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that required financing of political or ideological speech violates the right to freedom of speech.[9]

I find that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the First Amendment issue in this proceeding. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this proceeding are not relevant to Petitioner's First Amendment challenge to the MPRCIA and the assessments imposed pursuant to the MPRCIA. Thus, the requirement under the MPRCIA, the Mushroom Order, and the Mushroom Regulations that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's right to freedom of speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA, the Mushroom Order, or the Mushroom Regulations.[10]

2. Freedom of Association

Third, Petitioner contends that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), does not dispose of Petitioner's claim that the MPRCIA and the assessments imposed pursuant to the MPRCIA violate Petitioner's right to freedom of association guaranteed under the First Amendment of the Constitution of the United States (Petitioner's Appeal Petition at 7-11).

I disagree with Petitioner. The Court in *Wileman Bros.* addresses freedom of

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[9]*See Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

[10]*In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 48 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

association stating that, in contrast to compelled contributions for collective bargaining where an employee may have ideological, moral, or religious objections to the union's activities, "the collective programs authorized by the marketing order do not, as a general matter, impinge on speech or association rights." *Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2140 n.16. The United States District Court for the Eastern District of California, examining the constitutionality of a law permitting the California Table Grape Commission to assess shipped grapes to fund generic advertising of California table grapes, states "[t]he predicate of [*Wileman Bros.*] is that there is no First Amendment right of association not to be compelled to associate for generic advertising" and that "no compelling purpose is needed . . . to require commercial association." *Delano Farms Co. v. California Table Grape Comm'n, supra*, slip op. at 11 (emphasis in original).

Moreover, I have previously held, based on *Wileman Bros.*, that freedom of association is not infringed by compelled funding of the generic promotion program under the MPRCIA and the Mushroom Order, as follows:

> [T]he requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's right[] to freedom of association . . . under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

In re Donald B. Mills, Inc., supra, slip op. at 48.

C. Amendment of Petition

Fourth, Petitioner contends that the ALJ erred by not allowing Petitioner to amend its Petition, as follows:

> . . . In Petitioner's Opposition to the Respondent's Motion to Dismiss, at page 11 of that document, United Foods alleged that when it filed its Complaint, it was consistent with the Ninth Circuit decisions in *Wileman* and *Cal-Almond*. It was claimed that the U.S. Supreme Court had announced a new "test". Petitioners [sic] sought in that brief to be allowed to amend its Petition to allege factual allegations in light of the Supreme Court *Wileman* case. The ALJ never addressed the issue. Therefore, the ALJ's decision should be reversed, and United Foods should be given the

> opportunity to amend its Complaint in light of the *Wileman* decision. There would be no prejudice to the Respondent.

Petitioner's Appeal Petition at 11 (emphasis in original).

Petitioner states in Petitioner's Opposition to Respondent's Motion to Dismiss, filed November 14, 1997, that Petitioner should be entitled to amend its Petition, as follows:

> When Petitioner filed this complaint, it filed it consistent with the Ninth Circuit decisions in *Wileman* and *Cal-Almond.* The U.S. Supreme Court has now announced a new "test". Petitioner should be entitled to amend its petition to allege factual allegations in light of *Wileman.* The rules of practice allow amending petitions. There would be no prejudice to the Respondent.

Petitioner's Opposition to Respondent's Motion to Dismiss at 11.

Section 900.52b of the Rules of Practice (7 C.F.R. § 900.52b) provides for the amendment of pleadings, as follows:

> **§ 900.52b Amended pleadings.**
>
> At any time before the close of the hearing the petition or answer may be amended, but the hearing shall, at the request of the adverse party, be adjourned or recessed for such reasonable time as the judge may determine to be necessary to protect the interests of the parties. Amendments subsequent to the first amendment or subsequent to the filing of an answer may be made only with leave of the judge or with the written consent of the adverse party.

7 C.F.R. § 900.52b.

Further, section 900.59(a)(2) provides that the judge is authorized to rule on all motions and requests, as follows:

> **§ 900.59 Motions and requests.**
>
> (a) *General. . . .*
>
> (2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing clerk to the Secretary of the

record as provided in this subpart. . . .

7 C.F.R. § 900.59(a)(2).

However, Petitioner's statement (that "Petitioner should be entitled to amend its petition to allege factual allegations in light of *Wileman*") in Petitioner's Opposition to Respondent's Motion to Dismiss is in the form of a statement, rather than an application or request for a ruling, and I do not find that Petitioner's statement is a motion.[11] While the formalities of court practice do not apply to

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[11]Black's Law Dictionary 1013 (6th ed. 1990) defines the word *motion* as follows:

Motion. . . .

An application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant. . . .

See generally *United States v. Brick*, 905 F.2d 1092, 1098-99 (7th Cir. 1990) (concluding that statements made by the government to the court, including the statement that defendant's cooperation should be considered, do not satisfy the motion requirement under section 5K1.1 of the Sentencing Guidelines); *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990) (stating that letters from the government informing the court of defendant's cooperation, although the functional equivalent of a motion, do not satisfy the motion requirement of 18 U.S.C. § 3553(e)); *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982) (stating that St. Paul's "Objections to Proposed Order" is technically not a motion because it is in the form of a statement rather than an application or request for an order and does not set forth the relief or order sought); *In re Marriage of Houtchens*, 592 P.2d 158, 161 (Mont. 1979) (stating that in construing the civil rule on form motions, this court has frequently stated that a motion is an application for an order); *State ex rel. Gage v. District Court of the Second Judicial District*, 419 P.2d 746, 748 (Mont. 1966) (stating that a motion is an application for an order); *State v. Wise*, 419 P.2d 342, 344 (Ariz. 1966) (stating that the purpose of a motion is to obtain a ruling or an order directing that some act be done in favor of the applicant, and it should call to the attention of the court the particular purpose sought to be achieved, so that the court be given an opportunity to rule on the matter); *Williams v. Denning*, 133 S.E.2d 150, 151 (N.C. 1963) (per curiam) (stating that, under G.S. § 1-578, a motion is an application for an order); *State v. James*, 347 S.W.2d 211, 216 (Mo. 1961) (stating that a motion is an application made to a court or judge for the purpose of obtaining a ruling or order directing some act be done in favor of the applicant); *McClinton v. Rice*, 265 P.2d 425, 428 (Ariz. 1953) (stating that the purpose of a motion is to obtain a ruling or an order directing that some act be done in favor of the applicant, and the essentials of a motion are that the attention of the court must be called to the particular matter or request, and that the court be given an opportunity to rule as to the matter); *State ex rel. McVay v. District Court of Fourth Judicial District*, 251 P.2d 840, 845 (Mont. 1952) (stating that, under R.C.M. 1947, § 93-8401, a motion is an application for an order); *Iveson v. Second Judicial District Court*, 206 P.2d 755, 759 (Nev. 1949) (stating that a motion is a proceeding directed to a court's authority to act on a given subject; a motion is an application for an order); *People v. Hornaday*, 81 N.E.2d 168, 170 (Ill. 1948) (stating that a motion is an application to the court); *Paramount Publix Corp. v. Boucher*, 19 P.2d 223, 225 (Mont. 1933) (stating that a motion is merely "an application for an order" (section 9772, Rev. Codes 1921)); *Brown v. Caldwell*, 16 P.2d 139, 141 (Cal. 1932) (concluding that a statement of

(continued...)

motions filed in administrative proceedings, parties in administrative proceedings have an obligation to identify and frame applications or requests for rulings so that they are recognizable as such by administrative law judges. Petitioner's statement in Petitioner's Opposition to Respondent's Motion to Dismiss is neither identified nor framed as an application for a ruling. I do not find that the ALJ erred by failing to exercise his authority under section 900.59(a)(2) of the Rules of Practice (7 C.F.R. § 900.59(a)(2)) to rule on Petitioner's putative motion for leave to amend its Petition, which putative motion is in the form of a statement rather than an application or request for a ruling.

For the foregoing reasons, the following Order should be issued.

V. Order

The relief requested by Petitioner is denied and the Petition is dismissed with prejudice.

(...continued)
respondent's counsel that he intended to ask for an instructed verdict was not a motion for an instructed verdict; a motion is an application for an order (section 1003, Code of Civil Procedure), and counsel's statement of what he intended to do was not an application for an order); *People v. Brickey*, 178 N.E. 483, 484 (Ill. 1931) (stating that a motion is an application to the court); *Harris v. Chicago House-Wrecking Co.*, 145 N.E. 666, 669 (Ill. 1924) (stating that a motion is an application made to a court for a rule or order); *Genardini v. Kline*, 190 P. 568, 570 (Ariz. 1920) (stating that a motion is an application made to a judge or the court for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant); *State v. Warner Valley Stock Co.*, 137 P. 746, 747 (Or. 1914) (stating that in legal proceedings a motion is an application by a party to an action or suit for some kind of relief, that a motion should state what relief the mover desires and the reasons or grounds for asking for the relief, and that it is the duty of the party who asks for relief by motion to point out specifically what he desires); *Hammer v. Campbell Automatic Safety Gas Burner Co.*, 144 P. 396, 398 (Or. 1914) (stating that a motion is an application to the court for relief of some kind and it should state what relief is desired, and usually, it should state the grounds for asking for the relief demanded); *Taylor v. Woodbury*, 120 P. 367 (Kan. 1912) (stating that under Kansas civil code a motion is defined as an application for an order addressed to the court or a judge in vacation); *Brownell v. Superior Court of Yolo County*, 109 P. 91, 94 (Cal. 1910) (stating that a motion is an application for an order); *Arnold v. Regan*, 69 A. 292 (R.I. 1908) (per curiam) (stating that a motion is a request to the court to grant the mover some right to which he claims); *Williams v. Hawley*, 77 P. 762, 763 (Cal. 1904) (stating that a motion is an application for an order); *Reid v. Fillmore*, 73 P. 849, 850 (Wyo. 1903) (stating, by our Code of Civil Procedure, a motion is defined to be "an application for an order addressed to a court or judge by a party to a suit or proceeding, or one interested therein"); *McGuire v. Drew*, 23 P. 312, 314 (Cal. 1890) (stating that, under section 1003 of the Code of Civil Procedure, an application for an order is a motion).

NATIONAL DAIRY PROMOTION RESEARCH BOARD

In re: GALLO CATTLE COMPANY, A CALIFORNIA LIMITED PARTNERSHIP.
NDPRB Docket No. 96-0001.
Decision and Order filed April 22, 1998.

Dismissal of petition — Motion to dismiss — First amendment — Freedom of speech — Freedom of association — Bloc voting — Equal protection.

The Judicial Officer affirmed Judge Baker's (ALJ) Initial Decision and Order dismissing a Petition filed by a milk producer under the Dairy Production Stabilization Act of 1983, as amended (7 U.S.C. §§ 4501-4513) (DPSA) seeking an exemption from, or modification of, the Dairy Promotion Program (7 C.F.R. §§ 1150.101-.278) (Dairy Order) on the grounds that compelled assessments to promote fluid milk and dairy products under the DPSA and the Dairy Order violate Petitioner's First Amendment rights to freedom of speech and association and Petitioner's Fifth Amendment rights to due process of law and equal protection of the law. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising do not implicate the First Amendment, is dispositive of the First Amendment issues in the proceeding. Petitioner is not prohibited or restrained by the DPSA or the Dairy Order from communicating any message to any audience; Petitioner is not compelled to speak by the DPSA or the Dairy Order; the promotion program under the DPSA and the Dairy Order has no political or ideological content; and Petitioner is not compelled by the DPSA or the Dairy Order to endorse or finance any political or ideological views. Thus, the requirement under the DPSA and the Dairy Order that Petitioner fund the promotion of fluid milk and dairy products does not implicate Petitioner's rights to freedom of speech or association. When considering a motion to dismiss filed in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), allegations of material fact in a petition must be construed in the light most favorable to a petitioner. Even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, the Petition fails to state a claim upon which relief can be granted. Bloc voting by cooperatives in accordance with the DPSA (7 U.S.C. § 4508) does not violate Petitioner's rights to equal protection and due process guaranteed by the Fifth Amendment. The government has a legitimate interest in strengthening the dairy industry's position in the marketplace and maintaining and expanding the markets and uses for fluid milk and dairy products. The collection of assessments from milk producers and the use of the collected funds to promote fluid milk and dairy products is rationally related to the purposes of the DPSA, and Petitioner's right to equal protection of the laws is not violated by the use of the funds collected from Petitioner for the promotion of dairy products which Petitioner does not sell.

Gregory Cooper, for Respondent.
Brian C. Leighton, Clovis, California, and James A. Moody, Washington, D.C., for Petitioner.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Gallo Cattle Company, a California limited partnership [hereinafter Petitioner], instituted this proceeding by filing a Petition on April 16, 1996, pursuant to the Dairy Production Stabilization Act of 1983, as amended (7 U.S.C. §§ 4501-4513) [hereinafter the Dairy Production Stabilization Act]; the Dairy

Promotion Program (7 C.F.R. §§ 1150.101-.278) [hereinafter the Dairy Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter the Rules of Practice].

The Petition alleges that assessments imposed on Petitioner under the Dairy Production Stabilization Act and the Dairy Order and used to promote the sale of fluid milk and dairy products violate Petitioner's rights to freedom of speech and association guaranteed under the First Amendment to the Constitution of the United States and Petitioner's rights to due process of law and equal protection of the law guaranteed under the Fifth Amendment to the Constitution of the United States (Pet. ¶¶ 7, 19-22). Petitioner seeks an exemption from, or a modification of, the Dairy Order, whereby Petitioner cannot be compelled to pay assessments in connection with the Dairy Order (Pet. ¶ 24).

On May 14, 1996, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Answer of Respondent: (1) stating that the Petition fails to state a claim upon which relief can be granted and the Dairy Production Stabilization Act and the Dairy Order, as interpreted by Respondent and the National Dairy Promotion and Research Board, were, and are, constitutional and otherwise fully in accordance with law; and (2) requesting that the relief prayed for in the Petition be denied and the Petition be dismissed (Answer of Respondent at 4).

On June 20, 1996, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] held a telephone conference with Mr. Brian C. Leighton, Esq., of the Law Offices of Brian C. Leighton, Clovis, California, and Mr. James A. Moody, Esq., Washington, D.C., counsel for Petitioner, and Mr. Gregory Cooper, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., counsel for Respondent. The parties agreed that designation of an oral hearing date should be delayed in light of the Supreme Court of the United States having granted certiorari in *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S. Ct. 1875 (1996) (Memorandum of Prehearing Conference Call, filed June 21, 1996).[1]

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[1]At the time of the June 20, 1996, telephone conference, two cases were pending before the Supreme Court of the United States concerning First Amendment challenges to assessments to pay for generic advertising under marketing orders promulgated pursuant to the Agricultural Marketing Agreement Act of 1930, as amended [hereinafter AMAA]. *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S. Ct. 1875 (1996),

(continued...)

On June 25, 1997, the Supreme Court of the United States entered its decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), holding that compelled funding of generic advertising of California nectarines, plums, and peaches, in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the AMAA, neither abridges First Amendment rights nor implicates the First Amendment. Moreover, on June 27, 1997, the Supreme Court of the United States granted a petition for a writ of certiorari in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879), vacated the judgment of the United States Court of Appeals for the Ninth Circuit, and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim."

On September 11, 1997, the ALJ held a telephone conference with counsel for Petitioner and counsel for Respondent during which telephone conference, counsel for Respondent stated that he intended to file a motion to dismiss. The ALJ scheduled times within which Respondent could file a motion to dismiss, Petitioner could respond to Respondent's motion to dismiss, and Respondent could reply to Petitioner's response to Respondent's motion to dismiss. (Conference Memorandum, filed September 12, 1997.) On October 17, 1997, Respondent, relying on, *inter alia*, *Wileman Bros.*, filed a motion to dismiss Petitioner's Petition (Respondent's Motion to Dismiss; Respondent's Opening Memorandum in Support of Motion to Dismiss). On November 19, 1997, Petitioner filed Petitioner's Opposition to Respondent's Motion to Dismiss, and on December 19, 1997, Respondent filed Respondent's Reply Memorandum.

On January 22, 1998, the ALJ issued a Decision and Order of Dismissal [hereinafter Initial Decision and Order] in which the ALJ concluded that

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(...continued)
concerned a First Amendment challenge by growers, handlers, and processors of California tree fruits to assessments imposed pursuant to the AMAA, Marketing Order 916 (7 C.F.R. pt. 916), and Marketing Order 917 (7 C.F.R. pt. 917) to finance generic advertising of California nectarines, plums, and peaches. *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879), concerned a First Amendment challenge by almond handlers to assessments imposed pursuant to the AMAA and Marketing Order 981 (7 C.F.R. pt. 981) to finance generic advertising of almonds.

Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130 (1997); *Delano Farms Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW DLB (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ No. S-96-102 EJG/GGH (E.D. Cal. Aug. 4, 1997); and apposite decisions of the Judicial Officer are dispositive of the issues in this proceeding and dismissed the Petition with prejudice.

On March 2, 1998, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35);[2] on April 7, 1998, Respondent filed Respondent's Response to Petitioner's Appeal to the Judicial Officer; and on April 9, 1998, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's conclusion dismissing the Petition with prejudice. Therefore, I have adopted the ALJ's Initial Decision and Order as the final decision and order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's Initial Decision and Order.

APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Constitution of the United States:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Amendment V

No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Amendment XIV

Section 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. I; V; XIV, § 1.

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 76—DAIRY RESEARCH AND PROMOTION

SUBCHAPTER I—DAIRY PROMOTION PROGRAM

§ 4501. Congressional findings and declaration of policy

(a) Congress finds that—

(1) dairy products are basic foods that are a valuable part of the human diet;

(2) the production of dairy products plays a significant role in the Nation's economy the milk from which dairy products are manufactured is produced by thousands of milk producers, and dairy products are consumed by millions of people throughout the United States;

(3) dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation; and

(5) dairy products move in interstate and foreign commerce, and dairy products that do not move in such channels of commerce directly burden or affect interstate commerce of dairy products.

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States. Nothing in this subchapter may be construed to provide for the control of production or otherwise limit the right of individual milk producers to produce milk.

§ 4502. Definitions

As used in this subchapter—

(a) the term "Board" means the National Dairy Promotion and Research Board established under section 4504 of this title;

(b) the term "Department" means the Department of Agriculture;

(c) the term "Secretary" means the Secretary of Agriculture;

(d) the term "milk" means any class of cow's milk produced in the United States;

(e) the term "dairy products" means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products;

(f) the term "fluid milk products" means those milk products normally consumed in liquid form as a beverage;

(g) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(h) the term "producer" means any person engaged in the production of milk for commercial use;

(i) the term "promotion" means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of and demand for dairy products[.]

. . . .

§ 4503. Issuance of orders

(a) Notice and opportunity for public comment

During the period beginning with November 29, 1983, and ending thirty days after receipt of a proposal for an initial dairy products promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment upon the proposed order. The proposal for an order may be submitted by an organization certified under section 4505 of this title or by any interested person affected by the provisions of this subchapter.

(b) Effective date of orders

After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a dairy products promotion and research order. Such order shall become effective not later than ninety days following publication of the proposal.

. . . .

§ 4504. Required terms in orders

Any order issued under this subchapter shall contain terms and conditions as follows:

. . . .

(g) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the

producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board. The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subchapter. The rate of assessment prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof. A milk producer or the producer's cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase the consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed. . . . Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

. . . .

§ 4508. Cooperative association representation

Whenever, under the provisions of this subchapter, the Secretary is required to determine the approval or disapproval of producers, the Secretary shall consider the approval or disapproval by any cooperative association of producers, engaged in a bona fide manner in marketing milk or the products thereof, as the approval or disapproval of the producers who are members of or under contract with such cooperative association of producers. If a cooperative association elects to vote on behalf of its members, such cooperative association shall provide each producer, on whose behalf the cooperative association is expressing approval or disapproval, a description of the question presented in the referendum together with a statement of the manner in which the cooperative association intends to cast its vote on behalf of the membership. Such information shall inform the producer of procedures to follow to cast an individual ballot should the producer so choose within the period of time established by the Secretary for casting ballots. Such notification shall be made at least thirty days prior to the referendum and shall include an

official ballot. The ballots shall be tabulated by the Secretary and the vote of the cooperative association shall be adjusted to reflect such individual votes.

§ 4509. Petition and review

(a) Any person subject to any order issued under this subchapter may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

7 U.S.C. §§ 4501, 4502(a)-(i), 4503(a)-(b), 4504(g), 4508, 4509(a).

110 Stat.:

TITLE V—AGRICULTURAL PROMOTION

Subtitle A—Commodity Promotion and Evaluation

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.—In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

. . . .

(6) subtitle B of title I of Public Law 98-180 (7 U.S.C. 4501 et seq.)[.]

. . . .

(b) FINDINGS.—Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that

operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture—

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501(a)(6), (b)(1)-(9), 110 Stat. 888, 1029-31 (1996).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER X—AGRICULTURAL MARKETING SERVICE (Marketing Agreements and Orders; Milk) DEPARTMENT OF AGRICULTURE

. . . .

PART 1150—DAIRY PROMOTION PROGRAM

Subpart—Dairy Promotion and Research Order

DEFINITIONS

. . . .

§ 1150.104 Board.

Board means the National Dairy Promotion and Research Board established pursuant to § 1150.131.

§ 1150.105 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative or other entity.

. . . .

§ 1150.109 Qualified State or regional program.

Qualified State or regional program means any State or regional dairy product promotion, research or nutrition education program which is certified as a qualified program pursuant to § 1150.153.

§ 1150.110 Producer.

Producer means any person engaged in the production of milk for commercial use.

§ 1150.111 Milk.

Milk means any class of cow's milk produced in the United States.

. . . .

EXPENSES AND ASSESSMENTS

. . . .

§ 1150.152 Assessments.

(a) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof and shall remit the assessment to the Board.

(b) Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof.

(c) In determining the assessment due from each producer pursuant to § 1150.152(a) and (b), a producer who is participating in a qualified State or regional program(s) shall receive a credit for contributions to such program(s), but not to exceed the following amounts:

(1) In the case of contributions for milk marketed on or before May 31, 1984, up to the actual rate of contribution that was in effect under such program(s) on November 29, 1983, not to exceed 15 cents per hundredweight of milk marketed.

(2) In all other cases, the credit shall not exceed 10 cents per hundredweight of milk marketed.

7 C.F.R. §§ 1150.104-.105, .109-.111, .152(a)-(c).

ALJ'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . .

Summarily, the Petition . . . asserts that assessments mandated by the Dairy . . . Order are unconstitutional under the free speech and association provisions of the First Amendment [to the Constitution of the United States] and the equal protection and due process provisions of the Fifth Amendment [to the Constitution of the United States]. Essentially, it is Respondent's position that the decisions of

the United States District Court [for the Eastern District of California], the decisions of the Judicial Officer, and *Glickman v. Wileman Bros. & Elliott, Inc.*, [117 S. Ct. 2130 (1997),] are dispositive of the issues raised in this proceeding. The decision of the Supreme Court of the United States [states], among other things, that the advertising programs under [marketing] orders, paid for by mandatory assessments on the affected industries, do not even implicate, much less violate, the First Amendment.

[Petitioner contends] in Petitioner's Opposition to Respondent's Motion to Dismiss . . . that Respondent's Opening Memorandum in Support of Motion to Dismiss makes no distinction between the . . . Dairy . . . Order (a "free standing program") and the [California] tree fruit [marketing orders issued under the AMAA, which are the subject of] the Supreme Court's *Wileman Bros.* decision. Petitioner maintains that [the dairy promotion program conducted in accordance with the Dairy Production Stabilization Act and the Dairy Order] is dispositively different than the [California tree fruit marketing orders conducted in accordance with the AMAA, which are] addressed in *Wileman Bros.* Petitioner further argues that the type of product becomes significant because the [California] tree fruit marketing orders regulate size, quality, maturity, pack and container and that a "well-mature" (as defined by regulation) Santa Rosa plum that passes USDA inspection for quality (determined by regulation) of a size 4x4x5 is the same to the consumer regardless of the producer (unless the grocery store allows it to remain on the shelf too long). Thus, Petitioner argues there is nothing unique about a Santa Rosa well-matured plum whereas, on the other hand, Petitioner's jack cheese does not at all taste the same as the jack cheese produced by Kraft, or carried by private labels. Petitioner thus seeks to show that there is no valid comparison between tree fruit and cheese. Tree fruit is not a manufactured item, cheese is. Petitioner argues that the whole purpose of its operation from its farming, to its milk production, to its feeding of its dairy cows, to its cheese operation, to its promotion and advertising, is premised upon the genuine belief that its cheeses are not only distinguishable [from,] but superior to, its competitors' products, including the private label store branded cheeses. [However, under the Dairy Production Stabilization Act and the Dairy Order,] the National Dairy [Promotion and Research] Board . . . promotes purchases of private label cheese and treats all cheeses produced in the United States as a commodity; and, therefore, insinuates Petitioner's cheese is no better than all other cheeses produced in the United States. Thus, Petitioner argues that "[h]ere, [Petitioner] is being forced to fund a message chosen by a collectivist group that promotes [Petitioner's] competitors' cheeses." [(Petitioner's Opposition to Respondent's Motion to Dismiss at 16.)] Also argued by the Petitioner are other contentions including the argument that

the *Wileman Bros.* decision did not dispose of Petitioner's free association claims.

The distinctions sought by Petitioner are not compelling in view of [the relevant] case law. In *Delano Farms Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW DLB (E.D. Cal. Sept. 11, 1997), the court held that the *Wileman Bros.* decision by the Supreme Court [is summarized] in the words: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech. . . ." In the *Delano* case, the court rejected the argument that different results would be obtained "when a program does not regulate fruit size, color, etc." The court further [states in *Delano*] that nothing in the *Wileman Bros.* decision indicates results should differ in "stand alone" advertising programs. *Delano Farms Co. v. California Table Grape Comm'n, supra*, slip op. at 6.

Furthermore, in *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ No. S-96-102 EJG/GGH (E.D. Cal. Aug. 4, 1997), the district court states that: "Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction." *Matsui Nursery, Inc. v. California Cut Flower Comm'n, supra*, slip op. at 12-13.

Additionally, in *In re Donald B. Mills, Inc.*, 56 Agric. Dec. 1567 (1997), [*aff'd*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Mar. 26, 1998),] the Judicial Officer held that *Wileman Bros.* did extend to the [Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the MPRCIA]], and that [*Wileman Bros.*] did preclude the petitioner's First Amendment claims with respect to mandatory assessments for generic advertising [of fresh mushrooms]. The Judicial Officer held in *Mills* that neither freedom of association nor freedom of speech are infringed by the mushroom promotion program. He stated: "[T]he requirement under the MPRCIA and the Mushroom [Promotion, Research, and Consumer Information] Order [(7 C.F.R. §§ 1209.1-.280) [hereinafter Mushroom Order]] that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's rights to freedom of association and speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order." [*In re Donald B. Mills, Inc., supra*, 56 Agric. Dec. at 1603.]

The *Wileman Bros.* decision clearly disposes of Petitioner's First Amendment

claim. Although the generic advertising program in *Wileman Bros.* was established pursuant to marketing orders instead of by a promotion and research order, the advertising program [at issue in *Wileman Bros.*] is otherwise indistinguishable [from the advertising program at issue in this proceeding]. Both generic advertising programs are part of a larger regulatory scheme for research and promotion of their respective commodities. Both advertising programs are implemented by committees of individuals in their respective industries, with the advertising to be funded by assessments paid by the industry and, like the marketing orders [at issue] in *Wileman Bros.*, the Dairy [Production Stabilization Act and the Dairy Order] contain a mechanism by which producers can express their disapproval of the advertising program. There is no meaningful basis for distinguishing the generic advertising of milk and dairy products under the Dairy [Production Stabilization Act and the Dairy Order] from the generic advertising of California tree fruits [under the AMAA and Marketing Orders 916 and 917].

[Further, there is no basis for Petitioner's assertion that it is deprived of due process because neither the Dairy Production Stabilization Act nor the Dairy Order require escrow of assessments paid by Petitioner pending a decision on the merits. Petitioner's request to escrow assessments in an interest-bearing account pending a decision on the merits (Pet. ¶ 27) was considered and denied by the Judicial Officer. *In re Gallo Cattle Co.*, 55 Agric. Dec. 340 (1996) (Order Denying Interim Relief), *appeal dismissed*, No. CIV S-96-1140 EJG/JFM (E.D. Cal. Nov. 13, 1996), *appeal docketed*, No. 97-15198 (9th Cir. Jan. 7, 1997).] . . . Petitioner also [contends] that [the Dairy Production Stabilization Act violates Petitioner's rights to equal protection and due process guaranteed by the Fifth Amendment to the Constitution of the United States] because the Dairy [Production Stabilization Act] authorizes bloc voting by cooperatives (7 U.S.C. § 4508) and [the dairy promotion program violates Petitioner's rights to equal protection and due process guaranteed by the Fifth Amendment to the Constitution of the United States] because more money has been spent on fluid milk advertising than on cheese advertising. However, bloc voting by cooperatives repeatedly has been upheld by the courts even under . . . statutes[, which, unlike the Dairy Production Stabilization Act, do not provide] the individual producer [with] the choice to "opt out" [of the cooperative] and cast his [or her] own vote. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 578 (1939)[; *Cecelia Packing Corp. v. United States Dep't of Agric.*, 10 F.3d 616, 621-25 (9th Cir. 1993); *George Benz & Sons v. Hardin*, 342 F. Supp. 88, 91 (D. Minn. 1972). Moreover, the Judicial Officer has rejected a Fifth Amendment challenge to] bloc voting by cooperatives under the [Dairy Production Stabilization Act, as follows:

1. Constitutionality of Bloc Voting

Petitioners allege that the bloc voting provisions of the [Dairy Production Stabilization] Act are unconstitutional under the equal protection clause of the 5th and 14th Amendments. The [Dairy Production Stabilization] Act explicitly provides for bloc voting by cooperatives on behalf of producer-members if the cooperatives meet certain requirements with respect to supplying ballots and information about the referendum to members. 7 U.S.C. § 4508. The [Dairy Production Stabilization] Act also contains a provision allowing the members of the bloc voting cooperatives to vote individually, with the corresponding cooperative associations' votes being adjusted to reflect the individual votes. *Id.* It would be inappropriate for me to rule on the constitutionality of bloc voting, since "[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer." *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979); *see also In re Saulsbury Orchard*, 47 Agric. Dec. 378, 379 (1988).

Moreover, any review of the constitutionality of the [Dairy Production Stabilization] Act's bloc voting provisions would be guided by *Cecelia Packing Corp. v. USDA*, 10 F.3d 616 (9th Cir. 1993). The court there addressed the constitutionality of 7 U.S.C. § 608c(12), which required the Secretary to consider the vote of a cooperative association in a marketing order referendum as the vote of all producers who were members of the cooperative. The appellants in *Cecelia* argued, as Petitioners have, that the bloc voting provision impinged upon their fundamental right to vote. The court rejected the argument, applying the deferential "rational relationship" test in view of the limited scope of the referendum and the relatively limited authority of the marketing order. *Id.* at 624-25. The court concluded, as I would in the present case, that the bloc voting provision met the rational relationship test by encouraging producers to join cooperatives, thus furthering the legitimate goal of more stable and efficient markets. *Id.* at 625. Moreover, in the present case, the bloc voting provision of the Dairy Production Stabilization Act provides an additional safeguard, not present in the statute at issue in *Cecelia*: the right of an individual member of a bloc voting cooperative to vote independently. 7 U.S.C. § 4509.

In re C.I. Ferrie, 54 Agric. Dec. 1033, 1043-1044 (1995).]

Petitioner's Fifth Amendment objections to the advertising program are undermined by the Supreme Court's conclusion in *Wileman Bros.* that the analogous generic advertising for [California] tree fruit serves a legitimate purpose that is consistent with its regulatory goals. Generic advertising under the Dairy [Production Stabilization Act] likewise serves a legitimate purpose of increasing milk and dairy products consumption in order to serve the statutory goal[s] of strengthening the dairy industry's market position [and] maintaining and expanding markets [and uses] for fluid milk and dairy products [produced in the United States]. Advertising of milk under the Dairy [Production Stabilization Act] is clearly rationally related to a legitimate Government interest and reasonably adapted to its statutory purpose; and therefore satisfies the requirements of the equal protection clause. *See generally City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

A careful reading of the Supreme Court's decision in *Wileman Bros.*, and due consideration of [*Delano Farms Co. v. California Table Grape Comm'n, supra*, and *Matsui Nursery, Inc. v. California Cut Flower Comm'n, supra*,] involving California table grapes and California cut flowers respectively, as well as the [apposite] decisions of the Judicial Officer, compels a concurrence with Respondent that the subject Petition should be dismissed with prejudice.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises five issues in Petitioner's Appeal to the Judicial Officer [hereinafter Petitioner's Appeal Petition].

First, Petitioner contends that, when considering Respondent's Motion to Dismiss, "[a]ll of the facts alleged in the [Petition] must be construed in the light most favorable to the [Petitioner]." (Petitioner's Appeal Petition at 2.)

I agree with Petitioner. When considering a motion to dismiss filed in accordance with the Rules of Practice, allegations of material fact in a petition must be construed in the light most favorable to a petitioner.[3] However, even if the

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[3]*See In re United Foods, Inc.*, 57 Agric. Dec. ___, slip op. at 20-21 (Mar. 4, 1998) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner when considering a motion to dismiss filed pursuant to 7 C.F.R. § 1200.52(c)). *See also In re Cal-Almond*, 57 Agric. Dec. ___, slip op. at 15 (Mar. 6, 1998) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner when considering a motion to dismiss filed pursuant to 7 C.F.R. § 900.52(c)); *In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 113-14 (1997) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss filed pursuant to 7 C.F.R. § 900.52(c)); *In*

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allegations of material fact in the Petition are construed in the light most favorable to Petitioner, I agree with the ALJ's conclusion that, as a matter of law, the Petition fails to state a claim upon which relief can be granted. Therefore, I agree with the ALJ's Initial Decision and Order granting Respondent's Motion to Dismiss and dismissing Petitioner's Petition with prejudice.

Second, Petitioner contends that "[t]he most serious error the ALJ makes in her decision is claiming that there is no distinction between the National Dairy Board Law and the Tree Fruit Law for purposes of applying the *Wileman* Supreme Court decision." (Petitioner's Appeal Petition at 2.)

I disagree with Petitioner's contention that the ALJ erred when she concluded that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of Petitioner's First Amendment claims. The Supreme Court of the United States held in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the AMAA, neither abridges First Amendment rights nor implicates the First Amendment.

As Petitioner correctly notes (Petitioner's Appeal Petition at 3), the Court in *Wileman Bros.* stressed the importance of the statutory context in which the First Amendment issue arises. However, the Court did not limit its holding to marketing orders issued under the AMAA. Instead, the Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders do not compel producers to endorse or finance any political or ideological views.

An examination of the Dairy Production Stabilization Act and the Dairy Order reveals that the Dairy Production Stabilization Act and the Dairy Order have the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra.* First,

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re Asakawa Farms, Inc., 50 Agric. Dec. 1144, 1149 (1991) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss for want of standing filed pursuant to 7 C.F.R. § 900.52(c)), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993).

Petitioner is not prohibited or restrained by the Dairy Production Stabilization Act, the Dairy Order, or the National Dairy Promotion and Research Board from promoting or advertising its brand of cheese or from communicating any other message to any audience. Section 501(b)(4)-(5) of the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that neither the Dairy Production Stabilization Act nor the Dairy Order prohibits or restricts any individual advertising or promotion or replaces the individual advertising or promotion efforts of producers or processors (110 Stat. 1030). This factor distinguishes the Dairy Production Stabilization Act and the Dairy Order from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[4]

While the requirement that Petitioner fund generic advertising may reduce the amount of money available to Petitioner to conduct its own advertising or communicate other messages, this incidental effect of the Dairy Production Stabilization Act and the Dairy Order does not amount to a restriction on speech.[5]

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[4]*See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates the First and Fourteenth Amendments).

[5]*See generally Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2138-39 (1997) (stating that the First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget and the fact that an economic regulation may indirectly lead to a reduction in an individual advertising budget does not itself amount to a restriction on speech); *In re United Foods, Inc.*, 57 Agric. Dec. ___, slip op. at 24 (Mar. 4, 1998) (stating that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA and the Mushroom Order does not amount to a restriction on speech); *In re Cal-Almond, Inc.*, 56 Agric. Dec. 1158, 1223 (1997) (stating that while the requirement that petitioners fund generic advertising may reduce the amount of money available to petitioners to conduct their own advertising or communicate other messages, this incidental effect of the AMAA and the marketing order regulating Almonds Grown in California (7 C.F.R. §§ 981.1-.74) [hereinafter the Almond Order] does not amount to a restriction on speech); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1496 (1997) (stating that even if the requirements of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Promotion Act], the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Order], and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) [the Beef Regulations] did reduce resources available to respondent to engage in his own speech, this incidental effect would not amount to a restriction on speech); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1601 (1997) (stating

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Second, Petitioner is not compelled to speak by either the Dairy Production Stabilization Act or the Dairy Order. This fact distinguishes the Dairy Production Stabilization Act and the Dairy Order from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[6] While Petitioner is compelled under the Dairy Production Stabilization Act and the Dairy Order to fund promotion of milk and dairy products, this requirement is not a requirement that Petitioner speak. Petitioner is not publicly identified or publicly associated with the National Dairy Promotion and Research Board's promotion program, and Petitioner is not required to respond to the National Dairy Promotion and Research Board's promotion program.

Finally, on the issue of freedom of speech, Petitioner contends that the National Dairy Promotion and Research Board's promotion program promotes Bovine Growth Hormone (BGH) and that Petitioner "is very much ideologically and philosophically opposed to promoting BGH." (Petitioner's Appeal Petition at 8.) I do not find, based on Petitioner's allegations in the Petition, that the promotion of Bovine Growth Hormone is political or ideological because it does not appear that the promotion of Bovine Growth Hormone is designed to prescribe orthodoxy or communicate an official view.[7] Moreover, section 501(b)(8)(B) of

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that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA and the Mushroom Order does not amount to a restriction on speech), *aff'd*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Mar. 26, 1998).

[6]*See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

[7]*See generally United States v. Frame*, 885 F.2d 1119, 1135 (3d Cir. 1989) (stating that the purpose underlying the Beef Promotion Act is to bolster the image of beef solely to increase sales; the federal government harbors no intent to prescribe orthodoxy or communicate an official view; therefore the beef
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the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that the Dairy Production Stabilization Act establishes a program to produce "nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding . . . markets . . ." (110 Stat. 1031). Therefore, I do not find that Petitioner is compelled by the Dairy Production Stabilization Act or the Dairy Order to endorse or finance any political or ideological views. This fact distinguishes the Dairy Production Stabilization Act and the Dairy Order from cases in which the Supreme Court has found that required financing of political or ideological speech violates the right to freedom of speech.[8]

I find that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the freedom of speech issue in this proceeding. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this proceeding are not relevant to Petitioner's freedom of speech challenge to the Dairy Production Stabilization Act and the assessments imposed pursuant to the Dairy Production Stabilization Act. Thus, the requirement under the Dairy Production Stabilization Act and the Dairy Order that Petitioner fund the promotion of milk and dairy products does not violate Petitioner's right to freedom of speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the Dairy Production Stabilization Act or the Dairy Order.

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promotion program (a program similar in nature, purpose, and content to the dairy promotion program) is ideologically neutral), *cert. denied*, 493 U.S. 1094 (1990); *Goetz v. Glickman*, 920 F. Supp. 1173, 1183 (D. Kan. 1996) (rejecting the characterization of the beef promotion program (a program similar in nature, purpose, and content to the dairy promotion program) as ideological), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1497 (1997) (rejecting respondent's contention that the statement that "the consumption of beef is healthy" is ideological); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1601 (1997) (holding that the mushroom promotion program (a promotion program similar in nature, purpose, and content to the dairy promotion program) has no political or ideological content), *aff'd*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Mar. 26, 1998).

[8]*See Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

Third, Petitioner contends that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), does not dispose of Petitioner's claim that the Dairy Production Stabilization Act and the assessments imposed pursuant to the Dairy Production Stabilization Act and the Dairy Order violate Petitioner's right to freedom of association guaranteed under the First Amendment to the Constitution of the United States (Petitioner's Appeal Petition at 17).

I disagree with Petitioner. The Court in *Wileman Bros.* addresses freedom of association stating that, in contrast to compelled contributions for collective bargaining where an employee may have ideological, moral, or religious objections to the union's activities, "the collective programs authorized by the marketing order do not, as a general matter, impinge on speech or association rights." *Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2140 n.16. The United States District Court for the Eastern District of California, examining the constitutionality of a law permitting the California Table Grape Commission to assess shipped grapes to fund generic advertising of California table grapes, states "[t]he predicate of [*Wileman Bros.*] is that there is no First Amendment right of association not to be compelled to associate for generic advertising" and that "no compelling purpose is needed . . . to require commercial association." *Delano Farms Co. v. California Table Grape Comm'n, supra*, slip op. at 11 (emphasis in original).

Moreover, I have previously held, based on *Wileman Bros.*, that freedom of association is not infringed by compelled funding of the generic promotion of fresh mushrooms under the MPRCIA and the Mushroom Order (a promotion program similar in nature, purpose, and content to the dairy promotion program) and that the right to freedom of association under the First Amendment to the Constitution of the United States is not even implicated by the MPRCIA or the Mushroom Order.[9]

Fourth, Petitioner contends that bloc voting by cooperatives in National Dairy Promotion and Research Board referenda violates Petitioner's due process and equal protection rights (Petitioner's Appeal Petition at 21). I agree with the ALJ's conclusion that bloc voting does not violate Petitioner's rights to due process and equal protection of the law, and I have adopted the ALJ's discussion of the issue with only minor modifications.

Fifth, Petitioner contends that the National Dairy Promotion and Research Board's use of Petitioner's assessments to advertise dairy products that Petitioner

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[9] *In re United Foods, Inc.*, 57 Agric. Dec. ___, slip op. at 27-28 (Mar. 4, 1998); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997), *aff'd*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Mar. 26, 1998).

are "plausible,"[13] "arguable,"[14] or "conceivable"[15] reasons which may have been the basis for the distinction.

Congress declared that the purposes of the Dairy Production Stabilization Act are to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States. 7 U.S.C. § 4501(b). The Supreme Court of the United States has recognized the legitimate governmental interest in creating other mandatory marketing order programs for "advancing the interests of producers" and to "raise producer prices," *Block v. Community Nutrition Inst.*, 467 U.S. 340, 342 (1984), and has described a statutory scheme providing for generic advertising intended to stimulate consumer demand for an agricultural product as "legitimate." *Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2141.

Moreover, I have previously held that the government's purposes, as declared in the MPRCIA and the Beef Promotion Act, two acts the purposes of which are

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[13]*FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (holding that where there is a plausible reason for a legislative classification, the equal protection inquiry is at an end); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (stating that in general, the equal protection clause is satisfied so long as there is a plausible policy reason for the classification); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 116, 179 (1980) (holding that where there is a plausible reason for a legislative classification, the equal protection inquiry is at an end).

[14]*Vance v. Bradley*, 440 U.S. 93, 112 (1979) (holding that the admission that the facts in support of a legislative classification are arguable immunizes the legislative classification from an equal protection attack); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) (stating that a legislative classification is not arbitrary if any state of facts reasonably can be conceived that would sustain the classification and it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength).

[15]*Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993) (stating that a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (stating that in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification); *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (holding that those challenging legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker).

similar to the purposes of the Dairy Production Stabilization Act,[16] are legitimate.[17]

Therefore, I find that government's purposes, as declared in the Dairy Production Stabilization Act, are legitimate.

The second step in equal protection analysis is determining whether the challenged classification is rationally related to that legitimate governmental purpose. Petitioner challenges its inclusion in the classification of those from whom assessments are collected under the Dairy Production Stabilization Act because, while Petitioner sells one dairy product, cheese, the National Dairy

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[16]Section 1(b) of the MPRCIA sets forth the purposes of the MPRCIA, as follows:

§ 6101. Findings and declaration of policy

. . . .

(b) Policy

It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—

(1) strengthen the mushroom industry's position in the marketplace;
(2) maintain and expand existing markets and uses for mushrooms; and
(3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b).

Section 2(b) of the Beef Promotion Act sets forth the purposes of the Beef Promotion Act, as follows:

§ 2901. Congressional findings and declaration of policy

. . . .

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this chapter shall be construed to limit the right of individual producers to raise cattle.

7 U.S.C. § 2901(b).

[17]*In re Jerry Goetz*, 56 Agric. Dec. 1470, 1507 (1997); *In re Donald B. Mills, Inc.*, 56 Agric Dec. 1567, 1606 (1997), *aff'd*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Mar. 26, 1998).

Promotion and Research Board uses assessments paid by Petitioner to advertise many dairy products (Petitioner's Appeal Petition at 22). However, I find that the collection of assessments from milk producers in accordance with the Dairy Production Stabilization Act and the use of those assessments to promote fluid milk and dairy products is rationally related to the legitimate governmental purposes of the Dairy Production Stabilization Act, viz., the strengthening of the dairy industry's position in the marketplace and the maintenance and expansion of domestic and foreign markets and uses for fluid milk and dairy products produced in the United States.

Petitioner's challenge to the collection of an assessment on equal protection grounds appears to be based on Petitioner's view that it does not have the same economic interest or market as others in the dairy industry and Petitioner's desire to promote only one dairy product, Petitioner's cheese, and to distinguish its product from others in the dairy industry. However, *Wileman Bros.* makes clear that neither Petitioner's view regarding its economic interest relative to others in the dairy industry nor Petitioner's desire to distinguish its product from others in the dairy industry give rise to a constitutional claim. *Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2140, 2142. The government's purposes, as declared in the Dairy Production Stabilization Act, are legitimate and the challenged classification is rationally related to that legitimate governmental purpose. The fact that Petitioner believes that it could better use the money it is assessed to market its product "is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial." *Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2142. Therefore, I find no basis for Petitioner's contention that the National Dairy Promotion and Research Board's use of Petitioner's assessments to advertise dairy products that Petitioner does not sell violates Petitioner's right to equal protection of the law.

For the foregoing reasons, the following Order should be entered.

Order

The relief requested by Petitioner is denied, and the Petition is dismissed with prejudice.

NONPROCUREMENT DEBARMENT AND SUSPENSION

In re: MINORITY EMPOWERMENT FINANCIAL ASSOCIATED COUNCIL.
DNS Docket No. RD-98-0001
Decision and Order as to Minority Empowerment Financial Associated Council, filed May 28, 1998.

Nonprocurement debarment--False Statement--Failure to maintain adequate records--Debarment affirmed--Period of Debarment reduced from 5 years to 2 years.

Chief Administrative Law Judge Victor W. Palmer affirmed the decision of the debarring official that Respondent had violated its agreement with Natural Resources Conservation Service by falsely identifying itself as a 501(c)(3) tax exempt organization and failing to maintain adequate accounting records to show the disposition of funds received under the agreement. The period of debarment was, however, reduced from five years to two years because the causes for debarment were not so serious as to warrant a five year term of debarment.

Jill Long Thompson, Debarring Official.
Donald M. McAmis, for RD.
Joe L. Smith, Shreveport, LA, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This Decision and Order is issued pursuant to 7 C.F.R. §3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. § 3017.100-.515, the regulations that implement a governmentwide system for nonprocurement debarment and suspension (regulations).[1] The objective of the regulations is stated at 7 C.F.R. § 3017.115(a) and (b):

> (a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

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[1]The regulations implement Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. . . .

Pursuant to 7 C.F.R. § 3017.515, debarment decisions may be appealed to the Office of Administrative Law Judges. The administrative law judge may vacate the debarment if the implementing decision is not in accordance with law; not based on the applicable standard of evidence; or is arbitrary, capricious and an abuse of discretion. Decisions of the administrative law judge must be based solely on the administrative record which must demonstrate the evidentiary basis of the decision.

The Debarring Official, Jill Long Thompson, Under Secretary of Rural Development, United States Department of Agriculture issued a final notice of debarment on January 27, 1998, which debarred the Minority Enterprise Financial Acquisition Corporation (MEFAC) and all other organizations using the acronym MEFAC for a period of five years, effective January 27, 1998. The notice stated that the debarment was based on MEFAC's failure to return grant funds and failure to follow the terms of a Cooperative Agreement entered into with the Natural Resources Conservation Service (NRCS).

By letter of March 4, 1998, Respondent, an organization using the acronym MEFAC, appealed the decision of the Debarring Official. Neither the Minority Enterprise Financial Acquisition Corporation, nor any other organization using the acronym MEFAC appealed the decision. I issued a ruling regarding procedural requirements on March 9, 1998. On March 27, 1998, the Debarring Official filed her response to the appeal petition along with the administrative record.

On April 24, 1998, Respondent filed a reply to the Debarring Official's response, along with a motion to compel production of financial records that Respondent claimed were missing from the administrative record. I issued an Order instructing the Debarring Official to produce those financial records, as well as a video tape, in order to complete the record. On May 8, 1998, Bart Chilton, Senior Policy Director for Rural Development, filed a declaration swearing that Respondent did not submit financial records or a video tape for consideration by the Debarring Official.

On May 22, 1998, Respondent filed copies of the financial records and video tape in question, along with an affidavit swearing that the materials were submitted during a meeting with the Debarring Official on December 8, 1997. However, this material is not properly before me for two reasons. First, the governing rules of practice do not permit a moving party a right of reply; and,

therefore, any documents that Respondent wished to be considered had to be submitted with its initial motion. Second, my decision must be based on the administrative record as certified complete by the Debarring Official, who advises that nothing has been omitted, even inadvertently. Moreover, the material Respondent submitted was not sufficient to rebut the agency's allegations. Therefore, even if the documents were considered as part of the administrative record, debarment would still be fully warranted.

Although I have concluded that the Debarring Official's decision to debar is supported by the record, I have also found that the five year period of debarment that she imposed is not commensurate with the seriousness of the cause for debarment. As such I have affirmed the debarment, but reduced the period to two years.

Throughout this Decision and Order, references to the administrative record are cited as "A.R." followed by the number of the document.

Factual Background

The Minority Enterprise Financial Acquisition Corporation (MEFAC)[2] is a corporation formed by the leaders of the National Baptist Convention, Inc. and the National Baptist Convention, Dr. Henry J. Lyons and Dr. E. Edward Jones, respectively. MEFAC is dedicated to the promotion of economic empowerment of its national conventions, churches and communities. (A.R. AA29-31). To that end, MEFAC proposed an alliance with Rural Economic and Community Development (RECD), United States Department of Agriculture (USDA), in order to foster development in rural America. (A.R. AA45-46). The proposal consisted of a statement of work which outlined a plan for a series of workshops on business development. In the proposal MEFAC identified itself as a tax exempt 501(c)(3) entity.

MEFAC entered into a Cooperative Agreement with Natural Resources Conservation Service (NRCS), January 25, 1996. (A.R. E). Under the Agreement, MEFAC's obligations were as follows:

1. Provide innovative and accessible management education and training, tailored to rural business development on such subjects as building community leadership, coalitions and partnerships.

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[2]Throughout this decision Minority Empowerment Financial Associated Council, shall be referred to as Respondent. Minority Enterprise Financial Acquisition Council shall be referred to as MEFAC.

2. Serve as a natural resources clearing house for information about model policies, trends, and programs, technologies, innovation, and information data.

3. Provide research and technical assistance to rural agencies in support of their administrative and operations mission.

4. Provide a communications network linking rural agencies and departments to facilitate the exchange of information and spread of successful innovations.

5. Assign professional and clerical personnel, as needed, to assist in program implementation.

6. Provide necessary office space, equipment, and supplies for all personnel involved in the program.

7. Provide performance reports each quarter on the progress to the authorized NRCS representatives for the purpose of documenting accomplishments.

8. Perform all duties as outlined in the attached statement of work.[3]

(A.R. at E2). In exchange, NRCS agreed to:

1. Provide funding in the amount of $250,000.

2. Assign an employee from NRCS and RBS to collaborate with MEFAC on findings and outcomes.

3. Review and comment on community assistance from the program.

4. Share with other USDA agencies findings and outcomes of the

[3]It appears that the statement of work was not actually attached to the Cooperative Agreement at the time it was signed. The statement submitted with MEFAC's proposal was apparently undergoing revision. Wilbur Peer, Associate Administrator, Rural Business and Cooperative Development Service (RBS), faxed a revised statement of work, dated June 14, 1996 to MEFAC, on July 2, 1996. (A.R. AA79).

program.

(A.R. at E2).

The Agreement provided for termination as follows:

> This agreement may be terminated by either party hereto by written notice to the other party at least 30 days in advance of the effective date of the termination. This agreement for services can be terminated by NRCS if NRCS determines that MEFAC has failed to comply with the provisions of this agreement. In the event this agreement is terminated, MEFAC shall bill NRCS and be reimbursed for services provided up to the effective date of termination.

(A.R. at E4).

On December 6, 1995, MEFAC requested $75,000 as reimbursement for research and development; preparation of a staffing mobilization plan; and planning for the National Symposium. On February 12, 1996, MEFAC requested a second disbursement of $75,000 for research and identification of potential businesses to include in the MEFAC/RECD project, and for the planning and design of a model for regional workshops. Both requests for reimbursement were certified as proper and two disbursements of $75,000 each were made. (A.R. at F & G).

At the request of Pearlie Reed, Associate Chief, NRCS, Tom Reese, Acting director, Financial Management Division, and Ed Biggers, Director, Management Services Division, NRCS, traveled to the Alabama State Office on April 30, 1996 to review the validity of the Cooperative Agreement and the transfer of funds. (A.R. at H1). The May 9, 1996 report of the trip raised several concerns as to the legality of the agreement, noting First Amendment and Equal Protection issues, as well as a lack of legal authority for NRCS participation. (A.R. H3).

On May 16, 1996, Dayton Watkins, Administrator of RBS, advised the Debarring Official that he reviewed the issues raised by the Reese and Biggers report, and found that there were no problems with the agreement that could not be resolved by providing explanations and corrections in documents where necessary. (A.R. I). Mr. Watkins further found that the MEFAC invoices were properly certified, and that the payments had been properly made. (A.R. I3). Nevertheless, on June 18, 1996, NRCS notified MEFAC that it was initiating a review of the agreement at the request of Congress, and that pending the outcome

of the investigation, all work under the agreement was to cease immediately. (A.R. AA96). On December 12, 1996, NRCS notified MEFAC of its intent to terminate the agreement and collect the $150,000 that was previously disbursed. (A.R. K).

On December 17, 1996, the Office of Inspector General (OIG) issued a report which concluded that MEFAC had violated the terms of the agreement because it did not hold regional workshops; it was not a non-profit entity as claimed in the statement of work; it failed to maintain financial records in accordance with the regulations; and it used funds inappropriately. (A.R. L).

MEFAC has not returned the $150,000 that was disbursed prior to termination of the agreement. USDA turned the matter over to the Department of Treasury; however, the Department of Treasury does not consider misused grant funds to be collectable under the Debt Collection and Consolidation Act. (A.R. S5-7).

On July 16, 1997, the Debarring Official issued a notice of immediate suspension and proposed debarment to MEFAC. The notice informed MEFAC that the action was being taken because of MEFAC's failure to return grant funds and failure to follow the terms of the Cooperative Agreement, and that the debarment would be applicable to all of MEFAC's divisions and other organizational elements. (A.R. T1). The letter also stated that the seriousness of MEFAC's conduct warranted a period of debarment in excess of the usual three year maximum, and proposed a period of five years. (A.R. T3). Pursuant to § 3017.313 of the regulations, Respondent submitted information and argument in opposition to the proposed debarment on September 17, 1997. In addition, a meeting was held on December 8, 1997, at which Respondent submitted additional information and argument. On January 27, 1998, the Debarring Official issued a final notice of debarment, stating that MEFAC and all other organizations using the acronym MEFAC were prohibited from participating in government programs for a period of five years effective January 27, 1998. The Debarring Official cited as cause for debarment § 3017.305(b) which provides for debarment based "[v]iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program . . . ;" and § 3017.305(d) which allows debarment for "[a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a person."

Specifically the Debarring Official cited as cause for debarment, the failure to hold 12 regional workshops prior to December 1996, as called for in the statement of work; failure to be designated as a non-profit 501(c)(3) corporation as indicated in the statement of work; failure to maintain accounting records to show the disposition of funds received under the Cooperative Agreement; and failure to return grant funds dispersed prior to termination of the agreement. (A.R. Y2).

Discussion

Respondent does not appeal its inclusion in MEFAC's debarment. Instead it challenges the substance of the debarment, appealing on the grounds that the decision was not supported by the evidence; was arbitrary and capricious, and an abuse of discretion; and was not issued in accordance with law.

Respondent argues that the Debarring Official did not issue the decision in accordance with law, as she failed to issue findings of fact as required by § 3017.314(b). The regulations do not specify the form in which the findings of fact must be recited. It merely requires findings to be made whenever additional proceedings are held to resolve issues of material fact. The Debarring Official's decision contained factual statements in support of her decision, delineating the specific conduct that she determined to be cause for debarment. As such, the Debarring Official made the requisite factual findings in accordance with the law.

The remainder of Respondent's arguments essentially amount to a claim that the evidence does not support a finding that adequate cause for debarment existed under §§ 3017.305(b) and 3017.305(d); and that the decision was, therefore, arbitrary and capricious, and an abuse of discretion. In assessing an agency action under the arbitrary and capricious standard it is necessary to determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983).

Section 3017.305 of the regulations provides that:

> Debarment may be imposed in accordance with the provisions of §§ 3017.300 through § 3017.314 for:
>
> . . . .
>
> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:
>
> (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
>
> (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
>
> (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

. . . .

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

7 C.F.R. § 3017.305. The existence of cause for debarment must be established by the agency, by a preponderance of the evidence. 7 C.F.R. § 3017.314(c).

The Debarring Official cited four instances of conduct which she found violated the terms of the Cooperative Agreement, and were so serious as to affect the integrity of an agency program, and affected the present responsibility of Respondent.

1. Failure to Hold 12 Regional Workshops by December 1996.

The Debarring Official asserted that MEFAC's failure to hold 12 workshops by December 1996, as set forth in the statement of work, constitutes a violation of the terms and conditions of the Cooperative Agreement so as to provide cause for debarment. Respondent argues that the workshops were not required by the Cooperative Agreement because the agreement required performance of duties as outlined in the *attached* statement of work, and there was no statement of work attached to the agreement at the time it was signed.

Although the statement of work may not have been attached at the time the agreement was signed, it appears clear that the agreement was referencing the statement of work that was submitted by MEFAC and subsequently revised by RBS. The regional workshops were integral to both the original and the revised versions of the statement of work. It, therefore, seems clear that the workshops were intended to be an integral part of the MEFAC/NRCS alliance. NRCS, however, prevented performance by December 1996 when it order MEFAC to cease work under the agreement in June of 1996. As such, failure to hold the conferences cannot be considered a violation of the agreement so serious as to affect either the integrity of the program or MEFAC's present responsibility.

It is also worth noting that the workshops were not the only tasks to be completed under the statement of work. The agreement listed eight responsibilities on the part of MEFAC, and performing the duties as outlined in the statement of work was the eighth. Therefore, MEFAC's requests for reimbursement, if properly supported, were reasonable.

2. Failure to return funds disbursed prior to termination of the agreement.

The Debarring Official asserts that MEFAC's failure to return the $150,000 in grant funds that were disbursed prior to termination of the agreement

constitutes serious abdication of its responsibilities under the Cooperative Agreement. The payments were certified as proper at the time they were made. The agency has not obtained a judgment ordering return of the funds, and the Cooperative Agreement does not contain any provision directing the return of the grant funds upon termination of the agreement. To the contrary, the Cooperative Agreement requires NRCS to reimburse MEFAC for services provided up to the effective date of termination. (A.R. E4).

The regulations applicable to agreements with non-profit organizations do provide that if a grant recipient materially fails to comply with the terms and conditions of an award, all or part of the cost related to the noncompliant activity or action may be disallowed. 7 C.F.R. § 3019.62(a). In taking such an enforcement action, however, the agency is required to provide the grant recipient with a hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved. 7 C.F.R. § 3019.62(b). There is no indication that MEFAC was provided with any such opportunity to be heard. In fact, the same letter that terminated the agreement also demanded return of the grant funds. Therefore, although the agency might have some legal claim to the grant funds, at this point, MEFAC's failure to return the funds would not appear to be a valid cause for debarment.

3. Falsely identifying itself as a 501(c)(3) tax exempt organization.

The statement of work that MEFAC submitted to RECD states that "MEFAC is a 5013c [sic] corporation qualified to be the recipient of grants and other benefits of a not for profit entity." (A.R. AA30). In the preceding paragraph MEFAC was identified as the Minority Enterprise Financial Acquisition Corporation. There is no evidence that MEFAC is a non-profit organization. Although Respondent also uses the acronym MEFAC, and is a non-profit organization with a 501(c)(3), neither the statement of work, nor the Cooperative Agreement makes any reference to Respondent.

Respondent argues that because the agreement does not require a 501(c)(3) designation, MEFAC did not breach the agreement by failing to disclose its for-profit status. It is not, however, necessary to find a breach of contract to find cause for debarment. MEFAC falsely identified itself as a non-profit organization in its statement of work. NRCS apparently relied on this information in drafting the Cooperative Agreement as it incorporates by reference rules and regulations applying to grants awarded to non-profit entities. MEFAC's dishonesty seriously reflects on its present responsibility to engage in business with the government. As such, it is a valid cause for debarment under § 3017.305(d).

4. Failure to maintain accounting records to show the disposition of funds received under the Cooperative Agreement.

The Debarring Official found that MEFAC failed to maintain adequate accounting records as follows:

> Financial records were not maintained in accordance with regulations which require maintenance of continuous updated accounting records supported by source documentation;
>
> The poor condition of the records was exacerbated by the extensive use of unnumbered counter check [sic] totaling over $24,000, "off-book" transactions such as wire transfers to the credit of a consultant's personal loan account, and multiple and complex reimbursement processes;
>
> MEFAC income was not always deposited into the MEFAC bank account;
>
> MEFAC officials did not provide evidence for program outlays claimed on Form SF 270 Request for reimbursement; and
>
> No prior travel approval by NRCS, as required by the Cooperative Agreement, was obtained by MEFAC.

(A.R. Y2).

The Cooperative Agreement requires MEFAC to assure and certify that it is in compliance with, and will comply with in the course of the agreement, Office of Management and Budget Circulars A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, and A-133 Audits of States, Local Governments, and Non-Profit Organizations; as well as all applicable laws, regulations, Executive Orders, and other generally applicable requirements, including those set out in 7 C.F.R. § 3015.205(b). (A.R. E5-6). The USDA regulations implementing OMB Circular A-110, found at 7 C.F.R. Parts 3015 and 3019, are thus incorporated by reference.

Pursuant to Part 3015, grant recipients are required to maintain financial management systems in accordance with specific standards, including the following:

> . . . .
>
> (b) *Accounting records.* The source and application of funds shall be

readily identified by the continuous maintenance of updated records. Records, as such, shall contain information pertaining to grant or subgrant awards, authorizations, obligations, unobligated balances, assets, outlays, and income. . . .

(c) *Internal control.* Effective control over and accountability for all USDA grant or subgrant funds, real and personal property assets shall be maintained. Recipients shall adequately safeguard all such property and shall ensure that it is used solely for authorized purposes. In cases where projects are not 100 percent Federally funded, recipients must have effective internal controls to assure that expenditures financed with Federal funds are properly chargeable to the grant supported project.

. . . .

(g) *Source documentation.* Accounting records shall be supported by source documentation. These documentations include, by are not limited to, canceled checks, paid bills, payrolls, contract and subgrant award documents.

7 C.F.R. § 3015.61. *See also* 7 C.F.R. §§ 3015.205(b)(17) and 3019.21.

The administrative record contains some financial documents, including a budget, balance sheets, and lists of expenses. It does not, however, contain any accounting records or source documentation to support MEFAC's program outlays as identified in its requests for reimbursement. Furthermore, MEFAC's use of unnumbered checks and "off book" transactions, while perhaps not violations as such, contributed to the difficulty in tracing the use of grant funds. Likewise, Respondent's claim that no prior approval for travel was required because grant funds were not used for travel expenses is impossible to verify in the absence of detailed accounting records.

The Debarring Official also maintains that MEFAC failed to deposit grant money in MEFAC accounts. This allegation appears to be based on a finding in the OIG report that the first check was not deposited, but was instead endorsed and used to pay a pre-existing loan. There is no evidence in the record to support this claim; and, in fact, Respondent produced deposit slips showing that two deposits of $75,000 each were made into a MEFAC account.

Nevertheless, the failure to maintain adequate accounting records constitutes a violation of the terms of a public agreement. The ability of an agency to track the use of public funds is critical to the effective administration of grant programs. As such, the Debarring Official's determination that MEFAC's noncompliance was so serious as to affect the integrity of an agency program cannot be considered

arbitrary and capricious, or an abuse of discretion.

Period of Debarment

The regulations provide that:

> Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.
>
> (1) Debarment . . . generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

7 C.F.R. § 3017.320(a).

Based on her findings, the Debarring Official debarred Respondent from participation in government programs for a period of five years, effective as of January 27, 1998, the date the final debarment was issued. The causes in this case are not so serious as to merit a five year period of debarment. There was no criminal conduct involved, and there is no evidence that any of the grant funds were actually misappropriated. Respondent does not have a history of failure to perform public agreements. Furthermore, two of the causes relied upon by the Debarring Official were not valid.

The Debarring Official also failed to take into account the time during which Respondent was suspended. Accordingly, the period of debarment shall be reduced to two years, and shall be effective as of July 16, 1997, the date the suspension was issued.

Order

The decision of the Debarring Official to debar Respondent from participation in government programs is hereby affirmed. The period of the debarment shall be reduced to 2 years, effective July 16, 1997 through July 16, 1999.

This Decision and Order is final and is not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served on the parties.

[This Decision and Order became final May 28, 1998.--Editor]

MISCELLANEOUS ORDERS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: KREIDER DAIRY FARMS, INC.
94 AMA Docket No. M-1-2.
Order Denying Late Appeal filed January 12, 1998.

Late appeal — Jurisdiction of judicial officer — Postmark.

The Judicial Officer denied Petitioner's late-filed appeal. Section 900.69(d) of the Rules of Practice (7 C.F.R. § 900.69(d)) provides that any document or paper, except a petition filed pursuant to § 900.52, required or authorized to be filed under 7 C.F.R. §§ 900.50-.71, shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk. On the extended due date of September 19, 1997, Petitioner gave its appeal petition to Federal Express for delivery to the Office of the Hearing Clerk; however, Petitioner's appeal petition was not postmarked. Therefore, Petitioner's appeal petition was filed September 25, 1997, when it was actually received by the Office of the Hearing Clerk, which was 6 days after the time granted in the Informal Order of September 12, 1997, for filing Petitioner's appeal petition. Since no appeal was filed, or deemed to be filed, on or before September 19, 1997, the Decision and Order on Remand issued by the ALJ became final on September 20, 1997, and the Judicial Officer does not have jurisdiction to consider Petitioner's appeal petition.

Sharlene A. Deskins, for Respondent.
Marvin Beshore, Harrisburg, Pennsylvania, for Petitioner.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Kreider Dairy Farms, Inc. [hereinafter Petitioner], instituted this proceeding on December 28, 1993, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter AMAA]; the marketing order regulating Milk in New York-New Jersey Marketing Area (7 C.F.R. pt. 1002) [hereinafter Milk Marketing Order No. 2]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter Rules of Practice], by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner: (1) challenges the decision of the Market Administrator for Milk Marketing Order No. 2 that, beginning in November 1991, Petitioner was a handler regulated under Milk Marketing Order No. 2 (Petition ¶ 13); (2) asserts that it is, and at all times relevant to this proceeding was, a producer-handler under Milk Marketing Order No. 2 exempt from obligations under Milk Marketing Order No. 2 to make payments into a producer-settlement fund (Petition ¶ 13); and (3) seeks a refund, with interest, of all money that it paid into the producer-settlement fund (Petition ¶ 14).

On February 25, 1994, the Administrator of the Agricultural Marketing Service [hereinafter Respondent] filed an Answer: (1) denying the allegation that Petitioner is a producer-handler exempt from obligations to make payments into the producer-settlement fund (Answer ¶ 2); (2) asserting that Petitioner does not qualify as a producer-handler under Milk Marketing Order No. 2 because Petitioner does not distribute milk and milk products to route customers within the Milk Marketing Order No. 2 area (Answer ¶ 11); (3) asserting that Petitioner sells its milk and milk products to other handlers and does not maintain complete and exclusive control over the production, processing, and distribution of its milk and milk products (Answer ¶ 11); (4) stating that the Petition fails to state a claim upon which relief can be granted (Answer at 4); and (5) stating that Milk Marketing Order No. 2, as interpreted and administered by the Market Administrator and his agents and employees, was fully in accordance with the law and binding on Petitioner (Answer at 4).

On December 14, 1994, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] conducted an oral hearing in Washington, D.C. Mr. Marvin Beshore, Esq., of Milspaw & Beshore, Harrisburg, Pennsylvania, represented Petitioner. Ms. Denise Y. Hansberry, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.[1] On February 7, 1995, Petitioner filed Petitioner Kreider Dairy Farms, Inc.'s, Findings of Fact, Conclusions of Law and Brief in Support Thereof and Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Supporting Brief Thereof. On February 14, 1995, Petitioner filed Reply Brief of Petitioner Kreider Dairy Farms, Inc., and Respondent filed Respondent's Reply Brief.

On March 20, 1995, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that the "Market Administrator's decision to regulate Petitioner as a handler operating a partial pool plant is not in accordance with law"; (2) concluded that Petitioner is entitled to a refund of $543,864.68, which Petitioner paid into the producer-settlement fund during the period November 1991 to November 1994, and subsequent amounts Petitioner paid into the producer-settlement fund; and (3) denied Petitioner interest on the refund of amounts that Petitioner had paid into the

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[1]On March 25, 1997, Ms. Sharlene A. Deskins, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., entered an appearance on behalf of Respondent, replacing Ms. Denise Y. Hansberry, Esq., as counsel for Respondent (Notice of Appearance, filed March 25, 1997).

producer-settlement fund(Initial Decision and Order at 18).

On April 25, 1995, Petitioner, seeking interest on the refund of amounts that Petitioner had paid into the producer-settlement fund, appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On May 5, 1995, Respondent filed Respondent's Appeal Petition, requesting that the Judicial Officer vacate the ALJ's Initial Decision and Order and issue a ruling dismissing Petitioner's Petition (Respondent's Appeal Petition at 2).

On May 18, 1995, Respondent filed Reply to Appeal of Petitioner Kreider Dairy Farms, Inc.; on June 13, 1995, Petitioner filed Reply of Petitioner Kreider Dairy Farms, Inc. to Respondent's Appeal Petition; and on June 14, 1995, the case was referred to the Judicial Officer for decision.

The Judicial Officer issued a Decision and Order on September 28, 1995, concluding that the Market Administrator's determination that Petitioner is not a producer-handler exempt from the obligation under Milk Marketing Order No. 2 to pay into the producer-settlement fund is correct and dismissing Petitioner's Petition. *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996).

Pursuant to section 8c(15)(B) of the AMAA (7 U.S.C. § 608c(15)(B)), Petitioner sought review of *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995), in the United States District Court for the Eastern District of Pennsylvania. Specifically, Petitioner challenged the ruling of the Judicial Officer affirming the decision of the Market Administrator to regulate Petitioner as a handler under Milk Marketing Order No. 2, rather than designating Petitioner as a producer-handler exempt from making payments to the producer-settlement fund. *Kreider Dairy Farms, Inc. v. Glickman*, No. 95-6648, slip op. at 1-3, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996). The Court found that "neither the plain language of [Milk Marketing] Order [No.] 2 nor its promulgation history supports a finding that Kreider should be denied producer-handler status without further factual findings that Kreider is `riding the pool.'" *Kreider Dairy Farms, Inc. v. Glickman*, No. 95-6648, slip op. at 24, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996). The Court denied plaintiff's motion for

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

summary judgment and defendant's cross-motion for summary judgment and remanded the case to the Secretary of Agriculture for further factual findings and a decision regarding whether Kreider Dairy Farms, Inc., is "riding the pool." The Court explained the purpose of the remand order, as follows:

> The JO [Judicial Officer] and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind [Milk Marketing] Order [No.] 2's producer-handler exemption. The JO explains the economic purpose as follows:
>
> > "[M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the necessary burdens of surplus milk . . . through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to "ride the pool," i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated . . . ."

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this "pool riding" problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

> [Kreider] does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, [Kreider] can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by

means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive." (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 3 & 3 n.2.) Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production.

If the record cannot support the economic justification behind the Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of [Milk Marketing] Order [No.] 2 is ambiguous and the [Market Administrator's] action is not clearly supported by the promulgation history of [Milk Marketing] Order [No.] 2 or departmental interpretation. . . . Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool." To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

Kreider Dairy Farms, Inc. v. Glickman, No. 95-6648, slip op. at 18-21 (footnote omitted), 1996 WL 472414 (E.D. Pa. Aug. 15, 1996).

On December 30, 1996, the ALJ issued a notice of hearing stating:

In a December 30, 1996, telephone conference with Denise Hansberry and Marvin Beshore, counsel for the parties, the following were agreed

and/or decided:

I reviewed with counsel that the remand was triggered by the following language in the Judicial Officer's September 28, 1995, Decision:

> Respondent is arguing that Petitioner avoids producing a great deal of surplus milk. That is, Petitioner does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, Petitioner can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying Petitioner's milk. If a producer-handler could turn over its distribution functions to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production. pp. 52-53

Based upon this language, the United States District Court for the Eastern District of Pennsylvania stated in its August 15, 1996, Decision:

> Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production. [p. 19]
>
> . . . .
>
> Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is `riding the pool.' To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production. p[p. 20-21]

. . . .

The issue is, during the Ahava and Kreider dealings going back to

November 1990, were there any instances of short production by Kreider when Ahava acquired kosher milk from other handlers from the pool? This includes the following questions:

> Are there seasonal periods of shortages in milk production from Kreider and other similar producer-handlers?
>
> What are the patterns as to whether and how regularly Kreider maintains a surplus?

Summary of Telephone Conference--Notice of Hearing, filed December 30, 1996.

On April 23, 1997, the ALJ conducted an oral hearing in Washington, D.C. Mr. Marvin Beshore, Esq., represented Petitioner. Ms. Sharlene A. Deskins, Esq., represented Respondent. On June 12, 1997, Petitioner filed Proposed Findings of Fact, Conclusions of Law and Supporting Brief on Behalf of Petitioner Kreider Dairy Farms, Inc., and Respondent filed Respondent's Proposed Finding of Fact, Conclusions of Law, and Supporting Brief Thereof. On June 23, 1997, Respondent filed Respondent's Response to "Proposed Findings of Fact, Conclusions of Law and Supporting Brief on Behalf of Petitioner Kreider Dairy Farms, Inc.," and on June 24, 1997, Petitioner filed Petitioner's Reply Brief.

On August 12, 1997, the ALJ filed a Decision and Order [hereinafter Decision and Order on Remand] in which the ALJ: (1) found that it is feasible for Ahava to turn to other handlers in periods of Petitioner's short production; (2) found that although there are no requirements as to the amount of surplus a producer-handler must have, an inference can be made that Petitioner was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs; (3) concluded that the decision of the Market Administrator to deny Petitioner producer-handler status under Milk Marketing Order No. 2 must be upheld; and (4) dismissed Petitioner's Petition (Decision and Order on Remand at 7, 10).

On September 25, 1997, Petitioner appealed to, and requested oral argument before, the Judicial Officer. On November 12, 1997, Respondent filed Respondent's Opposition to Petitioner's Appeal Petition, and on November 14, 1997, the case was referred to the Judicial Officer for decision.

The Decision and Order on Remand was served on Petitioner on August 15,

1997.[3] The Decision and Order on Remand provides:

> Pursuant to the Rules of Practice, this Decision and Order shall become final and effective without further procedure thirty-five (35) days after service upon the parties unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service, as provided in section 900.65 of the Rules of Practice (7 C.F.R. § 900.65).

Decision and Order on Remand at 10.

A letter from the Office of the Hearing Clerk accompanying the Decision and Order on Remand states:

> CERTIFIED RECEIPT REQUESTED August 12, 1997
>
> Mr. Marvin Beshore
> Milspaw & Beshore
> Attorneys at Law
> 130 State Street
> P.O. Box 946
> Harrisburg, Pennsylvania 17108
>
> Dear Mr. Beshore:
>
> **Subject: In re: Kreider Dairy Farms, Inc., Petitioner-**
> **94 AMA Docket No. M-1-2**
>
> Enclosed is a copy of the Decision and Order issued in this proceeding by Administrative Law Judge Edwin S. Bernstein on August 12, 1997.
>
> Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.
>
> If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purposes of judicial review except a final

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[3]Return Receipt for Article Number P093041056 delivered August 15, 1997, and signed by Marvin Beshore.

order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) [sic] for the procedure for filing an appeal.

Letter from Joyce A. Dawson, Hearing Clerk, to Marvin Beshore.

In addition, the Return Receipt attached to the envelope containing the Decision and Order on Remand and the August 12, 1997, letter from the Office of the Hearing Clerk to Mr. Beshore states "94 AMA-M-1-2 30 days to appeal."[4]

Section 900.65(a) and (b)(1) of the Rules of Practice provides that:

§ 900.65 Appeals to Secretary: Transmittal of record.

(a) *Filing of appeal.* Any party who disagrees with a judge's decision or any part thereof, may appeal the decision to the Secretary by transmitting an appeal petition to the hearing clerk within 30 days after service of said decision upon said party. . . .

(b) *Argument before Secretary*—(1) *Oral argument.* A party bringing an appeal may request within the prescribed time period for filing such appeal, an opportunity for oral argument before the Secretary. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Secretary, in his discretion, may grant, refuse or limit any request for oral argument on appeal.

7 C.F.R. § 900.65(a), (b)(1).

Petitioner was required to transmit its appeal petition to the hearing clerk no later than September 15, 1997. On September 12, 1997, Petitioner, by telephone, moved for an extension of time within which to file its appeal petition. I issued an Informal Order granting Petitioner's motion, which provides, as follows:

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[4]Return Receipt for Article Number P093041056.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 94-AMA-M-1-2 Informal Order

The time for filing Petitioner's appeal petition is hereby extended to September 19, 1997.

Done at Washington, D.C.
September 12, 1997
/s/
William G. Jenson
Judicial Officer

The September 12, 1997, Informal Order was served on Petitioner on September 18, 1997.[5] The evidence indicates that Petitioner gave Appeal of Petitioner Kreider Dairy Farms, Inc. [hereinafter Petitioner's Appeal Petition], to Federal Express, on September 19, 1997, for delivery to the Office of the Hearing Clerk.[6] However, Petitioner did not actually file Petitioner's Appeal Petition until 9:30 a.m., September 25, 1997, as evidenced by the date and time stamped on the first page of Petitioner's Appeal Petition by the Office of the Hearing Clerk.

Section 900.69(d) of the Rules of Practice provides, as follows:

§ 900.69 Filing; service; extensions of time; effective date of filing; and computation of time.

. . . .

(d) *Effective date of filing.* Any document or paper, except a petition filed pursuant to § 900.52, required or authorized under these rules to be

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[5]Return Receipt for Article Number P093041082, delivered September 18, 1997, and signed by Marvin Beshore.

[6]See letter of September 19, 1997, from Marvin Beshore to Joyce A. Dawson, and recipient's copy of the FedEx USA Airbill (Tracking No. 9098777542), both of which accompanied Petitioner's Appeal Petition.

filed shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk.

7 C.F.R. § 900.69(d).

Therefore, in order for Petitioner's Appeal Petition to be deemed to have been filed on a date other than the actual date of filing, September 25, 1997, Petitioner's Appeal Petition must be postmarked. The verb *postmark* is generally defined as *to put a postmark on* and the noun *postmark* is generally defined as *an official postal marking on a piece of mail showing the date of mailing*.[7] Further, this section has been construed to require either a cancellation

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[7]*See, e.g.*, Merriam Webster's Collegiate Dictionary 910 (10th ed. 1997):

1postmark . . . *n*(1678) : an official postal marking on a piece of mail; *specf* : a mark showing the post office and date of mailing

2postmark *vt*(1716) : to put a postmark on

Black's Law Dictionary 1167 (6th ed. 1990):

Postmark. A stamp or mark put on letters or other mailable matter received at the post-office for transmission through the mails.

The Oxford English Dictionary Vol. XII at 200 (2d ed. 1991):

1postmark, *sb.* . . . A mark officially impressed upon letters or other postal packages for various purposes; formerly *esp.* one bearing the name of the office at which the letter was posted, with the words `paid' or `unpaid', and the amount of postage; later also, a mark used to deface or obliterate the postage stamp; now, usually a mark giving the place, date, and hour of dispatch, or of the arrival of the mail, in the former case also serving to deface the postage stamp, or combined with a special obliteration-mark for that purpose.

. . . .

1postmark, *v.* . . . *trans.* To mark with the post-office stamp, *esp.* that showing place and date of posting. Almost always in *pass.* Hence `**postmarked**' *ppl. a.*; `**postmarking**' *vbl. sb.*

Bouvier's Law Dictionary (8th ed. 1914):

POST-MARK. A stamp or mark put on letters in the postoffice.

Post-marks are evidence of a letter's having passed through the postoffice; 2 Camp. 620; 2 B. & P. 316; *New Haven Co. Bk. v. Mitchell*, 15 Conn. 206. But they are not evidence *per se* without proof; 1 Campb. 215; 16 M. & W. 124.

(continued...)

mark by the postal department, or at the very least, a private mark and evidence establishing delivery to the United States Postal Service, as follows:

> On August 26, 1991, an Initial Decision and Order was filed in this proceeding by Chief Administrative Law Judge Victor W. Palmer (ALJ) dismissing the Petition filed by Petitioner, which challenged regulations issued under Marketing Order 908 during the years 1979 to 1982, inclusive. The Initial Decision and Order was received by Petitioner's attorney on August 30, 1991, and a Notice of Effective Date of Decision and Order was filed by the Hearing Clerk on October 10, 1991, stating that since the case had not been appealed within the allotted time, the Initial Decision and Order "became final and effective on October 5, 1991."
>
> On October 22, 1991, Petitioner's appeal was stamped as received by the Hearing Clerk. However, the appeal is dated September 29, 1991, and the envelope, stamped by the Hearing Clerk as received on October 22, 1991, has a Pitney Bowes, Inc., meter stamp dated September 30, 1991, showing U.S. postage of 98 cents. (Presumably, the private individual stamping the document can stamp it to show any desired date.) There is no postal department cancellation mark on the meter stamp.
>
> Under the Department's Rules of Practice (7 C.F.R. § 900.69(d)

(...continued)

See also *United States v. Maude*, 481 F.2d 1062, 1065-66 (D.C. Cir. 1973) (stating that "it is commonly known that a postmark is the official mark which the Post Office Department places on mail); *Haynes v. Hechler*, 392 S.E.2d 697, 699 (W. Va. 1990) (citing Black's Law Dictionary 1050 (5th ed. 1979) as defining "postmark" as "[a] stamp or mark put on letters or other mailable matter received at the post-office for transmission through the mails"); *Severs v. Abrahamson*, 124 N.W.2d 150, 152 (Iowa 1963) (stating that the most recent definition of the word postmark to come to our attention is in Webster's Third International Dictionary which defines "postmark" when used as a noun as "an official postal marking on a piece of mail; specifically, a mark showing the name of the post office and the date and sometimes the hour of mailing and often serving as the actual and only cancellation"); *Micro Lapping & Grinding Co. v. Unemployment Compensation Board of Review*, 486 N.E.2d 225, 227 (Ct. App. Ohio 1984) (stating that the requirement that a mailed application be "postmarked" prior to the running of the appeal time has been limited to a post office postmark); *Application of George*, 57 N.Y.S.2d 494, 496 (Sup. Ct. 1945) (citing Funk & Wagnall's New Standard Dictionary as defining "postmark," the noun, as "[t]he mark or stamp of a post office on mail matter handled there" and "postmark," the verb, "[t]o put a postmark on, as a letter").

(1991)), a document such as an appeal "shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk." As I interpret this rule of practice, if a document is mailed, the filing date is the date of the postmark, but if it is hand delivered, or sent through the Department's internal mail system, it is filed when it is received by the Hearing Clerk. Since the Judicial Officer has no jurisdiction to hear this appeal if it was not delivered by the United States Postal Service but, rather, was hand delivered by someone, it is necessary for a determination to be made as to whether Petitioner's appeal was hand delivered or whether it was deposited with the United States Postal Service on September 30, 1991, and delivered by the United States Postal Service to the Department.

Order

This proceeding is remanded to the ALJ for the purpose of conducting a hearing to determine the circumstances with respect to the filing of Petitioner's appeal. . . . Particularly, the ALJ should determine whether the appeal came through the U.S. Postal Service or whether it was hand delivered by someone not connected with the U.S. Postal Service.

In re Sequoia Orange Co., Inc., 57 Agric. Dec. ___ (Jan. 3, 1992) (Remand Order).

The recipient's copy of the FedEx USA Airbill (Tracking No. 9098777542) which accompanied Petitioner's Appeal Petition sent to the hearing clerk is not postmarked. Therefore, Petitioner's Appeal Petition was filed September 25, 1997, when it was actually received by the Office of the Hearing Clerk, which was 6 days after the additional time granted in the Informal Order of September 12, 1997, for filing Petitioner's Appeal Petition.

Since no appeal was filed, or deemed to be filed, on or before September 19, 1997, the Decision and Order on Remand issued by the ALJ became final on September 20, 1997, and the Judicial Officer therefore no longer has jurisdiction to consider Petitioner's Appeal Petition. The issue of the failure to file a timely appeal petition under the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) appears to only have been considered on one previous occasion, *In re Sequoia Orange Co., Inc., supra.* Nevertheless, it has continuously and consistently been held under similar provisions under the Rules of Practice

Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final.[8]

This construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

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[8]*See In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .[9]

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after the initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days

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[9] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule).

after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Rule 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after the initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after the initial decision becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[10]

Accordingly, Petitioner's Appeal Petition must be denied, since it is too late for the matter to be further considered. Further, since Petitioner failed to file its request for oral argument within the prescribed time for filing an appeal, as required by section 900.65(b)(1) of the Rules of Practice (7 C.F.R. § 900.65(b)(1)), Petitioner's request for oral argument must be denied. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for the purpose of judicial review except a final decision issued by the Secretary pursuant to an appeal by a party to the proceeding." (7 C.F.R. § 900.64(c).)

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[10] *Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

For the foregoing reasons, the following Order should be issued.

Order

Petitioner's Appeal Petition filed September 25, 1997, is denied. The Decision and Order filed by the ALJ on August 12, 1997, is the final Decision and Order in this proceeding.

In re: KREIDER DAIRY FARMS, INC.
94 AMA Docket No. M-1-2.
Order Denying Petition for Reconsideration filed February 20, 1998.

Late appeal — Jurisdiction of judicial officer — Requests for extensions of time — Federal rules of civil procedure — Consideration of merits — Proceedings on remand.

The Judicial Officer denied Petitioner's Petition for Reconsideration. Petitioner has not raised any grounds in its Petition for Reconsideration for finding that Petitioner's Appeal Petition was timely filed. Requests for extensions of time for filing appeal petitions and responses to appeal petitions must be made prior to the time that the respective filing is due. The Federal Rules of Civil Procedure are not applicable to administrative proceedings instituted under the AMAA in accordance with the Rules of Practice (7 C.F.R. §§ 900.50-.71). The Judicial Officer has no jurisdiction under the Rules of Practice to consider the merits in a proceeding in which the initial decision and order has become final. Further, Judicial Officer's consideration of the merits after an initial decision and order becomes final has no effect on the proceeding. Factual findings were made and a decision issued in the proceeding in accordance with the remand order of the United States District Court for the Eastern District of Pennsylvania. Petitioner's contention that the Department proceeding on remand should not have been conducted in accordance with the Rules of Practice (7 C.F.R. §§ 900.50-.71) is raised for the first time in its Petition for Reconsideration, and new arguments cannot be raised for the first time on appeal to the Judicial Officer.

Sharlene A. Deskins, for Respondent.
Marvin Beshore, Harrisburg, Pennsylvania, for Petitioner.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Kreider Dairy Farms, Inc. [hereinafter Petitioner], instituted this proceeding on December 28, 1993, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter AMAA]; the marketing order regulating Milk in New York-New Jersey Marketing Area (7 C.F.R. pt. 1002) [hereinafter Milk Marketing Order No. 2]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter Rules of Practice], by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner: (1) challenges the decision of the Market Administrator for Milk Marketing Order No. 2 that, beginning in November 1991, Petitioner was a handler regulated under Milk Marketing Order No. 2 (Petition ¶ 13); (2) asserts that it is, and at all times relevant to this proceeding was, a producer-handler under Milk Marketing Order No. 2 exempt from obligations under Milk Marketing Order No. 2 to make payments into a producer-settlement fund (Petition ¶ 13); and (3) seeks a refund, with interest, of all money that it paid into the producer-settlement fund (Petition ¶ 14).

On February 25, 1994, the Administrator of the Agricultural Marketing Service [hereinafter Respondent] filed an Answer: (1) denying the allegation that Petitioner is a producer-handler exempt from obligations to make payments into the producer-settlement fund (Answer ¶ 2); (2) asserting that Petitioner does not qualify as a producer-handler under Milk Marketing Order No. 2 because Petitioner does not distribute milk and milk products to route customers within the Milk Marketing Order No. 2 area (Answer ¶ 11); (3) asserting that Petitioner sells its milk and milk products to other handlers and does not maintain complete and exclusive control over the production, processing, and distribution of its milk and milk products (Answer ¶ 11); (4) stating that the Petition fails to state a claim upon which relief can be granted (Answer at 4); and (5) stating that Milk Marketing Order No. 2, as interpreted and administered by the Market Administrator and his agents and employees, was fully in accordance with the law and binding on Petitioner (Answer at 4).

On December 14, 1994, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] conducted an oral hearing in Washington, D.C. Mr. Marvin Beshore, Esq., of Milspaw & Beshore, Harrisburg, Pennsylvania, represented Petitioner. Ms. Denise Y. Hansberry, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.[1] On February 7, 1995, Petitioner filed Petitioner Kreider Dairy Farms, Inc.'s, Findings of Fact, Conclusions of Law and Brief in Support Thereof and Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Supporting Brief Thereof. On February 14, 1995, Petitioner filed Reply Brief of Petitioner Kreider Dairy Farms, Inc., and Respondent filed Respondent's Reply Brief.

On March 20, 1995, the ALJ filed a Decision and Order [hereinafter Initial

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[1]On March 25, 1997, Ms. Sharlene A. Deskins, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., entered an appearance on behalf of Respondent, replacing Ms. Denise Y. Hansberry, Esq., as counsel for Respondent (Notice of Appearance, filed March 25, 1997).

Decision and Order] in which the ALJ: (1) concluded that the "Market Administrator's decision to regulate Petitioner as a handler operating a partial pool plant is not in accordance with law"; (2) concluded that Petitioner is entitled to a refund of $543,864.68, which Petitioner paid into the producer-settlement fund during the period November 1991 to November 1994, and subsequent amounts Petitioner paid into the producer-settlement fund; and (3) denied Petitioner interest on the refund of amounts that Petitioner had paid into the producer-settlement fund (Initial Decision and Order at 18).

On April 25, 1995, Petitioner, seeking interest on the refund of amounts that Petitioner had paid into the producer-settlement fund, appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On May 5, 1995, Respondent filed Respondent's Appeal Petition, requesting that the Judicial Officer vacate the ALJ's Initial Decision and Order and issue a ruling dismissing Petitioner's Petition (Respondent's Appeal Petition at 2).

On May 18, 1995, Respondent filed Reply to Appeal of Petitioner Kreider Dairy Farms, Inc.; on June 13, 1995, Petitioner filed Reply of Petitioner Kreider Dairy Farms, Inc. to Respondent's Appeal Petition; and on June 14, 1995, the case was referred to the Judicial Officer for decision.

The Judicial Officer issued a Decision and Order on September 28, 1995, concluding that the Market Administrator's determination that Petitioner is not a producer-handler exempt from the obligation under Milk Marketing Order No. 2 to pay into the producer-settlement fund is correct and dismissing Petitioner's Petition. *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 14, 1996).

Pursuant to section 8c(15)(B) of the AMAA (7 U.S.C. § 608c(15)(B)), Petitioner sought review of *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995), in the United States District Court for the Eastern District of Pennsylvania. Specifically, Petitioner challenged the ruling of the Judicial Officer affirming the decision of the Market Administrator to regulate Petitioner as a handler under Milk Marketing Order No. 2, rather than designating Petitioner as a producer-handler exempt from making payments to the producer-settlement fund. *Kreider Dairy Farms, Inc. v. Glickman*, No. 95-6648, slip op. at 1-3, 1996 WL 472414, at

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

*1 (E.D. Pa. Aug. 14, 1996). The Court found that "neither the plain language of [Milk Marketing] Order [No.] 2 nor its promulgation history supports a finding that Kreider should be denied producer-handler status without further factual findings that Kreider is `riding the pool.'" *Kreider Dairy Farms, Inc. v. Glickman*, No. 95-6648, slip op. at 24, 1996 WL 472414, at *11 (E.D. Pa. Aug. 14, 1996). The Court denied plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment and remanded the case to the Secretary of Agriculture for further factual findings and a decision regarding whether Kreider Dairy Farms, Inc., is "riding the pool."

The Court explained the purpose of the remand order, as follows:

> The JO [Judicial Officer] and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind [Milk Marketing] Order [No.] 2's producer-handler exemption. The JO explains the economic purpose as follows:
>
> > "[M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the necessary burdens of surplus milk . . . through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to "ride the pool," i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated . . . ."

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this "pool riding" problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

> [Kreider] does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, [Kreider] can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could

> turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive." (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 3 & 3 n.2.) Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production.

> If the record cannot support the economic justification behind the Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of [Milk Marketing] Order [No.] 2 is ambiguous and the [Market Administrator's] action is not clearly supported by the promulgation history of [Milk Marketing] Order [No.] 2 or departmental interpretation. . . . Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool." To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

Kreider Dairy Farms, Inc. v. Glickman, No. 95-6648, slip op. at 18-21 (footnote omitted), 1996 WL 472414, at *8-9 (E.D. Pa. Aug. 14, 1996).

On December 30, 1996, the ALJ issued a notice of hearing stating:

In a December 30, 1996, telephone conference with Denise Hansberry and Marvin Beshore, counsel for the parties, the following were agreed and/or decided:

I reviewed with counsel that the remand was triggered by the following language in the Judicial Officer's September 28, 1995, Decision:

> Respondent is arguing that Petitioner avoids producing a great deal of surplus milk. That is, Petitioner does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, Petitioner can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying Petitioner's milk. If a producer-handler could turn over its distribution functions to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production. pp. 52-53

Based upon this language, the United States District Court for the Eastern District of Pennsylvania stated in its August 15, 1996, Decision:

> Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production. [p. 19]
>
> . . . .
>
> Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is `riding the pool.' To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production. p[p. 20-21]

. . . .

The issue is, during the Ahava and Kreider dealings going back to November 1990, were there any instances of short production by Kreider

when Ahava acquired kosher milk from other handlers from the pool? This includes the following questions:

> Are there seasonal periods of shortages in milk production from Kreider and other similar producer-handlers?
>
> What are the patterns as to whether and how regularly Kreider maintains a surplus?

Summary of Telephone Conference--Notice of Hearing, filed December 30, 1996.

On April 23, 1997, the ALJ conducted an oral hearing in Washington, D.C. Mr. Marvin Beshore, Esq., represented Petitioner. Ms. Sharlene A. Deskins, Esq., represented Respondent. On June 12, 1997, Petitioner filed Proposed Findings of Fact, Conclusions of Law and Supporting Brief on Behalf of Petitioner Kreider Dairy Farms, Inc., and Respondent filed Respondent's Proposed Finding of Fact, Conclusions of Law, and Supporting Brief Thereof. On June 23, 1997, Respondent filed Respondent's Response to "Proposed Findings of Fact, Conclusions of Law and Supporting Brief on Behalf of Petitioner Kreider Dairy Farms, Inc.," and on June 24, 1997, Petitioner filed Petitioner's Reply Brief.

On August 12, 1997, the ALJ filed a Decision and Order [hereinafter Decision and Order on Remand] in which the ALJ: (1) found that it is feasible for Ahava to turn to other handlers in periods of Petitioner's short production; (2) found that although there are no requirements as to the amount of surplus a producer-handler must have, an inference can be made that Petitioner was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs; (3) concluded that the decision of the Market Administrator to deny Petitioner producer-handler status under Milk Marketing Order No. 2 must be upheld; and (4) dismissed Petitioner's Petition (Decision and Order on Remand at 7, 10).

The Decision and Order on Remand issued by the ALJ became final on September 20, 1997, and on September 25, 1997, Petitioner appealed to the Judicial Officer.[3] On November 12, 1997, Respondent filed Respondent's Opposition to Petitioner's Appeal Petition, and on November 14, 1997, the case was referred to the Judicial Officer for decision.

On January 12, 1998, I issued an Order Denying Late Appeal concluding that, since the Decision and Order on Remand issued by the ALJ became final on September 20, 1997, the Judicial Officer had no jurisdiction to consider the

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[3]See note 2.

Appeal of Petitioner Kreider Dairy Farms, Inc. [hereinafter Petitioner's Appeal Petition], filed September 25, 1997. *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. ___ (Jan. 12, 1998).

On January 27, 1998, Petitioner filed Petition for Reconsideration; on February 5, 1998, Respondent filed Respondent's Opposition to the Petitioner's Petition for Reconsideration; and on February 9, 1998, the case was referred to the Judicial Officer for reconsideration.

Petitioner raises three issues in its Petition for Reconsideration.

First, Petitioner contends that Petitioner's Appeal Petition was timely filed or should be deemed timely filed (Petition for Reconsideration at 2-4).

Petitioner's Appeal Petition was not timely filed and the reasons for finding that Petitioner's Appeal Petition was not timely filed are discussed in *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. ___ (Jan. 12, 1998). Petitioner has not raised any grounds in its Petition for Reconsideration for finding that Petitioner's Appeal Petition was timely filed.

Petitioner correctly states that the Judicial Officer may, and routinely does, grant requests to extend the time for filing appeal petitions and responses to appeal petitions, and Petitioner requests that I now deem Petitioner's Appeal Petition to have been timely filed (Petition for Reconsideration at 3).

Petitioner's request that I deem Petitioner's Appeal Petition timely filed is denied. Requests for extensions of time for filing appeal petitions and responses to appeal petitions must be made prior to the time that the respective filing is due.[4]

Further, Petitioner states that "[t]he judicial officer's decision dismissing the appeal is based on the single proposition that delivery by Federal Express is not delivery by mail." (Petition for Reconsideration at 3.) I disagree with Petitioner. The Rules of Practice (7 C.F.R. §§ 900.50-.71) neither require that appeal petitions must be delivered to the hearing clerk by the United States Postal Service nor prohibit delivery of appeal petitions to the hearing clerk by Federal Express. However, section 900.69(d) of the Rules of Practice provides, with respect to the effective date of filing, as follows:

§ 900.69 Filing; service; extensions of time; effective date of filing; and computation of time.

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[4]For example, in *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 4 n.2 (Jan. 13, 1998), complainant's September 26, 1997, request for an extension of time to file a response to an appeal petition, which was due September 26, 1997, was denied because the request was made at 4:13 p.m., September 26, 1997, and the Office of the Hearing Clerk closes for the purpose of filing documents in adjudicatory proceedings at 4:00 p.m.

. . . .

(d) *Effective date of filing.* Any document or paper, except a petition filed pursuant to § 900.52, required or authorized under these rules to be filed shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk.

7 C.F.R. § 900.69(d).

In order for Petitioner's Appeal Petition to be deemed to have been filed on a date other than the date it was received by the hearing clerk, the Petitioner's Appeal Petition must have been postmarked. Petitioner's Appeal Petition was not postmarked. Therefore, the effective date of filing Petitioner's Appeal Petition was September 25, 1997, when it was actually received by the hearing clerk, as indicated by the date and time stamped on the first page of Petitioner's Appeal Petition by the Office of the Hearing Clerk. Petitioner's Appeal Petition was filed 6 days after the additional time granted to Petitioner for filing an appeal petition and 5 days after the Decision and Order on Remand became final and the Judicial Officer lost jurisdiction.

Further still, Petitioner, relying on *Edmond v. United States Postal Service*, 727 F. Supp. 7 (D.D.C. 1989), states that "[c]ourts have recognized service by Federal Express as valid service where United States Mail also qualifies." (Petition for Reconsideration at 4.) *Edmond v. United States Postal Service, supra*, concerns service of pleadings on a party in accordance with Rule 5(b) of the Federal Rules of Civil Procedure. However, Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to this administrative proceeding which is conducted before the Secretary of Agriculture, under the

AMAA, and in accordance with the Rules of Practice (7 C.F.R. §§ 900.50-.71).[5]

Second, Petitioner contends that the Order Denying Late Appeal, filed January 12, 1998, is without precedent. Petitioner states that "[t]here are no cases . . . where an appeal petition has been dismissed where it was mailed by Federal Express on the date in which it could have been mailed by first class mail and been timely." (Petition for Reconsideration at 4.) I agree with Petitioner that there are no cases instituted under the Rules of Practice (7 C.F.R. §§ 900.50-71) in which an appeal petition has been dismissed under facts identical to the facts in this proceeding. However, the only fact relevant to the timeliness of Petitioner's Appeal Petition is the effective date of filing. The record establishes that Petitioner filed Petitioner's Appeal Petition on September 25, 1997, 5 days after the ALJ's Decision and Order on Remand became final. As explained in the Order Denying Late Appeal, filed January 12, 1998, the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.

Petitioner also contends that "in all of the decisions dismissing the appeals on the basis of being late filed, the judicial officer went on to rule on the merits of the case in any event." (Petition for Reconsideration at 4-5.) I have not reviewed all of the Judicial Officer's decisions dismissing late filed appeal petitions, but in a large number of these decisions, the Judicial Officer has considered the merits of

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[5]See generally, *Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam) 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Dean Byard*, 56 Agric. Dec. ___, slip op. at 21 (Aug. 8, 1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure are not applicable to the Department's disciplinary proceedings conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before the Department of Agriculture).

the case in the alternative. However, the Judicial Officer is not required by the Rules of Practice (7 C.F.R. §§ 900.50-.71) to consider the merits in a proceeding in which the initial decision and order has become final. Further, the Judicial Officer's consideration of the merits after an initial decision and order becomes final has no effect on the proceeding.

Third, Petitioner contends that the Order Denying Late Appeal, filed January 12, 1998, is in conflict with the order of the United States District Court for the Eastern District of Pennsylvania which states "[t]he case is remanded to the Secretary of Agriculture for further factual findings and a decision. . . ." *Kreider Dairy Farms, Inc. v. Glickman*, No. 95-6648 (Aug. 14, 1996) (Order).

I disagree with Petitioner's contention that the Order Denying Late Appeal, filed January 12, 1998, is in conflict with the United States district court's remand Order. The record in this proceeding clearly establishes that the ALJ conducted an oral hearing for the purpose of complying with the court's remand Order. After the oral hearing, the ALJ issued the Decision and Order on Remand which contains further factual findings and a decision as ordered by the United States District Court for the Eastern District of Pennsylvania. The ALJ's Decision and Order on Remand became the final agency decision on September 20, 1997. Since the ALJ made factual findings and issued a decision which became final, I find that the Secretary has complied with the August 14, 1996, Order issued by the United States District Court for the Eastern District of Pennsylvania.

Petitioner contends that the Rules of Practice (7 C.F.R. §§ 900.50-.71), under which I issued the Order Denying Late Appeal, are not applicable to the Department's proceeding on remand. Petitioner states that while this proceeding was initiated by a petition filed pursuant to 7 U.S.C. § 608c(15)(A) and the Rules of Practice (7 C.F.R. §§ 900.50-.71), "[t]he remand proceeding is in furtherance of [Chief] Judge Cahn's . . . jurisdiction [under 7 U.S.C. § 608c(15)(B)] and not self-evidently subject to the Rules of Practice [(7 C.F.R. §§ 900.50-.71)] which pertain to . . . petitions [instituted under 7 U.S.C. § 608c(15)(A)]." (Petition for Reconsideration at 6.)

As an initial matter, Petitioner's contention that the proceeding on remand from the United States District Court for the Eastern District of Pennsylvania should not have been conducted in accordance with the Rules of Practice (7 C.F.R. §§ 900.50-.71) is raised for the first time in its Petition for Reconsideration.[6] It is

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[6]Not only does Petitioner raise the issue of the applicability of the Rules of Practice (7 C.F.R. §§ 900.50-.71) to the Department's proceeding on remand for the first time in Petitioner's Petition for Reconsideration, but also, until Petitioner filed its Petition for Reconsideration, it appears that Petitioner

(continued...)

well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[7] Petitioner's failure, prior to its filing the Petition for Reconsideration, to argue that the Rules of Practice (7 C.F.R. §§ 900.50-.71) do not apply to the Department's proceeding on remand, comes too late to be considered.

Further, even if I were to find that Petitioner timely raised the issue of the applicability of the Rules of Practice (7 C.F.R. §§ 900.50-.71) to the proceeding on remand from the United States District Court for the Eastern District of Pennsylvania, I would find that the Rules of Practice (7 C.F.R. §§ 900.50-.71) are applicable to the Department's proceeding on remand.

Petitioner's petition for an exemption from Milk Marketing Order No. 2 is a petition filed pursuant to 7 U.S.C. § 608c(15)(A) which provides petitioners with an opportunity for a hearing in accordance with "regulations made by the Secretary of Agriculture . . . ." The Rules of Practice Governing Proceedings on

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(...continued)
took the position that the Rules of Practice (7 C.F.R. §§ 900.50-.71) were applicable to the proceeding on remand. (See Petitioner's Appeal Petition wherein Petitioner states "[o]ral argument upon this appeal is respectfully requested pursuant to the Rules of Practice, 7 C.F.R. § 900.65(b)(1)." (Petitioner's Appeal Petition at 5.))

[7] *In re Michael Norinsberg*, 57 Agric. Dec. ___, slip op. at 6-7 (Jan. 26, 1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 34-35 (Dec. 5, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) are the "regulations made by the Secretary of Agriculture" which are applicable to proceedings instituted in accordance with 7 U.S.C. § 608c(15)(A). Although the United States District Court for the Eastern District of Pennsylvania reviewed *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995), and remanded the case back to the Secretary pursuant to the court's jurisdiction under 7 U.S.C. § 608c(15)(B), the Department proceeding on remand was conducted in accordance with 7 U.S.C. § 608c(15)(A). I find no merit in Petitioner's contention that the Department proceeding on remand was conducted in accordance with 7 U.S.C. § 608c(15)(B). Title 7, United States Code, § 608c(15)(B), vests United States district courts with jurisdiction to review rulings made by the Secretary of Agriculture pursuant to 7 U.S.C. § 608c(15)(A); it does not, as Petitioner appears to contend, vest the Department with jurisdiction to conduct proceedings on remand.

Moreover, there is no indication in Chief Judge Cahn's Order remanding the proceeding back to the Department that the Chief Judge found that the Department proceeding on remand was to be conducted under 7 U.S.C. § 608c(15)(B) or that the Rules of Practice (7 C.F.R. §§ 900.50-.71) were inapplicable to the Department proceeding on remand.

For the foregoing reasons and the reasons set forth in the Order Denying Late Appeal, filed January 12, 1998, *In re Kreider Dairy Farms, Inc., supra*, the following Order should be issued.

Order

Petitioner's Petition for Reconsideration is denied.

In re: DON E. SPEEGLE and CHARLOTTE L. SPEEGLE.
AWA Docket No. 96-0074.
Order Dismissing Complaint as to Don E. Speegle filed February 5, 1998.

Susan C. Golabek, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

As Complainant's motion is not opposed, its motion to dismiss the Complaint as to Respondent Don E. Speegle is granted.

It is ordered that the Complaint as to Don E. Speegle, filed herein on September 16, 1996, be dismissed.

In re: STEVEN M. SAMEK and TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Dismissal of Complaint Against Trina Joann Samek, filed March 31, 1998.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Complainant has filed a motion to dismiss its complaint against Trina Joann Samek because it has been unable to locate her and keeping the case open while it searches for her would be a waste of government resources.

FOR GOOD CAUSE SHOWN, the complaint against Trina Joann Samek is hereby dismissed without prejudice.

In re: JERRY GOETZ, d/b/a JERRY GOETZ AND SONS.
BPRA Docket No. 94-0001.
Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration filed April 3, 1998.

Beef order - Collecting person - Assessments - Equal protection - Statute of limitations - Maintenance of records — Brand inspector.

The Judicial Officer denied Respondent's Petition for Reconsideration and denied in part and granted in part Complainant's Petition for Reconsideration. The Collection - Compliance Reference Guide, prepared by the Cattlemen's Beef Promotion and Research Board to assist qualified State beef councils to understand the Beef Promotion and Research Order and Beef Promotion Regulations, which provides that collecting persons must maintain records for at least 3 years, does not establish a 3-year statute of limitations on claims to collect assessments and late payment charges or on proceedings instituted under section 9(a) of the Beef

Promotion and Research Act of 1985 (7 U.S.C. § 2908(a)). Further, the Collection - Compliance Reference Guide is not a regulation binding on any collecting person or producer and is not evidence of what qualified State beef councils, the Cattlemen's Beef Promotion and Research Board, and the Secretary require of collecting persons. Respondent is not required to maintain records for a longer period than other similarly situated persons subject to the Beef Promotion and Research Act of 1985, nor is Respondent's burden with respect to the defense in the proceeding any greater than it would be for others charged with the same violations of Beef Promotion Order and the Beef Promotion Regulations. There is no evidence that Respondent failed to maintain records in violation of the Beef Promotion and Research Act of 1985. Respondent is responsible for collecting and remitting assessments for 174 cattle which Respondent sold not later than 10 days from the date on which Respondent acquired ownership. In accordance with 7 C.F.R. § 1260.311(c), the brand inspector, not Respondent, was the collecting person and responsible for collecting the assessment from the producer of 228 cattle, which Respondent purchased on February 22, 1992, in Imperial, Nebraska.

Sharlene A. Deskins, for Complainant.
David R. Klaassen, Marquette, Kansas, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on October 29, 1993.

The Complaint alleges that Jerry Goetz, d/b/a Jerry Goetz and Sons [hereinafter Respondent]: (1) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required reports (Compl. ¶ II(A)); (2) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit necessary information in

required reports (Compl. ¶ II(B)); and (3) willfully violated section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312) by failing to remit the assessments due for the purchase and sale of cattle (Compl. ¶ III(A)-(L)). Complainant requests the issuance of an order or orders as authorized under the Beef Promotion Act, including an order requiring Respondent to cease and desist from violating the Beef Promotion Order and Beef Promotion Regulations and assessing civil penalties against Respondent in accordance with section 9 of the Beef Promotion Act (7 U.S.C. § 2908) (Compl. at 4-5).

On December 10, 1993, Respondent filed an Answer denying the material allegations of the Complaint and contending that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void, and unenforceable (Answer ¶¶ 2-4). Respondent requests: (1) denial of the relief requested in the Complaint; (2) a determination and declaration that the Beef Promotion Act is unconstitutional, void, and unenforceable; and (3) a determination and declaration that the Beef Promotion Order and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void, and unenforceable (Answer at 1-2).

On August 2, 1994, Respondent filed an action in the United States District Court for the District of Kansas seeking a temporary restraining order to prevent a hearing from being held in this proceeding. The court issued an order requiring an audit by the accounting firm of Wendling, Noe, Nelson & Johnson of Topeka, Kansas, of Respondent's books and records pertaining to his raising, buying, selling, and trading of cattle and Respondent's collection of monies, if any, under the Beef Promotion Act and enjoined the instant proceeding pending the completion of the audit of Respondent's books and records (Complainant's Findings of Fact Conclusions of Law and Brief in Support Thereof [hereinafter Complainant's Findings of Fact], Ex. A). On August 4, 1994, Respondent filed a Complaint in the United States District Court for the District of Kansas challenging the constitutionality of the Beef Promotion Act. The court stayed the instant proceeding pending a decision regarding Respondent's constitutional challenges to the Beef Promotion Act. The audit was completed on November 23, 1994 (CX 18 at 5), and the court issued a decision on February 28, 1996, in which the court rejected each of Respondent's constitutional challenges to the Beef Promotion Act and set aside prior orders which enjoined and stayed this proceeding. *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996).

On September 25 and 26, 1996, Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing in Wichita, Kansas. Sharlene A.

Deskins, Esq., represented Complainant. David R. Klaassen, Esq., of Marquette, Kansas, and Clarence L. King, Jr., Esq., and Brian W. Wood, Esq., of the law firm of Hampton, Royce, Engleman & Nelson, of Salina, Kansas, represented Respondent.

On January 8, 1997, Complainant filed Complainant's Findings of Fact. On January 13 and 16, 1997, Respondent filed Respondent's Brief. On February 26, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondent failed to collect assessments and remit assessments to a State Cattlemen's Beef Promotion and Research Board for 22,118 cattle during the period October 1, 1986, through June 30, 1994, in violation of section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and .312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312) (Initial Decision and Order at 13-14); (2) ordered Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations (Initial Decision and Order at 14); (3) assessed a civil penalty of $46,624 against Respondent (Initial Decision and Order at 14); and (4) ordered Respondent to pay past-due assessments and penalties to the Kansas Beef Council in the amount of $68,742 (Initial Decision and Order at 14).

On April 7, 1997, Respondent filed an appeal to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557.[1] On June 6, 1997, Complainant filed Complainant's Opposition to the "Petition Appealing Decision and Order of Administrative Law Judge James W. Hunt Dated February 26, 1997, to the Judicial Officer, Combined With Supporting Brief"; Complainant's Appeal and Brief in Support Thereof. On August 18, 1997, Respondent filed Respondent's Response and Opposition to Complainant's Opposition and Appeal Combined With Supporting Brief, and the hearing clerk transmitted the case to the Judicial Officer for decision.

On November 3, 1997, I issued a Decision and Order: (1) concluding that Respondent willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to collect and remit assessments to a qualified State beef council for 21,423 cattle during the period October 1, 1986, through

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

June 30, 1994; (2) concluding that Respondent willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late payment charges for assessments that Respondent failed to remit to a qualified State beef council, when due, during the period October 1, 1986, through June 30, 1994; (3) concluding that Respondent willfully violated section 1260.201 of the Beef Promotion Order and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.201, .312) by failing to transmit monthly reports of assessments to the Kansas Beef Council during the period October 1, 1986, through June 30, 1994; (4) ordering Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations; (5) assessing Respondent a civil penalty of $69,244.51; and (6) ordering Respondent to pay past-due assessments and late payment charges of $66,577 to the Kansas Beef Council. *In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 29-30, 72-73 (Nov. 3, 1997).

On November 12, 1997, Complainant filed Complainant's Motion for Reconsideration; on November 17, 1997, Respondent filed Petition for Reconsideration of the Decision of the Judicial Officer [hereinafter Respondent's Petition for Reconsideration]; on December 3, 1997, Respondent filed Response to Complainant's Motion for Reconsideration; on January 7, 1998, Complainant filed Complainant's Brief in Support of its Motion for Reconsideration [hereinafter Complainant's Petition for Reconsideration]; on February 20, 1998, Respondent filed Respondent's Brief Opposing Complainant's Motion for Reconsideration and Supporting Respondent's Petition for Reconsideration of the Decision of the Judicial Officer; and on February 20, 1998, the hearing clerk transmitted the case to the Judicial Officer for reconsideration.

Respondent's request for oral argument before the Judicial Officer (Respondent's Petition for Reconsideration at 5) is denied because the issues have been fully briefed by Complainant and Respondent and oral argument on reconsideration would appear to serve no useful purpose.

Respondent raises three issues in Respondent's Petition for Reconsideration. First, Respondent contends that:

> . . . [the three-year recordkeeping provisions in the Collection - Compliance Reference Guide (RX 169)] establish a three-year statute of limitations from and after each transaction for the collection of any assessments related thereto, and any interest and penalties thereon. Therefore, claims for any assessments, or any interest or penalties thereon, being made in these administrative proceedings by the Complainant for any period more than three years prior to October 29, 1993, (the date this

administrative case was filed), are barred.

Respondent's Petition for Reconsideration at 2.

I disagree with Respondent's contention that the Collection - Compliance Reference Guide establishes a 3-year statute of limitations. The Collection - Compliance Reference Guide, prepared and distributed by the Cattlemen's Beef Promotion and Research Board to assist qualified State beef councils to understand the Beef Promotion Order and Beef Promotion Regulations and the collection process (Tr. 240), provides variously that the collecting person must "[m]aintain records and documentation pertaining to the checkoff for at least three years following each transaction[,]" "[c]ollecting persons and producers must maintain records pertinent to the checkoff for at least three years[,]" and "[a]ll parties involved in [a] transaction [in which one party has non-producer status] should retain a copy of the [non-producer status form] for three years" (RX 169 at 5, 6, 11). However, none of these provisions in the Collection - Compliance Reference Guide establishes a statute of limitations on claims to collect assessments and late payment charges that have not been timely remitted by the collecting person or on proceedings instituted under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Further, neither the Beef Promotion Act, the Beef Promotion Order, nor the Beef Promotion Regulations establishes a statute of limitations with regard to claims for assessments and late payment charges that have not been remitted by a collecting person in accordance with the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations or proceedings for the assessment of a civil penalty instituted under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Moreover, the Collection - Compliance Reference Guide is not a regulation binding on Complainant's enforcement proceedings. Complainant may therefore seek to collect unremitted assessments and late payment charges from the effective date of the Beef Promotion Order and seek a cease and desist order and the assessment of a civil penalty based on violations from the effective date of the Beef Promotion Order.

Second, Respondent contends that:

> . . . [the three-year recordkeeping provisions in the Collection - Compliance Reference Guide (RX 169)] are evidence of what the qualified State beef councils, the Cattlemen's Beef Promotion and Research Board . . . and the United States Secretary of Agriculture . . . consistently require of all other producers and collecting persons. . . . To require that the Respondent must have maintained records for more than three years in order to defend himself in these administrative proceedings would be a

> violation of the Respondent's [e]qual [p]rotection [r]ights under the United States Constitution. (This constitutional argument does not attack the constitutionality of the Beef Promotion Act, or the Order, or the rules and regulations thereunder. Rather, this argument is an attack upon the administration of the Beef Promotion Act, the Order, and the rules and regulations thereunder, and is an argument completely separate and independent of the constitutional challenge which the Judicial Officer attempts to address on pages 30-49 of the Judicial Officer's Decision and Order.)

Respondent's Petition for Reconsideration at 2-3.

I disagree with Respondent's contention that the recordkeeping provisions of the Collection - Compliance Reference Guide (RX 169) are evidence of what the qualified State beef councils, the Cattlemen's Beef Promotion and Research Board, and the Secretary of the United States Department of Agriculture require of all other collecting persons and producers. The Collection - Compliance Reference Guide is not a regulation binding on Respondent or any collecting person or producer, and is not evidence of what qualified State beef councils, the Cattlemen's Beef Promotion and Research Board, and the Secretary of the United States Department of Agriculture "consistently require of all other producers and collecting persons." (Respondent's Petition for Reconsideration at 2.) Instead, as Mr. Monte Reese, the Executive Director of the Cattlemen's Beef Promotion and Research Board testified, it is a document provided by the Cattlemen's Beef Promotion and Research Board to assist qualified State beef councils (Tr. 239-41).

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to the federal government.[2] Equal protection requires that persons

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[2]*See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is

(continued...)

similarly situated be treated alike.[3] However, there is no evidence on this record that Respondent is required to maintain records for a longer period than other similarly situated persons subject to the Beef Promotion Act, the Beef Promotion

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(...continued)
coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

[3]It should be noted that virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications. *See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (stating that the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that the equal protection clause does not demand that a statute necessaril apply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding that exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating that the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

Order, and the Beef Promotion Regulations, or that Respondent's burden with respect to his defense in this proceeding is any greater than it would be for others charged with the same violations of the Beef Promotion Order and the Beef Promotion Regulations.

Third, Respondent contends that his failure to maintain records prior to January 1, 1990, is not a violation of the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations, and without these records, no relevant evidence exists that Respondent violated the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations. (Respondent's Petition for Reconsideration at 3-4.)

I agree with Respondent that there is no evidence on this record that he failed to maintain records in violation of the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations. However, Complainant did not allege, and I did not conclude in the Decision and Order, *In re Jerry Goetz, supra*, that Respondent failed to maintain records in violation of the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations.

Complainant raises two issues in Complainant's Petition for Reconsideration. First, Complainant contends that:

> The Judicial Officer erred by failing to require the Respondent to remit assessments that the Respondent certified that he collected on 174 head of cattle that were subsequently resold in ten days because the Respondent was required to remit the assessments he collected regardless of whether the cattle were subsequently resold in ten days.
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> . . . .
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> The Judicial Officer erred by determining that since the 174 head of cattle were resold in ten days, then the Respondent was not required to remit an assessment on the cattle. This is a misinterpretation of Section 1260.314. See 7 C.F.R. § 1260.314. Section 1260.314 which is sometimes referred to as the "ten day rule" provides for a limited exemption on the collection of assessments. Section 1260.314 provides that an assessment is not mandatory when three conditions are meet [sic]. Those conditions are 1) that the person certifies that he facilitated the transfer of ownership to a third party 2) the person establishes that the cattle were resold within ten days and 3) the person certifies that the assessment has been collected and remitted. 7 C.F.R. § 1260.314(a)(2) (emphasis added). Thus, the

> resale of cattle in ten days is only one of three conditions that must be met in order to be exempt from paying an assessment. In this case the Respondent established that the cattle were resold in ten days. However, the Respondent certified that he collected the assessments on the earlier purchase but would not remit the assessment as required. Thus, the Respondent failed to fulfill all of the conditions under Section 1260.314(a)(2) that would allow him to be exempt from paying an assessment on the 174 cattle when he resold them.

Complainant's Petition for Reconsideration at 1, 3-4 (footnote omitted).

I agree with Complainant that I erroneously determined, in the Decision and Order, *In re Jerry Goetz, supra*, that Respondent was not required to remit the assessments he collected on 174 cattle, which Respondent resold in 10 days.

Section 1260.106 defines a collecting person, as follows:

§ 1260.106 Collecting person.

> "Collecting person" means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

7 C.F.R. § 1260.106.

Section 1260.172(a)(1) of the Beef Promotion Order also provides that each person making payment to a producer for cattle shall be a collecting person and is required to collect an assessment from the producer and remit the assessment, as follows:

§ 1260.172 Assessments.

> (a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

7 C.F.R. § 1260.172(a)(1).

Moreover, section 1260.311(a) of the Beef Promotion Regulations requires each person making payment to a purchaser for cattle purchased in the United States to collect and remit an assessment, as follows:

> **§ 1260.311 Collecting persons for purposes of collection of assessments.**
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> Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be:
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> (a) Except as provided in paragraph (b) and (c) of this section, each person making payment to a producer for cattle purchased in the United States shall collect from the producer an assessment at the rate of $1.00 per head of cattle purchased and shall be responsible for remitting assessments to the qualified State beef council or the Cattlemen's Board as provided in § 1260.312. The collecting person shall collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. The person paying the producer shall give the producer a receipt indicating payment of the assessment.

7 C.F.R. § 1260.311(a).

The record reveals that Respondent purchased the 174 cattle in question from producers and collected an assessment at the rate of $1 per head from the producers, but failed to remit the assessment to the Cattlemen's Beef Promotion and Research Board or a qualified State beef council. Neither section 1260.311(b) nor 1260.311(c) exempts Respondent from the requirement that he collect and remit an assessment for the 174 cattle in question. Therefore, Respondent is required pursuant to section 1260.311(a) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(a)) to collect and remit the assessment for the 174 cattle in question. Further, I do not find that there is any regulation approved by the Secretary that exempts Respondent from the requirement to collect and remit the assessment for the 174 cattle in question in accordance with section 1260.172(a) of the Beef Promotion Order (7 C.F.R. § 1260.172(a)).

I found in the Decision and Order, *In re Jerry Goetz, supra*, that section 1260.314(a)(2) of the Beef Promotion Regulations exempted Respondent from the requirement to collect and remit the assessment on the 174 cattle that Respondent purchased from producers. However, on reconsideration, I find that section 1260.314(a)(2) of the Beef Promotion Regulations (7 C.F.R. § 1260.314(a)(2))

exempts a collecting person from having to pay an assessment on the sale of cattle if the collecting person sells cattle within 10 days from the date on which the collecting person acquired ownership of the cattle and the collecting person complies with the additional provisions of section 1260.314(a)(2) of the Beef Promotion Regulations (7 C.F.R. § 1260.314(a)(2)). However, compliance with section 1260.314(a)(2) of the Beef Promotion Regulations does not exempt a collecting person from the requirement that he or she collect and remit an assessment based upon the purchase of cattle, even if the cattle are subsequently sold within 10 days from the date on which the collecting person acquired ownership of the cattle.

The October 1, 1986, interim final rulemaking document describes the certification in section 1260.314(a)(2) of the Beef Promotion Regulations as designed to relieve the seller of the responsibility of paying an assessment, as follows:

> The Board also recommended the form of the certification which must be used to claim that a transaction is exempt from an assessment under the order because ownership of such cattle was acquired merely to facilitate the transfer of such ownership to a third party. *This certification will relieve the seller of such cattle of the responsibility for paying an additional $1 per head assessment upon the resale of such cattle and would provide the collecting person with documented evidence that an assessment is not due.*

51 Fed. Reg. 35,196, 35,197 (1986) (emphasis added).

On February 26, 1988, the Agricultural Marketing Service published a final rulemaking document adopting, with modifications not relevant to this proceeding, the October 1, 1986, interim final rule. The final rulemaking document describes the purpose of the exemption from assessment, as follows:

> The Board also recommended the form of the certification which must be used to claim that a transaction is exempt from an assessment under the order because ownership of such cattle was acquired merely to facilitate the transfer of such ownership to a third party. This certification relieves the person who would otherwise be required to collect an assessment of the responsibility for collecting the assessment and would provide documentary evidence that an assessment is not due for such a transaction.

Comments

The interim final rule provided a period of 30 days for comments. One comment was received from an association representing livestock markets.

The commentor suggested that § 1260.314 "Certification of non-producer status for certain transactions" be modified. *This section provides that assessments will not be levied on sales of cattle if the owners certify* (1) that their only share in the proceeds of the sale is a sales commission, handling fee or other service fee, or (2) *that they acquired ownership to facilitate the transfer of ownership to a third party and that the resale occurred within 10 days.* The commentor suggested that persons who sell cattle on commission should not be required to complete a certificate of exemption.

Auction markets and commission firms which sell cattle on commission without taking ownership of the cattle are not required by § 1260.314 to complete certification of non-producer status forms for such transactions. However, the section does require persons who buy cattle and resell them on a commission basis (for example, order buyers) to make the certification in order to be eligible for exemption from assessment on such transactions. This certification is necessary for the effective enforcement and administration of the Act and order because the documents which are provided to buyers in the general course of business may not always reveal whether the seller is receiving only a sales commission, handling fee, or other service fee. *Without the certification, buyers in such transactions could not be certain whether they would be required to collect an assessment.* The certification will help the Board to determine whether a buyer should have collected an assessment on a particular transaction. Accordingly the suggested change has not been adopted.

53 Fed. Reg. 5752, 5753-54 (1988) (emphasis added).

Therefore, the Order in the Decision and Order issued November 3, 1997, is not reinstated, and a new Order is issued in this Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration which increases the amount of the civil penalty assessed against Respondent and the past-due assessments and the late payment charges imposed on Respondent to reflect Respondent's failure to remit

the assessments for the 174 cattle in question.[4]

Second, Complainant contends that with respect to the purchase of 228 cattle which Respondent purchased from Mr. Clements in Nebraska on February 22, 1992, Respondent, and not the brand inspector, was the collecting person and was responsible for collecting an assessment from Mr. Clements and remitting the assessment to the Cattlemen's Beef Promotion and Research Board or a qualified State beef council (Complainant's Petition for Reconsideration at 5-8).

I disagree with Complainant's contention that Respondent was the collecting person with respect to 228 cattle which Respondent purchased from Mr. Clements on February 22, 1992.

Section 1260.172(a)(1) of the Beef Promotion Order provides that the person making payment to a producer for cattle shall be a collecting person, as follows:

§ 1260.172 Assessments.

(a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment

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[4]I found in the Decision and Order that Respondent committed 21,516 violations of the Beef Promotion Order and the Beef Promotion Regulations. Based on Complainant's recommendation, I assessed Respondent a civil penalty of $3.2182798 per violation for a total civil penalty of $69,244.51. *In re Jerry Goetz, supra*, slip op. at 71-73. For the reasons set forth in this Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration, I now find that Respondent committed 21,690 violations of the Beef Promotion Order and the Beef Promotion Regulations. Based on Complainant's recommendation of $3.2182798 per violation, I am increasing the civil penalty assessed against Respondent from $69,244.51 to $69,804.49.

Moreover, in the Decision and Order, I ordered Respondent to pay past-due assessments and late payment charges of $66,577 to the Kansas Beef Council. *In re Jerry Goetz, supra*, slip op. at 73. The order to pay past-due assessments and late payment charges of $66,577 was based, in part, on a finding that for the period January 1, 1990, through June 30, 1994, Respondent owes $12,441 for 12,441 cattle for which he failed to remit assessments and late payment charges of $11,553, using an average per head of cattle based on the late payment charges determined by the auditor. *In re Jerry Goetz, supra*, slip op. at 27. For the reasons set forth in this Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration, I now find that for the period January 1, 1990, through June 30, 1994, Respondent owes $12,615 for 12,615 cattle for which he failed to remit assessments and late payment charges of $11,715, using an average per head of cattle based on the late payment charges determined by the auditor. Therefore, I am increasing the amount Respondent must pay in past-due assessments and late payment charges to the Kansas Beef Council from $66,577 to $66,913.

> to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

7 C.F.R. § 1260.172(a)(1).

The final rulemaking document relating to the Beef Promotion Order, which was published on July 18, 1986, states that section 1260.172 of the Beef Promotion Order authorizes the issuance of regulations which would permit collection of assessments by brand inspectors and would release the person making payment to the producer of the responsibility of collecting assessments, as follows:

> It was suggested by one State beef council that the order allow those States which use brand inspectors to collect State assessments to continue to use brand inspectors as collecting persons. The Act contemplates that the collecting person will ordinarily be the person making payment to a cattle producer, but it also contemplates that existing collection mechanisms will be utilized by the Board to the extent possible. This final rule authorizes the issuance of regulations which would permit the collection of assessments by brand inspectors in certain states, and also release the person making payment to the producer of the responsibility of collecting assessments in those States.

51 Fed. Reg. 26,132, 26,136 (1986).

On October 1, 1986, the Agricultural Marketing Service issued an interim final rule with a request for comments which states that the interim rule identifies those states in which State brand inspectors are to serve as the collecting person, as follows:

> The order defines a collecting person as the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary. There are marketing situations in which the collection and remittance process would be facilitated if a person other than the person making payment to the producer were deemed the collecting person. Therefore, the Board has determined that the use of brand inspectors in those States and parts of States where brand inspectors are authorizes [sic] by State law to collect assessments under existing State beef promotion and research programs would be an appropriate and expeditious means of collecting and remitting assessments. These regulations authorize the brand inspectors in the States

listed herein to serve as the collecting person in those transactions where assessments are due under the order.

51 Fed. Reg. 35,196, 35,196 (1986).

On February 26, 1988, the Agricultural Marketing Service published a final rulemaking document adopting, with modifications not relevant to this proceeding, the October 1, 1986, interim final rule. The final rule addresses the brand inspectors as collecting persons, as follows:

> The order provides that the collecting person shall be the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting assessments by regulations prescribed by the Board and approved by the Secretary. There are marketing situations in which the collection and remittance process would be facilitated by using the collection mechanism of existing State programs. Accordingly, it has been determined that the use of brand inspectors in those States and parts of States where brand inspectors are authorized by State law to collect assessments under existing State beef promotion and research programs would be an appropriate and expeditious means of collecting and remitting assessments. These regulations authorize the brand inspectors in the States listed herein to serve as the collecting person for assessments due under the order.

53 Fed. Reg. 5752, 5753 (1988).

Section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) provides that, with respect to Nebraska country sales (country sales include any sale which is not conducted at an auction or livestock market and which is not a sale to a slaughter/packer, feedlot, or an order buyer or dealer), the brand inspector has responsibility to collect; however, when there has not been a physical brand inspection, the person paying the producer shall be the collecting person and has the responsibility to collect and remit assessments due.

The record establishes that Respondent's February 22, 1992, purchase of cattle from Mr. Clements at Imperial, Nebraska, was a Nebraska country sale and that a brand inspector was present at the sale. Section 54-101(6) of the Nebraska Revised Statutes defines a brand inspector as a person employed to, among other things, identify brands, as follows:

> **54-101. Terms, defined.** For purposes of sections 54-101 to 54-169, 54-415, and 54-1183 to 54-1186, unless the context otherwise requires:

. . . .

(6) Brand inspector shall mean a person employed by the brand committee, or some other brand inspection agency, within or without the State of Nebraska, for the purpose of identifying brands, marks, or other identifying characteristics of livestock to determine the existence of such brands, marks, or other identifying characteristics and from such determinations attempt to establish correct and true ownership of such livestock, and generally carry out the provisions and enforcement of all laws pertaining to brands, brand inspection, and associated livestock laws. At any time a brand inspection is required by law, any duly authorized Nebraska brand inspector or brand investigator may transfer evidence of ownership of such cattle from a seller to a buyer by issuing a certificate of inspection[.]

Neb. Rev. Stat. § 54-101(6) (1996).

Imperial is located in Chase County which is part of the area designated as the Nebraska brand inspection area.[5] In accordance with section 54-101(25) of the Nebraska Revised Statutes, cattle sold within the brand inspection area must be brand inspected, as follows:

54-101. Terms, defined. For purposes of sections 54-101 to 54-169, 54-415, and 54-1183 to 54-1186, unless the context otherwise requires:

. . . .

(25) Brand inspection area shall mean that portion of the State of Nebraska designated by the Legislature as set forth in section 54-134, where brand inspection shall be mandatory and performed on all cattle sold at auction markets, packing plants, slaughterhouses, or farm or ranch sales within such area and all other cattle prior to leaving such brand inspection

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[5]Section 54-134 of the Nebraska Revised Statutes provides, as follows:

54-134. Nebraska brand inspection area; territory included. There is hereby created the Nebraska brand inspection area which shall consist of all that part of the State of Nebraska lying within the following counties: . . . Chase. . . .

Neb. Rev. Stat. § 54-134 (1996).

area unless destined for an open market[.[6]]

Neb. Rev. Stat. § 54-101(25) (1996).

Further, section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) provides that in Nebraska "there exists a requirement that cattle be brand inspected by State authorized inspectors prior to sale" and sections 54-143 and 54-169 of the Nebraska Revised Statutes appear to require a brand inspection under the circumstances relevant to the February 22, 1992, cattle sale by Mr. Clements to Respondent.

Given the presence of the brand inspector during the February 22, 1992, sale of cattle by Mr. Clements to Respondent, the duties of the brand inspector, the location of the sale in a Nebraska *brand inspection area*, section 1260.311(c) of the Beef Promotion Regulations which provides that there is a requirement in Nebraska that cattle must be brand inspected by State authorized inspectors prior to sale, and sections 54-143 and 54-169 of the Nebraska Revised Statutes which appear to require a brand inspection of the 228 cattle in question, I infer that a physical brand inspection was made by the brand inspector. Therefore, in accordance with section 1260.311(c) of the Beef Promotion Regulations, the brand inspector, not Respondent, was the collecting person and responsible for collecting the assessment from the producer and remitting the assessment to the Cattlemen's Beef Promotion and Research Board or a qualified State beef council.[7]

I agree with Complainant that Respondent has enriched himself by collecting the assessment in the amount of $228 for the 228 cattle he purchased from Mr. Clements on February 22, 1992, and failing to remit the assessment to the Cattlemen's Beef Promotion and Research Board or a qualified State beef council.[8] However, while Mr. Clements may have a cause of action against Respondent,

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[6]Section 54-101(12) of the Nebraska Revised Statutes defines an open market as "a sales barn, market agency, stockyard, packing plant, or terminal market located out of the Nebraska brand inspection area created in section 54-134 or out of the confines and boundaries of the State of Nebraska, declared as such by the brand committee under section 54-142, where brand inspection is maintained either by employees of the brand committee or by some other state under a reciprocal agreement as allowed under the Packers and Stockyards Act, 1921, as amended[.]"

[7]Should the Agricultural Marketing Service institute an action against the brand inspector for failing to collect and remit the assessment with respect to the February 22, 1992, cattle sale, my inference in this proceeding that the brand inspector was the collecting person is not prejudicial because the brand inspector may show that no physical brand inspection was made and that, therefore, he or she was not the collecting person.

[8]*In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 51-58 (Nov. 3, 1997).

Respondent's enrichment does not make Respondent a *collecting person* liable to a qualified State beef council or the Cattlemen's Beef Promotion and Research Board for the assessment because section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) specifically provides that the brand inspector has the responsibility to collect under the circumstances that I find existed during the February 22, 1992, Nebraska country sale of 228 cattle by Mr. Clements to Respondent.

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 3, 1997, *In re Jerry Goetz, supra*, Respondent's Petition for Reconsideration is denied, and Complainant's Petition for Reconsideration is denied in part and granted in part.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[9] Complainant's Petition for Reconsideration and Respondent's Petition for Reconsideration were timely filed and automatically stayed the Decision and Order filed on November 3, 1997. Since Complainant's Petition for Reconsideration is granted in part, the Order in the Decision and Order filed November 3, 1997, is not reinstated.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C §§ 2901-2911), the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217), and the Rules and Regulations (7 C.F.R. §§

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[9] *In re Allred's Produce*, 57 Agric. Dec. ___, slip op. at 4-5 (Feb. 2, 1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. ___, slip op. at 10 (Jan. 26, 1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 13 (Dec. 22, 1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

1260.301-.316) and, in particular, shall cease and desist from:

(a) failing to remit all assessments when due;

(b) failing to remit late payment charges; and

(c) failing to transmit reports in a timely manner.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, is assessed a civil penalty of $69,804.49 which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2014 - South Building
1400 Independence Avenue, S.W.
Washington, D.C. 20250-1413

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 70 days after service of this Order on Respondent.

3. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, shall pay past-due assessments and late payment charges of $66,913 which shall be paid by certified check or money order, made payable to the Kansas Beef Council, and forwarded to:

Kansas Beef Council
P.O. Box 4567
Topeka, Kansas 66604-0567

Respondent's payment of the past-due assessments and late payment charges shall be forwarded to, and received by, the Kansas Beef Council within 70 days after service of this Order on Respondent.

In re: JERRY GOETZ, d/b/a JERRY GOETZ AND SONS.
BPRA Docket No. 94-0001.
Stay Order filed June 25, 1998.

Sharlene A. Deskins, for Complainant.
David R. Klaassen, Marquette, Kansas, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On November 3, 1997, I issued a Decision and Order: (1) concluding that Jerry Goetz, d/b/a Jerry Goetz and Sons [hereinafter Respondent], willfully violated the Beef Promotion and Research Order and the Rules and Regulations (7 C.F.R. §§ 1260.101-.316); (2) ordering Respondent to cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) and the Beef Promotion and Research Order and the Rules and Regulations (7 C.F.R. §§ 1260.101-.316); (3) assessing Respondent a civil penalty of $69,244.51; and (4) ordering Respondent to pay past-due assessments and late payment charges of $66,577 to the Kansas Beef Council. *In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 29-30, 72-73 (Nov. 3, 1997).

On November 12, 1997, Complainant filed Complainant's Motion for Reconsideration and on November 17, 1997, Respondent filed Petition for Reconsideration of the Decision of the Judicial Officer. On April 3, 1998, I issued an Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration. *In re Jerry Goetz*, 57 Agric. Dec. ___ (Apr. 3, 1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). Based on my granting Complainant's Motion for Reconsideration in part, I did not reinstate the Order in the Decision and Order issued November 3, 1997, but instead issued a new Order: (1) ordering Respondent to cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) and the Beef Promotion and Research Order and the Rules and Regulations (7 C.F.R. §§ 1260.101-.316); (2) assessing Respondent a civil penalty of $69,804.49; and (3) ordering Respondent to pay past-due assessments and late payment charges of $66,913 to the Kansas Beef Council. *In re Jerry Goetz*, 57 Agric. Dec. ___, slip op. at 23-25 (Apr. 3, 1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.).

On June 22, 1998, Respondent filed a Motion for an Order Staying Enforcement [hereinafter Motion for a Stay Order] requesting a stay during the pendency of two judicial proceedings, as follows:

> (1) The case entitled *Jerry Goetz, d/b/a Jerry Goetz and Sons, individually and on behalf of others similarly situated, Plaintiff, vs. Dan Glickman, Secretary, United States Department of Agriculture,*

Defendant, et al., Civil Action No. 94-1299-FGT . . ., which is currently on appeal to the United States Court of Appeals for the Tenth Circuit as Appeal No. 96-3120, . . . and all appeals taken therefrom; and,

(2) The case entitled *Jerry Goetz, d/b/a Jerry Goetz and Sons, Plaintiff, vs. United States of America, et al., Defendants*, presently pending before the United States District Court for the District of Kansas as Civil Action No. 98-1155-JTM . . . and all appeals taken therefrom.

Motion for a Stay Order at 1-2.

On June 24, 1998, the Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to Motion for an Order Staying Enforcement stating that "Complainant does not oppose the staying of the sanctions imposed by the Judicial Officer in [*In re Jerry Goetz*, 56 Agric. Dec. ___ (Nov. 3, 1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. ___ (Apr. 3, 1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.)]."

On June 24, 1998, the Hearing Clerk transmitted the record in this proceeding to the Judicial Officer for a ruling on Respondent's Motion for a Stay Order.

Respondent's Motion for a Stay Order is granted, and the Order issued in this proceeding on April 3, 1998, *In re Jerry Goetz*, 57 Agric. Dec. ___ (Apr. 3, 1998), is hereby stayed pending the outcome of proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. ___ (Nov. 3, 1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. ___ (Apr. 3, 1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), and *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996).

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: ROGER JOHN BOGESTAD, d/b/a JOHN BOGESTAD and SONS.
FCIA Docket No. 97-0007.
Dismissal of Complaint filed March 17, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is a proceeding under the Federal Crop Insurance Act, as amended (7 U.S.C. § 1501 *et seq.*)("the Act"), and the regulations issued pursuant thereto (7 C.F.R. Part 400)("the Regulations"). The Manager of the Federal Crop Insurance Corporation filed a Complaint on June 26, 1997, alleging that Respondent willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Act in violation of 7 U.S.C. § 1506(n).

The Complaint alleges that Respondent filed a claim for a wheat crop in which he did not have an insurable interest. Complainant seeks to disqualify Respondent from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of ten years.

On July 22, 1997, Respondent filed an Answer in which he denied all material allegations of the Complaint and offered affirmative defenses. Complainant filed a Motion for Summary Judgment on October 17, 1997, to which Respondent filed a response, along with a cross-motion for summary judgment, on November 17, 1997. Complainant's time in which to file a response to Respondent's cross-motion was twice extended, and was ultimately filed on February 5, 1998. On March 10, 1998, I granted a temporary stay of adjudication, at Respondent's request, in order to allow further exploration of settlement possibilities. On March 16, 1998, Respondent filed a motion requesting that the stay be lifted, which I hereby grant.

Factual Background

In 1990, a company called Tri-Campbell Farms ("Tri-Campbell") purchased 480 acres of land ("Tri-Campbell land"), adjacent to land owned and operated by Respondent. Shortly after the purchase, Tri-Campbell determined that it could not irrigate the land as it had intended, and decided to sell. Respondent was interested in purchasing the land and began negotiations with Tri-Campbell in 1992. Respondent harvested the 1992 crop at Tri-Campbell's request. In the spring of 1993, Respondent and Tri-Campbell arranged for Respondent to plant and farm the 1993 crop. Tri-Campbell characterizes the agreement as one for custom farming. Respondent maintains he was farming the land with the understanding that the negotiations would ultimately be successful and the crop would belong to him.

Respondent planted the crop in question on April 21 and 22, 1993, and performed all of the work and incurred all of the expenses with respect to the crop. Respondent sent Tri-Campbell a bill which indicated the expenses related to the land. Tri-Campbell never made any payment on the bill. Prior to harvest, Tri-Campbell transferred interest in the crop to Respondent.

Respondent purchases crop insurance from Nelson Insurance Agency through Rural Community Insurance Services (RCIS), formally National Ag Underwriters. RCIS is reinsured by Complainant. When Respondent met with his insurance agent, Michael Douglas, to discuss coverage on his 1993 crops, he inquired as to whether the Tri-Campbell land should be included. Mr. Douglas informed him that the crop insurance policy requires that all crops in which the insured has an interest must be reported and that he could be assessed a premium for crops which were omitted. Based on his discussion with Mr. Douglas, Respondent concluded that he must report the Tri-Campbell land since he had performed all of the work relating to production of the crop. Mr. Douglas agreed that he had an insurable interest. It should be noted that Tri-Campbell did not have an insurance policy on the crop.

Respondent harvested the crop on the Tri-Campbell land on September 25 and October 6, 1993. The crop had suffered serious damage resulting from excessive rain. Due to the damage, Respondent filed a claim for which an indemnity check was issued in November 1993. In July 1995, RCIS notified Respondent of FCIC's determination that he did not have an insurable interest in the crop on the Tri-Campbell land, and that the indemnity paid for the loss on that crop must be repaid.

In August 1995, Michael Douglas wrote to RCIS in appeal of the determination. RCIS denied the appeal in September 1995. In November 1995, Respondent again wrote to RCIS, in appeal of the determination and included documentation of his operating expenses and time invested in the crop. RCIS again denied the appeal by a letter dated November 28, 1995; however, it also wrote to FCIC on December 12, 1995, requesting that the file be reopened and reconsidered, as it now believed that Respondent had an insurable interest in the crop. On August 22, 1996, FCIC declined to reconsider the case. RCIS notified Respondent of this determination on October 25, 1996.

The insurance policy contained a binding arbitration clause. Pursuant to that clause, Respondent submitted to dispute resolution before the American Arbitration Association on March 27, 1997. On May 22, 1997, the arbitrator determined that Respondent did have an insurable interest in the wheat crop on the Tri-Campbell land and ordered RCIS to pay the claim.

Discussion

Both parties filed motions for summary judgment. Summary judgment is appropriate when there is no genuine issue as to any material fact to be determined by the finder of fact, and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment should lie, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Moreover, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

Respondent's motion argues that the doctrines of res judicata and collateral estoppel preclude Complainant from asserting that Respondent did not have an insurable interest in the crop on the Tri-Campbell land, because the matter was already decided by the arbitrator. Respondent further argues that he did have an insurable inteest in the crop; and that Complainant has failed to establish that Respondent willfully or intentionally provided false or inaccurate information to FCIC or th insurer. Complainant disputes the applicability of the doctrines of collateral estoppel and res judicata; and maintains there is sufficient record evidence to show that Respondent did not have an insurable interest in the crop on the Tri-Campbell land and that he willfully and intentionally reported the interest falsely.

A. *Res Judicata*

Res judicata serves to bar subsequent claims if the following four elements are met: (1) the first suit must result in a final judgement on the merits; (2) the first suit must be based on proper jurisdiction; (3) both suits must involve the same nucleus of operative fact; (4) both suits must involve the same parties or their privies. *See Kolb v. Scherer Brothers Financial Services Co.*, 6 F.3d 542, 544 (8th Cir. 1993); *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987).

Complainant admits that the arbitration was based on proper jurisdiction and constitutes a final judgment on the merits; and it does not deny that both claims share a common nucleus of operative fact. Inasmuch as Respondent does not contend that Complainant was a party to the arbitration proceeding, the only operative question is whether Complainant was in privity with RCIS so as to be bound by the arbitration.

There are three categories of nonparties generally said to be bound by prior adjudications: 1) a nonparty who controls the prior action; 2) a nonparty who is

a successor in interest to the prior party; and 3) a nonparty whose interests were adequately represented by a party in the prior action. *See Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1997), *cert den'd Miller v. Schoemehl*, 117 S. Ct. 1427 (1997); *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934, 938 (8th Cir. 1995).

Complainant did not participate in the arbitration proceedings in any manner and is not a successor in interest to RCIS. Therefore, it could only be in privity with RCIS on the basis of adequate representation. The Eighth Circuit, which is the jurisdiction in which any appeal of this matter will eventually lie, favors a liberal application of the adequate, or virtual, representation concept. *See Tyus, supra* at 455. Coincidental interests alone are not enough, however, to apply virtual representation. *Sondel, supra* at 940. There must be some special relationship to justify preclusion. *Tyus, supra* at 455.

Although the Eighth Circuit has not established a definitive test for determining whether virtual representation is present, the court, in *Tyus*, did identify a number of factors which should be considered:

> First, identity of interests between the two parties is necessary, though not alone sufficient. Other factors to be considered "include a close relationship between the parties; participation in the prior litigation; apparent acquiescence; and whether the present party deliberately maneuvered to avoid the effects of the first action."
> Another factor to consider is adequacy of representation which is best viewed in terms of incentive to litigate.

Tyus, supra at 455 (citations omitted).

Complainant has a close relationship with RCIS as evidenced by the amount of control it has over the insurance policies and the contractual relationships between the parties. *See Owen v. Crop Hail Management*, 841 F. Supp. 297, 304 (W.D. Mo. 1994). In addition, under the Standard Reinsurance Agreement, Complainant had the right to intervene and to direct any legal actions arising under the policy.

Complainant did not, however, participate in the prior litigation. In fact, Complainant was not notified that Respondent had submitted to dispute resolution. Respondent argues that Complainant should have known about the proceeding because it knew of the dispute, and knew that arbitration was the only recourse available to Respondent. Complainant, however, maintains that there are far too many claims filed to track all of them. It is inconsequential whether Complainant could have, or should have, stayed abreast of the dispute. The fact remains that Complainant was not involved in the arbitration.

Furthermore, although it seems the interests and incentives to litigate should have been identical, such a conclusion is belied by the fact the RCIS asked the arbitrator to accept Respondent's appeal, as it agreed that there was an insurable interest in the crop. Therefore, it cannot be said that RCIS adequately represented Complainant's interests in proving the lack of an insurable interest.

Considering all of these factors, as well as the equitable nature of the doctrine, it is determined that Complainant was not in privity with RCIS; and that the doctrine of res judicata does not apply.

B. *Collateral Estoppel*

Collateral estoppel bars the relitigation of an issue that has already been decided if the following elements are met:[1] 1) the issue sought to be precluded is identical to that in the prior adjudication; 2) the issue was actually litigated in the prior action; 3) the issue was determined by a valid and final judgment; 4) the determination was essential to the prior judgment; and 5) the party to be estopped was a party to, or in privity with, a party to the prior action. *Tyus*, *supra* at 453; *American Federation of Television and Radio Artists Health and Retirement Funds v. WCCO Television, Inc.*, 934 F.2d 987, 991 (8th Cir. 1991).

Since Complainant was not a party to, or in privity with a party to, the arbitration, Complainant is not estopped from asserting that Respondent did not have an insurable interest in the crop on the Tri-Campbell land. Therefore, it is necessary to turn to the substantive merits of the Complaint.

C. *Section 1506(n)*

The Complaint alleges that Respondent violated 7 U.S.C. § 1506(n), by taking out a policy, and filing a claim for losses to a wheat crop with respect to which he did not have an insurable interest. Section 1506(n) provides as follows:

(1) **False information**

If a person willfully and intentionally provides any false or inaccurate information to the [Federal Crop Insurance] Corporation or to any insurer with respect to an insurance plan or policy under this chapter, the Corporation may,

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[1]It should be noted that mutual defensive collateral estoppel, as is being asserted here, may be used against the government. *See United States v. Stauffer Chemical, Co.*, 464 U.S. 165, 169 (1983).

after notice and an opportunity for a hearing on the record–

(A) impose a fine of not to exceed $10,000 on the person; and

(B) disqualify the person from purchasing catastrophic risk protection or receiving noninsured assistance for a period of not to exceed 2 years, or from receiving any other benefit under this chapter for a period of not to exceed 10 years.

(2) **Assessment of penalty**

In assessing penalties under this subsection, the Corporation shall consider the gravity of the violation.

7 U.S.C. § 1506(n).

With respect to producer eligibility, the Act provides that:

Except as otherwise provided in this chapter, a producer shall not be denied insurance under this chapter if–

(1) for purposes of catastrophic risk protection coverage, the producer is a "person" (as defined by the Secretary); and

(2) for purposes of any other plan of insurance, the producer is 18 years of age and has a bona fide insurable interest in a crop as an owner-operator, landlord, tenant, or sharecropper.

7 U.S.C. § 1520. The crop insurance policy specifies that: "The insured share is your share as landlord, owner-operator, or tenant in the insured crop at the time the insurance attaches." The policy further provides that the insurance attaches at the time the crop is planted. At the time he took out the policy, Respondent was engaged in negotiations to purchase the land, but did not yet own it. Respondent maintains that he was operating the land under the assumption that it would ultimately be his, and that he would suffer any loss. In *Parks v. Federal Crop Insurance Corporation*, 416 F.2d 833 (7th Cir. 1969), the court held that a producer has an insurable interest in a crop if he suffers a risk of loss, regardless of whether he holds title to the property. *Id.* at 839; *see also Hermes v. Federal Crop Insurance Corporation*, 729 F. Supp. 1292, 1297 (D. Kan. 1990).

Complainant maintains that Respondent was merely providing custom farming services for Tri-Campbell. Therefore, Respondent would have been entitled to payment for services rendered, but would have no entitlement to the crop and, accordingly, would have no interest in the crop as an operator.

The exact nature of Respondents's interest is unclear. For purposes of

summary judgment, however, the facts must be viewed in the light most favorable to the nonmoving party. For purposes of Respondent's motion, therefore, it is assumed that Respondent was performing custom farming services, and that he did not have an insurable interest in the crop. Even under this assumption, Complainant has nevertheless failed to show that Respondent willfully and intentionally reported the crop falsely.

Respondent was not attempting to defraud the government, he was simply trying to comply with the requirements and protect his investments in the crop. Respondent discussed the property in question with his insurance agent, and after their review of the policy requirements, they concluded that the Tri-Campbell crop had to be reported. Respondent's belief that he had an insurable interest was not unreasonable considering the unusual nature of his relationship to the land, a relationship so strong that his insurance agent, and later RCIS and an arbitrator all found that he had an insurable interest.

When a party who has the ultimate burden of proving an issue fails to present sufficient evidence to show the existence of an essential element, summary judgment must be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Complainant failed to show Respondent acted willfully and intentionally. Therefore, Respondent is entitled to summary judgment in its favor.

For the foregoing reasons, Respondent's motion for summary judgment is granted; and Complainant's motion for summary judgment is denied. Accordingly, the Complaint is hereby dismissed.

In re: PHILLIP ROWE.
FCIA Docket No. 97-0009.
Order Dismissing Complaint filed March 17, 1998.

Kimberly Arrigo, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on July 25, 1997, be dismissed without prejudice.

In re: CARL LEMKE.
FCIA Docket No. 97-0015.
Dismissal filed May 22, 1998.

Donald McAmis, for Complainant.
Thomas J. Anderson, Harlan, IA, for Respondent.*Order issued by Victor W. Palmer, Chief Administrative Law Judge.*

The parties have filed a joint stipulation advising that a settlement agreement has been reached and this proceeding may be dismissed.

Accordingly, this proceeding is hereby DISMISSED.

In re: JOSE B. MENDEZ-GUZMAN.
P.Q. Docket No. 97-0003.
Order Dismissing Complaint filed March 5, 1998.

Cynthia Koch, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's March 4, 1998, motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on November 8, 1996, be dismissed.

DEFAULT DECISIONS

ANIMAL QUARANTINE AND RELATED LAWS

In re: BILLY C. ROBINSON, d/b/a B & R FARMS.
A.Q. Docket No. 97-0011.
Decision and Order filed December 30, 1997.

Failure to file an answer - Transport of cattle interstate without required certificates - Civil penalty.

Rick Herndon, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate transportation of cattle in the United States (9 C.F.R. § 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act) and the regulations promulgated thereunder, by a complaint filed on June 11, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Billy C. Robinson is an individual doing business as B & R Farms whose mailing address is P. O. Box 106, Ranburne, Alabama 36273.

2. Between June 5 and October 2, 1996, the respondent transported twenty-nine (29) cows from Alabama to livestock markets in Georgia without certificates as required by section 78.9 (b) (3) of the regulations (9 C.F.R. § 78.9(b)(3)). The

respondent transported the subject cows as follows:

a) June 5: Two cows from Centre Livestock Market, Centre, Alabama, to Carroll County Livestock Sales Barn, Carrollton, Georgia.

b) June 28: One cow from Centre Livestock Market, Centre, Alabama, to Coosa Valley Livestock Market, Rome, Georgia.

c) July 10: Two cows from Centre Livestock Market, Centre, Alabama, to Carroll County Livestock Sales Barn, Carrollton, Georgia.

d) July 17: One cow from Centre Livestock Market, Centre, Alabama, to Carroll County Livestock Sales Barn, Carrollton, Georgia.

e) July 19: Two cows from Centre Livestock Market, Centre, Alabama, to Coosa Valley Livestock Market, Rome, Georgia.

f) July 24: Four cows from Centre Livestock Market, Centre, Alabama, to Carroll County Livestock Sales Barn, Carrollton, Georgia.

g) August 7: Two cows from Centre Livestock Market, Centre, Alabama, to Carroll County Livestock Sales Barn, Carrollton, Georgia.

h) August 30: One cow from Centre Livestock Market, Centre, Alabama, to Coosa Valley Livestock Market, Rome, Georgia.

i) September 11: Two cows from Centre Livestock Market, Centre, Alabama, to Carroll County Livestock Sales Barn, Carrollton, Georgia.

j) September 13: One cow from Centre Livestock Market, Centre, Alabama, to Coosa Valley Livestock Market, Rome, Georgia.

k) September 18: Five cows from Centre Livestock Market, Centre, Alabama, Carroll County Livestock Sales Barn, Carrollton, Georgia.

l) September 25: Three cows from Centre Livestock Market, Centre, Alabama, to Carroll County Livestock Sales Barn,

Carrollton, Georgia.

m) October 2: Three cows from Centre Livestock Market, Centre, Alabama, and one cow from South Alabama Livestock, Brundidge, Alabama, to Carroll County Livestock Sales Barn, Carrollton, Georgia.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (9 C.F.R. § 78.1 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of six thousand five hundred dollars ($6,500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 97-0011.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final March 12, 1998.-Editor]

In re: VAN SIEU LA.
A.Q. Docket No. 97-0007.
Decision and Order filed February 19, 1998.

Failure to file an answer - Importation of cured meats derived from ruminants from Vietnam without a certificate - Civil penalty.

James Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and regulations promulgated thereunder (9 C.F.R. § 94.4).

This proceeding was instituted by a complaint filed against Van Sieu La, respondent, on March 25, 1997, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Finding of Fact

1. Van Sieu La is an individual with a mailing address of 3363 So. 100 E Street, #146, Salt Lake City, Utah 84106.

2. On June 1, 1996, at Los Angles, California, respondent imported cured meat derived from ruminants into the United States from Vietnam without a certificate.

Conclusion

By reason of the facts contained in the Findings of Fact above, Van Sieu La, respondent, has violated 9 C.F.R. § 94.4. Therefore, the following Order is issued.

Order

Van Sieu La, respondent, is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final May 4, 1998.-Editor]

In re: CARLOS E. AMIERO.
A.Q. Docket No. 97-0012.
Decision and Order filed March 3, 1998.

Failure to file an answer - Importation of parrots without offering them at a designated port of entry - Civil penalty.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of seven (7) amazon pet parrots (9 C.F.R. § 101 (c)(3), 9 C.F.R. § 92.102 (a) or § 92.105(b)), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act) and the regulations promulgated thereunder, by a complaint filed on June 11, 1997, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c))

provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Carlos E. Amiero is an individual whose mailing address is Calle 7-E-22, Repto Marquez, Recibo, Puerto Rico 00612.

2. On or about March 12, 1996, respondent imported seven (7) amazon pet parrots, in violation of § 92.101(c)(3) of the regulations (9 C.F.R. § 92.101(c)(3)), in that the bird was not offered for entry at one of the ports of entry designated in 9 C.F.R. § 92.102(a) or § 92.105(b) of the regulations.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 92.101 - § 92.106). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 97-0012.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final May 22, 1998.-Editor]

ANIMAL WELFARE ACT

In re: LAURA CARPENTER.
AWA Docket No. 96-0087.
Decision and Order filed October 14, 1997.

Failure to file an answer - Veterinary care - Primary enclosures - Removal of waste - Cease and desist order - Civil penalty - Suspension.

Donald Tracy, for Complainant.
Respondent., Pro se
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by personal service on February 6, 1997. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. (a) Laura Carpenter, hereinafter referred to as respondent, is an individual whose address is 5003 County Road 486, Tebbets, Missouri 65080.

(b) The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

(c) When the respondent became licensed and annually thereafter, she

received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

2. (a) On February 29, 1996, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

(b) On February 29, 1996, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)); and

2. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)).

3. (a) On April 1, 1996, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

(b) On April 1, 1996, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)); and

2. Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act, as well as standards and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and

(c) Failing to maintain primary enclosures for animals in a clean and sanitary condition.

2. The respondent is assessed a civil penalty of $7,500.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent's license is suspended for a period of 30 days and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein. When respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied this condition, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this Order shall become effective on the first day after service of this decision on the respondents. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties

[This Decision and Order became final December 31, 1997.-Editor]

In re: DAVID TWOMEY and JUDI TWOMEY.
AWA Docket No. 96-0079.
Decision and Order filed November 18, 1997.

Failure to file an answer - Operating as an exhibitor without being licensed - Records - Veterinary care - Exercise space - Waste removal - Cease and Desist order - Civil penalty - Suspension.

Donald Tracy, for Complainant.
Respondents, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondents by personal service on February 20, 1997. Respondents were informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondents failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted by respondents' failure to file an Answer pursuant to the Rules of Practice, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. A. David Twomey and Judy Twomey, hereinafter referred to as the respondents, are individuals doing business as Happytime Circus and whose mailing address is Post Office Box 269, Windsor, California 95492.

B. The respondents, at all times material herein, were operating as exhibitors as defined in the Act and the regulations.

C. When the respondents became licensed and at each renewal date, they received copies of the Act and regulations and agreed, in writing, to comply with them.

2. On at least six occasions between May 9 and June 14, 1992 the respondents operated as exhibitors without being licensed as required, in willful violation of section 4 of the Act ((7 U.S.C. § 2134), section 2.1 of the regulations (9 C.F.R. § 2.1), and the Order issued in AWA Docket No. 89-6 on August 9, 1991.

3. The respondents operate a traveling exhibition. On September 15, 1993,

February 8, 1994, and October 21, 1994, APHIS inspectors requested their itineraries, so that their operations could be inspected. The respondents have repeatedly failed and refused to provide the required information, in willful violation of section 2.125 of the regulations (9 C.F.R. § 2.125).

4. On September 15, 1993, February 8, 1994, and October 21, 1994, APHIS inspected the respondents' operations and found that:

A. The respondents had failed to maintain complete records showing the acquisition and disposition of dogs, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

B. The respondents had failed to establish a written program of veterinary care with regularly scheduled visits of an attending or consulting veterinarian, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

C. The respondents had failed to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise, and to provide such plan to APHIS upon request, in willful violation of section 2.100 of the regulations and section 3.8 of the standards (9 C.F.R. §§ 2.100, 3.8).

5. On February 8, 1994, and October 21, 1994, APHIS inspected the respondents' operations and found that the respondents had failed to provide dogs with adequate space in primary enclosures and, for dogs on tethers, had failed to provide tethers of sufficient length, in willful violation of section 2.100 of the regulations and sections 3.6(a)(xi) and 3.6(c)(2) of the standards (9 C.F.R. §§ 2.100, 3.6(a)(xi), 3.6(c)(2)).

6. On March 15, 1996, APHIS inspected the respondents' operations and found that:

A. The respondents had failed to maintain records concerning veterinary care, and exercise and socialization for dogs in violation of sections 2.40 and 3.8 of the regulations and standards (9 C.F.R. 2.40 and 3.8).

B. The respondents did not adequately clean the primary enclosures of excreta in violation of section 3.11(a) of the standards (9 C.F.R. 3.11(a)).

C. The respondents failed to provide a sufficiently long tether for a dog in violation of section 3.6(c) of the standards (9 C.F.R. 3.6(c)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act, as well as standards and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the

circumstances.

Order

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

(a) Failing to provide itineraries and other information regarding their business upon request;

(b) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required.

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(d) Failing to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise, and to provide such plan to APHIS upon request; and

(e) Failing to provide sufficient space for dogs in primary enclosures, and, when dogs are tethered, to provide tethers of sufficient length.

2. The respondents are jointly and severally assessed a civil penalty of $15,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondents' license is suspended for a period of 120 days and continuing thereafter until they demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein. When respondents demonstrate to the Animal and Plant Health Inspection Service that they have satisfied this condition, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this Order shall become effective on the first day after service of this decision on the respondents. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final January 7, 1998-Editor]

In re: WALLACE ECKLOF, d/b/a PICK OF THE LITTER.
AWA Docket No. 97-0030.
Decision and Order filed September 9, 1997.

Failure to file an answer - Operating as a dealer without obtaining a license - Failure to notify APHIS of change of address - Failure to allow inspection - Cease and desist order - Civil penalty - License disqualification.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent Wallace Ecklof on June 25, 1997.[1] Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Wallace Ecklof has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

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[1]The Hearing Clerk attempted to serve a copy of the complaint and the Rules of Practice on the respondent by certified mail but the documents were returned marked unclaimed. Pursuant to section 1.147(c) of the Rules of Practice, the complaint and the Rules of Practice were served on the respondent by regular mail on June 25, 1997.

Findings of Fact and Conclusions of Law

I

1. Wallace Ecklof, hereinafter referred to as respondent, is an individual doing business as Pick of the Litter, whose address is 17789 43rd Street North, Loxahatchee, Florida 33470.

2. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

3. From about June 1995, through about December 1995, the respondent willfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1) by operating as a dealer as defined in the Act and the regulations without having obtained a license. Respondent sold, in commerce, at least 142 dogs for resale for use as pets. The sale of each animal constitutes a separate violation.

4. From about June 1995, through about December 1995, the respondent willfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1) by operating as a dealer as defined in the Act and the regulations without having obtained a license. Respondent purchased, in commerce, at least 30 dogs for resale for use as pets. The purchase of each animal constitutes a separate violation.

5. On October 31, 1995, the respondent willfully violated section 2.27(a) of the regulations (9 C.F.R. § 2.27(a)), by failing to notify APHIS of a change in address of his business or operation, or of any additional sites, within 10 days of the change.

6. On October 31, 1995, the respondent willfully violated section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126), by failing to allow APHIS employees to conduct a complete inspection of his animal facilities.

7. On December 5, 1995, the respondent willfully violated section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126), by failing to allow APHIS employees to conduct a complete inspection of his animal facilities.

8. On February 6, 1996, the respondent willfully violated section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126), by failing to allow APHIS employees to conduct a complete inspection of his animal facilities.

Conclusions

1 The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of $4,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified for a period of one year from becoming licensed under the Act and regulations, and continuing thereafter until he has paid the civil penalty assessed against him.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final January 7, 1998.-Editor]

In re: JAMES DANIEL.
AWA Docket No. 96-0065.
Decision and Order filed February 19, 1998.

Failure to file an an answer - Shipment of dogs which were not at least eight weeks of age - Failure to individually identify dogs - Cease and desist order - Civil penalty - Suspension.

Robert Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et. seq.)*

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was duly served on the respondent by the Office of the Hearing Clerk. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. James Daniel, hereinafter referred to as respondent, is an individual whose address is 2224 Daniel Drive, Joshua, Texas 76058.

2. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

3. Between October 16, 1992 and February 16, 1993, respondent shipped 68 dogs which were not a least eight weeks of age to a retail pet store in Oakham, Massachusetts, in willful violation of section 2.130 of the regulations (9 C.F.R. § 2.130). The shipment of each underage dog constitutes a separate violation.

4. Between January 1992 and April 1993, respondent shipped 1,567 dogs which were not individually identified to a retail store in Oakham, Massachusetts, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from failing to individually identify dogs, as required, and from shipping dogs under the minimum age.

2. The respondent is assessed a civil penalty of $7,500, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent's license is suspended for a period of 60 days and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty. When respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied this condition, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 1, 1998.-Editor]

In re: DANIELE L. JONES, d/b/a D&J ANIMALS.
AWA Docket No. 97-0041.
Decision and Order filed February 13, 1998.

Failure to file an answer - Operating as a dealer without a license - Cease and desist order - Civil Penalty - Disqualification.

Frank Martin, Jr., for Complainant.
Respondents, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by certified mail on November 14, 1997. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

A. Daniele L. Jones, hereinafter referred to as respondent, is an individual doing business as D&J Animals whose address is 8952 County Bend S Cir., Jacksonville, Florida 32244.

B. The respondent, at all times material hereto, was operating as a dealer as defined in the Act and the regulations.

C. During 1995 and 1996, the respondent willfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1) by operating as a dealer as defined in the Act and the regulations without having obtained a license. Respondent sold, in commerce, at least 1200 animals for resale for use in research, for use as pets or for exhibition. The sale of each animal constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent

has violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. The respondent is assessed a civil penalty of $3,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The respondent is disqualified for a period of one year from becoming licensed under the Act and regulations, and continuing thereafter until she has paid the civil penalty assessed against her. The provisions of this Order shall become effective on the first day after service of this decision on the respondent.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 18, 1998.-Editor]

FEDERAL CROP INSURANCE ACT

In re: JEFFREY EDWARDS.
FCIA Docket No. 96-0007.
Decision and Order filed November 25, 1997.

Failure to file an answer - Willfully and intentionally providing fals e and inaccurate information to FCIC or the insurer - Disqualification.

Kimberly Arrigo, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.143(b) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(b)), the Motion for Summary Judgment filed by the complainant, Federal Crop Insurance Corporation (FCIC), is granted on the grounds that there are no genuine issues of material fact. The respondent, Jeffrey Edwards, willfully and intentionally provided false information to FCIC when he signed crop insurance documents based on an full guarantee when he knew that his father, Jerry Edwards, was still the operator of the farm after he was placed on the nonstandard classification system and should have received a significantly reduced guarantee. The respondent willfully and intentionally provided false information to FCIC when under-reported his production in the 1991 and 1992 crop years. The respondent willfully and intentionally provided false information to FCIC when he reported his share in FSN 1663 as 100 percent when he was renting such acreage for a 25 percent share of the crop.

Therefore, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the

crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final January 6, 1998.-Editor]

In re: WENDELL EUGENE BECKWITH.
FCIA Docket No. 97-0010.
Decision and Order filed January 22, 1998.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to the FCIC or to the insurer with respect to a plan or policy under the Act - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136(c)), failure of respondent, Wendell Eugene Beckwith, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final March 2, 1998.-Editor]

In re: EDDIE J. ROBINSON.
FCIA Docket No. 97-0017.
Decision and Order filed January 22, 1998.

Failure to file an answer - Willfully and intentionally providing false or inaccurate information to FCIC or the insurer - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136 (c)), failure of respondent Eddie J. Robinson, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final March 3, 1998.-Editor]

In re: LUTHER ALLEN WEST.
FCIA Docket No. 97-0014.
Decision and Order filed January 22, 1998.

Failure to file an answer - Willfully and intentionally providing false or inaccurate information to

FCIC or to the insurer - Disqualification.

Donald McAmis., for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136 (c)), failure of respondent Luther Allen West, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final March 5, 1998.-Editor]

In re: THOMAS JOE AGEE
FCIA Docket No. 98-0002.
Decision and Order filed February 19, 1998.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to FCIC or the insurer - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136 (c)), failure of respondent, Thomas Joe Agee, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final March 30, 1998.-Editor]

In re: M. MICHAEL ROGERS.
FCIA Docket No. 98-0004.
Decision and Order filed February 19, 1998.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to FCIC or the insurer - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136(c)), failure of respondent, M. Michael Rogers, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully

and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final April 2, 1998.-Editor]

In re: DIANE BECKWITH.
FCIA Docket No. 97-0011.
Decision and Order filed March 6, 1998.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to FCIC or insurer - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, the failure of respondent Diane Beckwith, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), and upon consideration of the gravity of the violation, respondent, and any entity in which she retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk

protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final April 15, 1998.-Editor]

In re: LEONARD HOFFMAN.
FCIA Docket No. 97-0001.
Decision and Order filed March 3, 1998.

Failure to file an answer - Willfully and intentionally providing false or inaccurate information - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136(c)), the failure of respondent, Leonard Hoffman, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that upon consideration of the gravity of the violations which respondent is deemed to have admitted, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is hereby disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification shall commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final April 13, 1998.-Editor]

In re: LARRY D. BECKWITH.
FCIA Docket No. 97-0013.
Decision and Order filed March 6, 1998.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to the FCIC or insurer - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.136(c)), the failure of respondent Larry D. Beckwith, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), and upon consideration of the gravity of the violation, respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final April 16, 1998.-Editor]

In re: EUGENE BECKWITH.
FCIA Docket No. 97-0012.
Decision and Order filed March 6, 1998.

Failure to file an answer – Willfully and intentionally providing false inaccurate information - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136(c)), the failure of respondent Eugene Beckwith, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), and upon consideration of the gravity of the violation, respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final May 4, 1998.-Editor]

In re: JAMES E. ARCENEAUX, JR.
FCIA Docket No. 97-0004.
Decision filed April 9, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Summary judgment - Willfully and intentionally providing false or inaccurate information - Disqualification.

This matter having been brought upon motion of the Complainant, seeking summary judgment on a complaint for the disqualification of respondent, James E. Arceneaux, Jr., from purchasing catastrophic risk protection for a period of two years, and any other benefit under the Federal Crop Insurance Act, as amended (7 U.S.C § 1501 *et seq.* 1990), for a period of ten years; and in consideration of the motion, and any opposition thereto, and for good cause appearing, complainant's motion is hereby granted; and, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act (7 U.S.C. § 1506(m)).

Accordingly, pursuant to section 506 of the Act (7 U.S.C. § 1506), and subpart R of the Regulations (7 C.F.R. §§ 400, 454), it is ORDERED that the respondent be and is thereby disqualified from purchasing catastrophic risk protection for a period of two years, and from receiving any other benefit under the Federal Crop Insurance Act for a period of ten years.

It is further ORDERED that any entity in which the respondent retains a substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period to two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.145).

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year, and remain in effect for the entire period specified in this decision.

[This Decision and Order became final May 19, 1998.-Editor]

In re: JAMES E. ARCENEAUX, JR.
FCIA Docket No. 97-0004.
Order Denying Motion to Vacate Decision filed April 28, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Having considered the matter, Respondent's motion to vacate decision (entitled motion for rehearing) is denied.

In re: JEMMY RICHARDSON.
FCIA Docket No. 97-0006.
Decision and Order filed April 6, 1998.

Failure to file an answer - Willfully and intentionally providing false or inaccurate information - Disqualification.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136(c)), failure of the respondent, Jemmy Richardson, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Because the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act (7 U.S.C. section 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. section 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice Governing Formal

Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.145).

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year, and remain in effect for the entire period specified in this decision.

[This Decision and Order became final May 19, 1998.-Editor]

PLANT QUARANTINE ACT

In re: JONES COSMAS ONNENU.
P.Q. Docket No. 96-0025.
Decision and Order filed October 9, 1997.

Admission of material allegations - Importation of eggplants from Nigeria - Civil penalty.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty as authorized by section 3 of the Act of February 2, 1903, as amended (21 U.S.C. § 122), section 108 of the Federal Plant Pest Act, as amended (7 U.S.C. § 150gg), and section 10 of the Plant Quarantine Act, as amended (7 U.S.C. § 163), for a violation of the regulation issued under the Act that governs preventing the dissemination of plant pests into or through the United States (7 C.F.R. § 330.101 *et. seq.*), hereinafter referred to as the regulations.

This proceeding was instituted by a complaint filed on March 26, 1996, by Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated 7 C.F.R. § 319.56 of the regulation (7 C.F.R. § 319.56), in that 20 fresh eggplants were imported from Nigeria to Detroit, Michigan.

The answer filed by the respondent contained an admission of all jurisdictional and material allegations of fact contained in the complaint. In accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), such admission shall constitute a waiver of hearing.

The Decision and Order, therefore is issued pursuant to section 1.139 and 1.141 of the Rules of Practice applicable to this proceeding (7 C.F.R. §§ 1.139 and 1.141).

Accordingly, the material facts alleged in the complaint, which Respondent is deemed to have admitted, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Jones Cosmas Onnenu is an individual whose mailing address is 16140 Fairfield, Detroit, Michigan 48221.

2. On or about September 19, 1995, at Detroit, Michigan, respondent violated 7 C.F.R. § 319.56 of the regulations (7 C.F.R. § 319.56) in that 20 fresh eggplants were imported from Nigeria to Detroit, Michigan.

Conclusion

By reason of the Findings of Fact set forth above, Respondent has violated the Act and Part 319, Subpart 319.56 of regulations promulgated thereunder (7 C.F.R. Part 319, Subpart 319.56). Therefore, the following order is issued. Therefore, the following Order is issued.

Order

Respondent Jones Cosmas Onnenu, is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). The civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order. Respondent shall indicate on the check or money order that payment is made in reference to P. Q. Docket No. 96-0025.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final January 5, 1998.-Editor]

In re: JOSE JAIME MARTINEZ.
P.Q. Docket No. 97-0014.
Decision and Order filed December 2, 1997.

Failure to file an answer - Importation of hog plums from El Salvador - Civil penalty.

Rick Herndon, for Complainant.
Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on May 6, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Jose Jaime Martinez is an individual whose mailing address is 1517 Culley Street, Las Vegas, Nevada 89110.

2. On or about May 10, 1996, at Houston, Texas, respondent imported 35 hog plums from El Salvador into the United States, in violation of Section 7 C.F.R. § 319.56 (b) and (c) because importation of such fruit from El Salvador is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of seven hundred and fifty

dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0014.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final January 15, 1998.-Editor]

In re: MARIA ROSARIO HERNANDEZ.
P.Q. Docket No. 97-0017.
Decision and Order filed December 2, 1997.

Failure to file an answer - Importation of chorizo sausage from Mexico - Civil penalty.

Jane Settle, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty, as authorized by section 3 of the Act of February 2, 1903, as amended (21 U.S.C. § 122), for a violation of the regulations governing the importation of meat products from Mexico (9 C.F.R. § 94 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.*, and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111) and regulations promulgated thereunder (9 C.F.R. § 94 *et seq.*), by a complaint filed on July 3, 1997, by the Acting Administrator of the Animal

and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about April 23, 1995, respondent imported two (2) pounds of chorizo sausage from Mexico into the United States in violation of 9 C.F.R. § 94.9, because such importation is prohibited.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Maria Rosario Hernandez is an individual with a mailing address of 14220 Franciequito Ave., #418, Baldwin Park, California 91706.
2. On or about April 23, 1995, respondent imported two (2) pounds of chorizo sausage from Mexico into the United States in violation of 9 C.F.R. § 94.9, because such importation is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (9 C.F.R. § 94.9). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred and seventy-five dollars ($375.00)[1]. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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[1]The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0017.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final February 19, 1998.-Editor]

In re: VERONICA F. REYNOLDS.
P.Q. Docket No. 97-0021.
Decision and Order filed February 19, 1998.

Failure to file an answer - Importation of sugarcane from Jamaica without a permit - Importation of yams and thyme from Jamaica without a permit - Civil penalty.

Jeffrey Kirmmsse, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on September 12, 1997, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the

complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Veronica F. Reynolds is an individual whose mailing address is 1035 Clarkson Avenue, Brooklyn, New York 11212.

2. On or about November 9, 1994, respondent imported sugarcane (Saccharum spp.) from Jamaica into the United States in violation of 7 C.F.R. § 319.15(a) because the importation of sugarcane without a permit is prohibited.

3. On or about November 9, 1994, respondent imported yams (Dioscorea spp.), and thyme (Thymus spp.) from Jamaica into the United States in violation of 7 C.F.R. § 319.56-2(e) because the importation of yams and thyme without a permit is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0021.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final March 31, 1998.-Editor]

In re: JOSE MERIDO RAMIREZ ARIAS.
P.Q. Docket No. 97-0009.
Decision and Order filed March 5, 1998.

Failure to file an answer - Importation of mangoes - Civil penalty.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fresh mangoes from Mexico to the United States (7 C.F.R. § 319.56(c) *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on March 6, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about April 10, 1996, respondent imported 25 fresh mangoes from Mexico into the United States at Los Angeles International Airport, in violation of 7 C.F.R. § 319.56(c).

The respondent signed for receipt of the filed Complaint on March 14, 1997. However, respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and has not filed an answer as of the date of the filing of the motion for this Order. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this

Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Jose Merido Ramirez Arias, herein referred to as the respondent, is an individual whose mailing address is 1933 Pennsylvania Ave., Los Angeles, CA 90033.

2. On or about April 10, 1996, respondent imported 25 fresh mangoes from Mexico into the United States at Los Angeles International Airport, in violation of 7 C.F.R. § 319.56(c).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56(c) *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Jose Merido Ramirez Arias, is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 97-0009.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final April 24, 1998.-Editor]

In re: DONALD REID.
P.Q. Docket No. 97-0022.
Decision and Order filed February 27, 1998.

Failure to file an answer - Importation of mangoes and sasumbas without a permit - Civil penalty.

Jeffrey Kirmsse, for Cormplainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on September 12, 1997, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139.)

Findings of Fact

1. Donald Reid is an individual whose mailing address is 566 Parkside Avenue, Brooklyn, New York 11336.

2. On or about July 12, 1995, respondent imported mangoes and sasumbas from Jamaica into the United States in violation of 7 C.F.R. § 319.56-3 because the respondent did not apply for and receive an import permit, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated

the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0022.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145.)

[This Decision and Order became final May 4, 1998.-Editor]

In re: FRANCISCO J. GAMBOA.
P.Q. Docket No. 97-0020.
Decision and Order filed February 27, 1998.

Failure to file an answer - Importation of avocados without a permit - Civil penalty.

Jeffrey Kirmsse, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance

with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*
This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on September 12, 1997, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139.) Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. 1.139).

Findings of Fact

1. Francisco J. Gamboa is an individual whose mailing addressis 11845 Clara Barton, El Paso, Texas 79936.

2. On or about May 27, 1995, at El Paso, Texas, respondent imported avocados into the United States from Mexico, in violation of Section 7 C.F.R. § 319.56-4 because importation of avocados without a permit is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0020. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145.)

[This Decision and Order became final May 4, 1998.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Remick Farms, Kevin Remick, and Noel Remick. AMAA Docket No. 97-0003. 4/9/98.

ANIMAL QUARANTINE and RELATED LAWS

Seaboard Marine of Florida, Inc. A.Q. Docket No. 97-0013. 1/15/98.

Alex Nichols Agency, Inc., and William A. Nichols. A.Q. Docket No. 97-0010. 5/22/98.

ANIMAL WELFARE ACT

John Haye. AWA Docket No. 97-0007. 1/5/98.

Manuel Ramos, d/b/a Oscarian Brothers Circus. AWA Docket No. 97-0026. 1/6/98.

Lois Stevens. AWA Docket No. 98-0002. 1/12/98.

Bethan and I.B. (Trey) Chapman III, d/b/a Alamo Tiger Ranch. AWA Docket No. 97-0035. 1/13/98.

Donald Foster. AWA Docket No. 97-0034. 1/14/98.

Lamont and Anna Cox, d/b/a The Lion. AWA Docket No. 97-0038. 2/2/98.

Jacqueline Lovelace, d/b/a Pet Country Club. AWA Docket No. 97-0037. 2/18/98.

Edward and Ann Langeliers, d/b/a Langeliers Lakside Kennel. AWA Docket No. 97-0006. 2/19/98.

John Cuneo and the Hawthorn Corporation. AWA Docket No. 97-0040. 3/16/98

Elmer Scherbring. AWA Docket No. 96-0080. 4/3/98.

Kevin Ackerman and Vickie Ackerman, d/b/a Ackerman's Puppy Palace. AWA Docket No. 97-0039. 4/3/98.

American Airlines, Inc. AWA Docket No. 93-0041. 4/6/98.

Huntingdon Life Sciences, Inc. AWA Docket No. 98-0015. 4/8/98.

Cathy Lamke. AWA Docket No. 96-0064. 4/24/98.

Buckshire Corporation and Glen G. Wrigley. AWA Docket No. 96-0041. 5/11/98.

Delta Air Lines, Inc. AWA Docket No. 98-0012. 5/11/98.

Halvor Skaarhaug. AWA Docket No. 98-0004. 5/22/98.

City of Los Angeles, Department of Recreation and Parks, d/b/a Los Angeles Zoo. AWA Docket No. 96-0001. 5/29/98.

Joel K. Kuhns. AWA Docket No. 97-0010. 5/29/98.

David Sabo, New York Primate Center, Inc. AWA Docket No. 96-0057. 6/17/98.

New England Alive Nature Study Center, Inc., and Lyle Jensen. AWA Docket No. 96-0089. 6/29/98.

EGG RESEARCH CONSUMER INFORMATION ACT

McRee Feed Mill, Inc. ERCIA Docket No. 97-0001. 2/25/98.

FEDERAL MEAT INSPECTION ACT

Foremost Packing Co. FMIA Docket No. 98-0001. 3/27/98.

HORSE PROTECTION ACT

Floye Denham. HPA Docket No. 97-0010. 1/9/98.

David Landrum. HPA Docket Nos. 97-0005 & 98-0001. 2/18/98.

Robin Edwards. HPA Docket No. 95-0003. 2/26/98.

Clement R. Hipple, Cindy Hipple, and Kensington Gate Farm, Inc. HPA Docket No. 97-0005. 3/23/98.

Jacqueline B. Whatley. HPA Docket No. 98-0001. 4/7/98.

Willie H. Bryant, Debbie Bryant, and Clint Bryant. HPA Docket No. 98-0004. 4/16/98.

Larry Patton. HPA Docket No. 98-0003. 4/23/98.

Meg and Roger E. Winningham. HPA Docket No. 98-0003. 4/23/98.

Sonya D. Odom. HPA Docket No. 98-0005. 4/30/98.

Louis A. Fulcher. HPA Docket No. 98-0006. 5/4/98.

PLANT QUARANTINE ACT

ProTree Nurseries. P.Q. Docket No. 98-0004. 1/7/98.

Danny Mark Shook. P.Q. Docket No. 96-0032. 3/18/98.

Edward Cherkassky. P.Q. Docket No. 97-0018. 4/8/98.

Sea-Land Services, Inc. P.Q. Docket No. 97-0019. 6/1/98.

AGRICULTURE DECISIONS

Volume 57

January - June 1998
Part Two (P&S)
Pages 504 - 526

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

LIST OF DECISIONS REPORTED

JANUARY - JUNE 1998

PACKERS AND STOCKYARDS ACT

COURT DECISION

MISCELLANEOUS ORDER

DEFAULT DECISIONS

PACKERS AND STOCKYARDS ACT

COURT DECISION

UNITED STATES OF AMERICA v. GREAT AMERICAN VEAL, INC. and THOMAS BURKE.
Civ. No. 96-4110 (HAA).
Decided March 16, 1998.

(Cite as 998 F. Supp. 416; 1998 WL 135618).

Civil penalty collection - Statute of limitations.

The United States District Court for the District of New Jersey held that the complaint issued by the United States to recover a civil penalty assessed against defendants pursuant to the Packers and Stockyards Act was not time-barred under the applicable statute of limitations (28 U.S.C. § 2462). The statute provides that a suit for enforcement of a civil penalty shall not be entertained unless commenced within 5 years from the date the claim first accrued. The court held that the right to demand payment is the hallmark of accrual of a claim and that where an order states that "the civil penalty shall be paid not later than the 90th day after the effective date of this order[,]" the five year statute of limitations does not begin to run until 90 days after the effective date of the order.

Colette R. Buchanan, Newark, NJ, for Plaintiff.
David Pennella, Esq., Dover, NJ, for Defendants.

UNITED STATES DISTRICT COURT

court are the following: (1) defendants' motion for summary judgment to dismiss the complaint; and (2) plaintiff's cross-motion for summary judgment. For the reasons set forth below, defendants' motion for summary judgment is DENIED, and plaintiff's motion is GRANTED.

I. BACKGROUND & PROCEDURAL HISTORY

The pertinent facts in this case are not in dispute. GAV was engaged in the business of buying livestock for slaughter and manufacturing or preparing meats for sale. *Declaration of Neil R. Gallagher* ("*Gallagher Decl.*"), Exh. A at 5. GAV was subject to regulation by the USDA pursuant to the Packers Act. Burke was the president as well as the owner of all of the outstanding stock of GAV. *Id.*, Exh. A at 6.

By Decision and Order dated January 19, 1989 (the "January 19, 1989 Order"), and pursuant to 7 U.S.C. § 193, the Judicial Officer of the USDA, acting as and for the Secretary of Agriculture (the "Secretary") under authority delegated to him to perform regulatory functions,[2] ordered the defendants, *inter alia*, (1) to cease and desist from certain practices which were deemed unlawful under the Packers Act, and (2) to pay a civil penalty, jointly and severally, in the amount of $129,000.00. *See Gallagher Decl.*, Exh. A at 58. The January 19, 1989 Order required the defendants to pay the penalty "not later than the 90th day after the effective date of this Order . . . ." *Id.*, Exh. A at 58-59.

The defendants appealed the January 19, 1989 Order to the United States Court of Appeals for the Third Circuit. *See* 7 U.S.C. § 194(h) (investing exclusive jurisdiction in Court of Appeals "to review, and to affirm, set aside, or modify such orders of the Secretary"). On February 22, 1989, the Judicial Officer entered an order staying the civil penalty provisions of the January 19, 1989 Order pending the defendants' appeal to the Third Circuit. *Gallagher Decl.*, Exh. C. The Third Circuit Court of Appeals entered a Judgment Order on November 27, 1989 denying defendants' petition for review and affirming the January 19, 1989 Order. *Gallagher Decl.*, Exh. D.

Based on the Third Circuit's Judgment Order, and upon application by the Secretary, the Judicial Officer lifted the previously entered stay by order dated May 22, 1991. The substance of the May 22, 1991 Order, in its entirety, read as follows:

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c to 450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. App. at 193 (1996).

> The stay order previously issued in this proceeding is hereby lifted. The order filed January 19, 1989, provided that the civil penalty shall be paid "not later than the 90th day after the effective date of this order . . . ." The "effective date of this order," insofar as payment of the penalty is concerned, shall be the date of service on respondents of the present order removing the stay order.

Id. Exh. E. The May 22, 1991 Order was served on Burke and GAV on June 4, 1991 and June 5, 1991, respectively. *See Affidavit of Joyce A. Dawson* at 2.

The defendants failed to pay the civil penalty. The instant action by the United States to enforce the imposition of the civil penalties was commenced on August 27, 1996.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving, party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Todaro v. Bowman*, 872 F.2d 43, 46 (3d Cir. 1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.), *cert. dism'd*, 483 U.S. 1052 (1987). Put differently, "summary judgment may be granted if the movant shows that there exists no genuine issues of material fact that would permit a reasonable jury to find for the nonmoving party." *Miller v. Indiana Hosp.*, 843 F.2d 139, 143 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is material if it influences the outcome under the governing law. *Id.* at 248.

The party seeking summary judgment always bears the initial burden of production, *i.e.*, of making a *prima facie* showing that it is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This may be done either by demonstrating that there is no genuine issue of fact and that as a matter of law the moving party must prevail, or by demonstrating that the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. *Id.* at 322-23. Once either showing is made, the burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden, as well as establish the existence of genuine issues of material fact. *Id.* at 324.

The sole issue raised in the respective motions for summary judgment is whether the plaintiff's complaint for recovery of the civil penalty is time-barred under the applicable statute of limitations. There is no dispute as to the underlying civil penalty imposed upon the defendants. *See Memorandum in Opposition to Plaintiff's Motion for Summary Judgment* ("*Dfs. Opp. Brf.*"), at 2 ("At this juncture, there is no continuing dispute that the underlying penalty imposed by the Department of Agriculture is beyond challenge and could have been enforced if timely suit was brought.").

B. The Packers Act and 28 U.S.C. § 2462

The Packers Act was enacted to regulate meat packers by prohibiting unfair, discriminatory or deceptive trade practices. *See Stafford v. Wallace*, 258 U.S. 495, 513 (1922). The legislation embodies a comprehensive effort on the part of Congress to "remedy a number of undesirable practices which had arisen in connection with the buying and selling of livestock at the major stockyards." *United States v. Woerth*, 130 F. Supp. 930, 936 (N.D. Iowa 1955), *aff'd*, 231 F.2d 822 (8th Cir. 1956).

In order to effectuate the overall purpose of the legislation, the statute provides the Secretary with the authority to cause complaints to be served upon any alleged violators and hold hearings thereon. 7 U.S.C. § 193(a). In addition to other remedies specified in the statute, § 193(b) permits the Secretary to "assess a civil penalty of not more than $10,000 for each . . . violation" of the act. Section 193(b) goes on to state the following with respect to the Secretary's power to enforce any civil penalty assessments:

> If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

Sections 193(a) and (b), read together, contemplate that a civil penalty must first be assessed by the administrative agency before suit may be filed in a district court.

The Packers Act does not, however, prescribe a time limit within which an action to enforce an administratively imposed penalty must be brought. Accordingly, as both parties acknowledge, reference must be made to 28 U.S.C. § 2462 for the applicable statute of limitations. That section provides as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary, or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

§ 2462. There is no dispute that the instant action concerns "an action, suit or proceeding for the enforcement of [a] civil fine, penalty, or forfeiture," within the intendment of the statute. The issue raised by the respective motions concerns when plaintiff's "claim first accrued."

The defendants' motion presents three alternative dates on which the plaintiff's claim first accrued, all of which would render the instant action time-barred. First, defendants argue that the government's present claim accrued on the date of the underlying violation. Second, defendants argue that the date on which the § 2462 time limitation began to run was November 27, 1989, when the defendants' petition for review was denied by the Third Circuit. Third, assuming that the court does not accept either of the preceding dates, defendants argue that pursuant to the terms of the May 22, 1991 Order, the government's present claim began to accrue on the date each defendant was served with the order, *i.e.*, the "effective date" of the May 22, 1991 Order. As noted above, defendants were served with a copy of the order on June 4, and June 5, 1991, respectively. Defendants contend, accordingly, that the government's action to enforce a civil penalty, instituted on August 27, 1996, is time-barred pursuant to the five-year statute of limitations imposed under § 2462.

By contrast, the government argues that pursuant to the terms of the May 22, 1991 Order, its cause of action did not begin to accrue until ninety-days after the defendants were served with a copy of the order, September 2, 1991 with respect to Burke, and September 3, 1991 with respect to GAV. Thus, the United States necessarily argues that the May 22, 1991 Order incorporated that portion of the January 19, 1989 Order which allowed the defendants to pay the civil penalty within ninety days of the date of the order.

These contentions will be discussed in turn.

(1) Date of Predicate Violation or Date of Assessment of Civil Penalty

Defendants first argue that the statute of limitations began to run from the date of the predicate violation of the Packers Act. The issue of when the § 2462 five-year limitation begins to run for purposes of enforcing civil penalties has been the subject of various federal cases, albeit in the context of statutes other than the

Packers Act. Moreover, these cases have not been altogether consistent in their application of § 2462.

In *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967), a private litigant sued the United States for an adjustment to a government contract. Pursuant to the terms of the government contract, a private party's right to sue in court was made expressly contingent upon exhaustion of administrative remedies. *Id.* at 511-12. The limitations provision at issue, 28 U.S.C. § 2401(a), similar to 28 U.S.C. § 2462, read as follows:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The plaintiff brought an action in federal court more than six years after it completed performance of the contract, but less than six years from the date of the final administrative decision. *Id.* at 508. Based upon the fact that the plaintiff was prohibited from suing the government in court prior to the exhaustion of administrative remedies, the Supreme Court held that the plaintiff's claim was timely under § 2401(a):

> In our opinion, if its claim arose under the contract, it first accrued at the time of the final decision of the [administrative agency], that is upon the completion of the administrative proceedings contemplated and required by the provisions of the contract . . . . [T]he "right of action" of which § 2401(a) speaks is not the right to administrative action but the right to file a civil action in the courts against the United States.

Id. at 511. The Court concluded that the "`right to demand payment has . . . been the hallmark of accrual of a claim in this court.'" Id. at 514 (quoting *Nager Elec. Co., Inc. v. United States*, 368 F.2d 847, 859 (Ct. Cl. 1966)).

Relying on *Crown Coat Front*, the First Circuit Court of Appeals, in *United States v. Meyer*, 808 F.2d 912, 914 (1st Cir. 1987), held that a claim first accrues under § 2462 to enforce a civil penalty imposed under the Export Administration Act ("EAA"), 50 U.S.C. App. § 2401 *et seq.*, from the date of the assessment of the administrative penalty, rather than from the date of the predicate violation. The court reasoned that a cause of action does not "accrue," in the ordinary sense of that word, until a suit may be maintained thereon, and thus, "a claim for `enforcement' of an administrative penalty cannot possibly `accrue' until there is a penalty to be enforced." *Meyer*, 808 F.2d at 914.

Tracking the rationale of the Supreme Court in *Crown Coat Front*, the *Meyer* court placed great significance in the fact that the EAA prohibited the government from commencing suit in the district court until a penalty had been assessed and reduced to an administrative judgment. *Id.* Section 2410(f) of the EAA provides--with language similar to that used in § 193(b), the statute at issue in this litigation--that "in the event of the failure of any person to pay a penalty imposed pursuant to [the antiboycott provisions of the EAA], a civil action for the recovery thereof may . . . be brought in the name of the United States." This language mirrors § 193(b), the statute at issue in this litigation. The First Circuit concluded that

> [t]his language alone strongly suggests--indeed, requires--that the Department [of Commerce] refrain from initiating a civil suit until the appropriate administrative authority has imposed a sanction which the respondent has thereafter refused to satisfy.

Meyer, 808 F.2d at 914.

Similarly, in *United States Department of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982), the Seventh Circuit held that, in the context of the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 801 *et seq.*, the limitations provision of § 2462 did not begin to run until an administrative proceeding had concluded. Pursuant to 30 U.S.C. § 819(a)(4), the Secretary of Labor could petition the district court to enforce a civil penalty "[i]f the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order . . . ." Accordingly, the Seventh Circuit, also relying on *Crown Coat*, reasoned as follows:

> The Coal Act states specifically that the Secretary shall file a petition for enforcement of the order assessing the civil penalty only if the person against whom the penalty was assessed fails to pay it within the time prescribed in the order. 30 U.S.C. § 819(a)(4). Obviously, an administrative agency order must exist before the Secretary can file a district court action to enforce it. Therefore, if 28 U.S.C. § 2462 applies to the district court proceeding the limitations period begins to run when the administrative order becomes final.

Old Ben Coal, 676 F.2d at 261.

Defendants in this action rely primarily on *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), and *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), to support their initial contention that the § 2462 five-year time limitations period began to run from the date of the underlying

Packers Act violation. In *Core Laboratories*, as in *Meyer*, the United States instituted suit to recover civil penalties imposed under the EAA. 759 F.2d at 481. Unlike *Meyer*, however, the Fifth Circuit Court of Appeals held that the enforcement suit was time-barred since § 2462, as applied to the EAA, began to run from the date of the underlying violation, rather than from the date of the administrative assessment of the penalty. *Id.* at 483. The court noted, in rather broad fashion, that a review of the cases involving § 2462 and its predecessors "clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the statute began to run." *Id.* at 482.

It is questionable, however, whether the cases cited and relied upon by the Fifth Circuit were as clearly supportive of its holding as the court believed. For instance, the Fifth Circuit's reliance on *United States v. Athlone Industries, Inc.*, 746 F.2d 977 (3d Cir. 1984), a case decided by this circuit, may have been misplaced. *Athlone Industries* principally concerned the *res judicata* effect of prior litigation brought by the Consumer Product Safety Commission (the "Commission") against a manufacturer pursuant to the Consumer Product Safety Act ("CPSA") on a subsequently initiated matter seeking the imposition of civil penalties under the CPSA. The *Athlone Industries* suit arose out of the Commission's past unsuccessful attempts to administratively impose civil penalties upon the manufacturer, distributor and individual corporate officers. 746 F.2d at 980-81. On two separate occasions, federal appellate courts held that the Commission lacked the authority to assess civil penalties administratively under the CPSA. *Id.* (citing *Advance Mach. Co. v. Consumer Prod. Safety Comm'n*, 666 F.2d 1166 (8th Cir. 1981), and *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983)).

In light of these holdings, the Commission instituted suit in the District of New Jersey, seeking civil penalties under 15 U.S.C. § 2069. The district court dismissed the Commission's action based on the *res judicata* effect of related suits decided previously. *Athlone Indus.*, 746 F.2d at 981. The issue of the § 2462 statute of limitations was apparently first raised on appeal by the respondent as an additional basis to affirm the district court's dismissal, and the Third Circuit's entire discourse on the issue was contained in a footnote. *See id.* at 982 n.1. The court expressed no opinion on whether summary judgment would have been appropriate on the issue of the suit's timeliness under § 2462 since there were no findings by the district court as to whether the CPSA mandated a continuing duty to disclose to the Commission defects which would create a substantial product hazard, or when the manufacturer first had a duty to report such a defect. *Id.*

Significantly, in *Athlone Industries*, the administrative agency never had the

opportunity to first assess civil penalties. Accordingly, the issue addressed in the footnote was not whether the § 2462 statutory time period began to run from the date of the predicate violation or the date of the civil penalty assessment. Rather, the issue was whether the action which sought to impose the civil penalties *in the first instance* was time-barred. Clearly, with respect to this issue, the date of the predicate violation can be the only basis on which to determine whether the § 2462 statute of limitations would apply to bar the action.

Moreover, *Athlone Industries* did not require, as in this case, administrative proceedings as a precondition to initiation of suit in court. Rather, § 2069(b) of the CPSA required the *executive* agency to determine the amount of penalty--relying on certain factors enumerated in the statute--prior to commencing a civil penalty suit. *Athlone Indus.*, 746 F.2d at 982 n.1. As noted by the First Circuit in *Meyer*, such "prosecutorial determinations," as opposed to "adjudicatory administrative proceedings,"

> however necessary they may be to the prosecution of enforcement actions, are not in any sense adjudicative. At bottom, they comprise nothing more or less than decisions to bring suit. In significant contrast to the adjudicative administrative proceedings required before EAA penalties may be imposed and enforced, these determinations fall entirely within the suzerainty of the government. Were the statute of limitations to run against, say, an F.T.C. action, the Commission would have only its own indecision to blame. The EAA analogue to this kind of administrative prerequisite is not the imposition of a statutory penalty by an ALJ after notice, discovery an hearing; rather it is the Department's initial issuance of a charging letter . . . . To liken prosecutorial decisionmaking to mandatory administrative adjudication is to compare plums with pomegranates.

808 F.2d at 920-21.

Accordingly, the factual circumstances of and the statutory scheme at issue in *Athlone Industries* are meaningfully different from those at issue in *Meyer* and *Core Laboratories*, as well as the case at bar. It is therefore apparent to this court that *Athlone Industries* is not quite so deserving of the significance placed upon it by the *Core Laboratories* court.

The *Core Laboratories* court also found persuasive support in the Supreme Court's decision in *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), a case on which defendants herein rely heavily. In *Unexcelled Chemical*, the Court interpreted a two-year statute of limitations applicable to civil actions brought under the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*, as running from the

date of the underlying violation. 345 U.S. at 65-66. As made clear by the Court's subsequent decision in *Crown Coat Front*, however, the Fifth Circuit's reliance on *Unexcelled Chemical* may have been misplaced. The Court in *Crown Coat Front* clearly limited the precedential sweep of the *Unexcelled Chemical* holding:

> Nor do[es] . . . *Unexcelled* control this case. [I]n *Unexcelled*, where the statutory period was held to run from the date of the breach of statutory duty under the Walsh-Healey Act . . . rather than from the date of the administrative determination of the liquidated damages due the Government, it seems apparent that the United States, to (.Uwhich damages were payable, could have brought suit without first resorting to administrative remedies.

386 U.S. at 519.

As in *Crown Coat Front*, *Meyer* and *Old Ben Coal*, and in contrast to *Unexcelled Chemical*, it appears that the Packers Act required the government to first obtain a civil penalty assessment through an administrative proceeding prior to instituting an enforcement proceeding in this court. Accordingly, this court finds that defendants' reliance on *Unexcelled Chemical*, while not unreasonable in light of *Core Laboratories*, is misplaced.

No court in this district or circuit has had occasion to squarely confront this issue.[3] The core principle underpinning the *Meyer* and *Old Ben Coal* decisions--that "`[i]f disputes are subject to mandatory administrative proceedings [before judicial action may be taken], then the claim does not accrue until their conclusion,'" *Meyer*, 808 F.2d at 916 (quoting *Lins v. United States*, 688 F.2d 784, 786 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 1147 (1983)); *Old Ben Coal*, 676 F.2d at 261--appears to this court to be sound, and moreover, preferable to the reasoning employed by the Fifth Circuit.[4] Stripped of its supporting case citations, *Core Laboratories* simply does not possess any persuasive authority to this case.

Furthermore, the application of the *Core Laboratories'* rationale to this case would lead to anomalous results. The conduct underlying the Packers Act violation occurred in 1980 and 1981. *See Gallagher Decl.*, Exh. A at 3. If the

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[3]As noted previously, *Athlone Industries* is not on point, and thus, does not control this case.

[4]At least two other district courts have arrived at the same conclusion. *See United States v. McIntyre*, 779 F. Supp. 119 (S.D. Iowa 1991) (finding reasoning of *Meyer* persuasive); *United States v. McCune*, 763 F. Supp. 916, 918 (S.D. Ohio 1989) ("This Court finds the First Circuit's analysis to be more compelling than that of the Fifth.").

holding of *Core Laboratories* were applied to this case, then the United States would have been required to bring the action to enforce a civil penalty either in 1985 or 1986, well before the January 19, 1989 Order assessing those civil penalties by the Judicial Officer, in whom final administrative authority was delegated. Thus, the statute of limitations would have lapsed in this enforcement action even before the government's right to sue arose. Moreover, application of *Core Laboratories* would create the danger, as clearly evident in this case, of the government successfully seeking civil penalties and yet, because the administrative proceedings took longer than five years, unable to enforce the penalties from a violator who simply refuses to pay. *See, e.g., Crown Coat Front*, 386 U.S. at 514 (noting that similar result under 28 U.S.C. § 2401(a) "is not an appealing result"). The First Circuit's concern is quite apt under these circumstances:

> The concern that 28 U.S.C. § 2462 could pluck an enforcement suit from the vine before it had even ripened enough to be brought is by no means theoretical. According to the Fifth Circuit's construction of 28 U.S.C. § 2462, the Department would have a total of five years from the date of a statutory violation within which to uncover the infraction, conduct the necessary investigation, issue a charging letter, and wend its way through the (often lengthy) administrative process. A suspected violator would, in the straitened circumstances made possible by, the *Core* court, have considerable incentive to employ the available procedures to work delay--not a particularly difficult task in view of the marked resemblance between the conduct of modern administrative litigation and King Minos's labyrinth in ancient Crete.

Meyer, 808 F.2d at 919.

This court accordingly holds that, under the Packers Act, when an assessment of a civil penalty through an administrative proceeding is a prerequisite to the initiation of an enforcement action in a federal district court, the five-year statute of limitations imposed under § 2462 begins to run, for purposes of bringing an enforcement action under the Packers Act, only when a final administrative decision has been issued, and not when underlying violation of the statute has occurred. As applied to this case, § 193(b) mandates that an action to enforce a civil penalty in the district courts must await the imposition of a civil penalty in an administrative proceeding and the failure on the part of a violator to pay such penalty. Thus, the statute of limitations established under § 2462 does not begin to run, as argued by defendants, on the date of the predicate violations.

(2) Date of Third Circuit's Denial of Defendants' Petition for Review

Defendants alternatively argue that the date on which the § 2462 time limitation began to run in this case was November 27, 1989, when the defendants' petition for review was denied by the Third Circuit. In essence, defendants argue that since the January 19, 1989 Order became final and non-appealable when the Third Circuit rejected their petition for review, the time began to run on November 27, 1989. This argument is unavailing.

On February 22, 1989, the Judicial Officer had entered an order staying the civil penalty provisions of the January 19, 1989 Order pending the defendants' appeal to the Third Circuit. *See Gallagher Decl.*, Exh. C. At the time of the Third Circuit's November 27, 1989 affirmance order, however, the stay order was still in effect. The stay was not lifted automatically upon the entry of the Third Circuit's affirmance order. The stay order itself did not provide for an automatic lifting of the stay upon the occurrence of a specified event, and defendants have not pointed to any source which provides for such an event. Rather, the evident practice before the Department of Agriculture is that an order by the Judicial Officer must be entered lifting the stay. *See, e.g., In re Jackie McConnell*, 54 Agric. Dec. 448 (1995). *In re William Dwaine Elliott*, 52 Agric. Dec. 1372 (1993). In the case at bar, the Judicial Officer, upon application by the Secretary, entered such an order lifting the stay on May 22, 1991. Accordingly, the running of the statute of limitations did not begin on November 27, 1989 when the Third Circuit affirmed the January 19, 1989 Order and rejected the defendants' petition for review.

(3) Date of Entry of Removal of Stay Order

Defendants' final alternative argument is that the statute of limitations began to run on the date that service of the May 22, 1991 removal of stay order was served on the defendants. This argument is also unavailing. The May 22, 1991 order provided as follows:

> The order filed January 19, 1989, provided that the civil penalty shall be paid "not later than the 90th day after the effective date of this order . . . ." The "effective date of this order," insofar as payment of the penalty is concerned, shall be the date of service on respondents of the present order removing the stay order.

Referring to this language, the defendants argue that the

> Government's inclusion of an additional ninety (90) day period is certainly

> beyond the four corners of the May 22, 1991 order. On its face, this order makes absolutely no reference to such a period . . . . Obviously, in formulating the May 22, 1991 order, the Judicial Officer was cognizant of when the order became "effective" and "payment due". The terms of the May 22, 1991 Order reference both circumstances. Consequently, had the Judicial Officer *truly* intended another ninety (90) days to then apply, he certainly could have said so, by simply stating that payment was due "ninety (90) days after the effective date". His failure to include this type of reference can only be interpreted to mean that no further extension for payment was intended.

Dfs. Opp. Brf., at 3 (emphasis in original). This argument is entirely meritless, and indeed, based on even a cursory reading of the May 22, 1991 order, somewhat bewildering.

The ninety day period originally provided under the January 19, 1989 Order is, contrary to the defendants' assertions, specifically referenced in the May 22, 1991 order. Although the "effective date" was June 4 and 5, 1991, when Burke and GAV were respectively served with the May 22, 1991 order, the defendants were clearly given ninety days to pay the civil penalty, as evidenced by the order's incorporation of that portion of the January 19, 1989 Order which required the defendants to pay the civil penalty "not later than the 90th day after the effective date of this order . . . ." There is no ambiguity here.

Thus, the "effective date" of the May 22, 1991 order was significant only for purposes of counting the ninety day period provided to the defendants to pay the civil penalty. Consequently, the United States was precluded from instituting suit for enforcement of the civil penalty during that ninety day period. As the Supreme Court recognized, the "`right to demand payment has . . . been the hallmark of accrual of a claim in this court."' *Crown Coat Front*, 386 U.S. at 514 (quoting *Nager Elec.*, 368 F.2d at 859).

This court finds that the five year statute of limitations did not begin to run until ninety days after the defendants were served with the order, or September 2 and 3, 1991. The complaint in this action was filed on August 27, 1996. Accordingly, the defendants' motion for summary judgment on grounds that the suit is time-barred is DENIED. As there are no other issues in this case, plaintiff's motion for summary judgment is hereby GRANTED.

ORDER

This matter having come before the court on the motion of Great American Veal, Inc., and Thomas Burke (David Pennella, Esq., appearing), defendants in

the above-captioned action, for summary judgment pursuant to Federal Rule of Civil Procedure 56, and the cross-motion of the United States of America, plaintiff in the above-captioned action (Colette R. Buchanan, Esq., appearing for summary judgment; and the court having reviewed the moving and cross-moving papers and all other papers submitted in support thereof and all papers submitted in opposition thereto; and for the reasons expressed in an opinion issued on this same day; and for good cause shown;

IT IS ON THIS 16th day of March, 1998;

ORDERED that defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is hereby DENIED; and it is further

ORDERED that plaintiff's cross-motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is hereby GRANTED.

MISCELLANEOUS ORDER

In re: RICKEY THOMPSON d/b/a THOMPSON CATTLE CO.
P&S Docket No. D-94-0016.
Supplemental Order filed March 27, 1998.

Eric Paul, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

On July 9, 1997, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant for a period of 5 years, and thereafter until respondent demonstrates that his current liabilities do not exceed his current assets, provided, that respondent could seek a supplemental order terminating the suspension at any tiine after 35 days of the suspension were served upon demonstrating that all unpaid livestock sellers have been paid in full, and that respondent's current liabilities no longer exceed his current assets.

Respondent has demonstrated to the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), that all unpaid livestock sellers have been paid, and that respondent's current liabilities no longer exceed his current assets.

Complainant has requested the issuance of a supplemental order terminating the suspension of respondent as a registrant.

IT IS HEREBY ORDERED that the suspension of respondent as a registrant

is terminated. The order shall remain in effect in all other respects.

The provisions of this order shall become effective on the first day after entry.

In re: JOHN CARL STEPHENS, d/b/a CARL STEPHENS.
P&S Docket No. D-96-0048.
Decision Without Hearing By Reason of Admissions filed November 21, 1997.

Admission of material allegations - Issuance of checks in payment for livestock without having sufficient funds on deposit - Failure to pay, when due, the full purchase price of livestock - Cease and desist order - Suspension of registration.

Timothy Morris, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This disciplinary proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*), hereinafter referred to as the "Act", by a complaint filed on August 30, 1996, by the Acting Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, alleging that the respondent willfully violated the Act. It is alleged in the complaint that the respondent (1) had current liabilities that exceeded current assets; (2) issued checks in purported payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and (3) failed to pay, when due, the full purchase price of livestock.

A copy of the complaint was served upon respondent on September 3, 1996 by certified mail. In an answer that was received by the Hearing Clerk on September 26, 1996, respondent Carl Stephens admitted to the allegations set forth in the complaint. Respondent's answer constitutes an admission of all the material allegations of fact contained in the complaint pursuant to Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). The admission in the answer of all the material allegations of fact contained in the complaint further constitutes a waiver of hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant moved for the issuance of a Decision, pursuant to Section 1.139 of the Rules of Practice. Therefore, the following Decision and Order is issued

without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. John Carl Stephens, d/b/a Carl Stephens, hereinafter referred to as respondent, is an individual whose mailing address is P.O. Box 513, Irwinville, Georgia 31760.

2. Respondent is and at all times material herein was:

a. Engaged in the business of a market agency buying livestock on a commission basis and in the business of a dealer buying livestock in commerce for his own account; and

b. Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and as a dealer to buy livestock in commerce for his own account.

3. As more fully set forth in paragraph II of the complaint, respondent's current liabilities exceeded his current assets by $172,013.65 as of September 30, 1995.

4. As more fully set forth in paragraph III of the complaint, respondent issued checks in purported payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented, and respondent failed to pay, when due, the full purchase price of livestock.

Conclusions

By reason of the facts found in Findings of Fact No. 3 above, respondent's financial condition does meet the requirements of the Act pursuant to 7 U.S.C. § 204. By reason of the facts found in Findings of Fact No. 4 above, respondent has willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and section 409 of the Act (7 U.S.C. § 228b) for which the Order below is issued.

Order

Respondent John Carl Stephens, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Allowing current liabilities to exceed current assets, a financial condition which does not comply with the requirements of the Act;

2. Issuing checks in purported payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and

3. Failing to pay, when due, the full purchase price of livestock.

Respondent John Carl Stephens is suspended as a registrant under the Act for a period of 28 days and thereafter until respondent has demonstrated solvency. When respondent demonstrates that current liabilities no longer exceed current assets, a supplemental order will be issued terminating the suspension after the expiration of the 28-day period of suspension.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final and effective January 5, 1998.-Editor]

In re: JOHN CARL STEPHENS, d/b/a CARL STEPHENS.
P&S Docket No. D-96-0048.
Supplemental Order filed April 27, 1998.

JoAnn Waterfield, for Complainant.
Respondent, Pro se.
Supplemental Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Upon request of the respondent, John Carl Stephens, doing business as Carl Stephens, a supplemental order is hereby issued lifting the previously issued suspension order and permitting Respondent to operate subject to the Act. All other aspects of the decision and order remain in effect.

In re: ROBERSONVILLE MEATS, INC. AND OLIVER G. MEADS.
P&S Docket No. D-97-0023.
Decision Without Hearing By Reason of Default filed December 22, 1997.

Failure to file an answer - Failure to obtain an adequate bond - Cease and desist order - Civil penalty.

Mary Hobbie, for Complainant.
Respondents, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Deputy Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. §1.130 *et seq.*) governing proceedings under the Act were served upon respondents by certified mail on July 15, 1997. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. Robersonville Meats, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated and doing business in the State of North Carolina, and whose mailing address is P.O. Box 370, Robersonville, NC 27871.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter, whose average annual purchases of livestock exceed $500,000; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Oliver G. Meads, hereinafter referred to as the individual respondent, is an individual whose mailing address P.O. Box 370, Robersonville, NC 27871.

4. The individual respondent is, and at all times material herein was:

(a) President of the corporate respondent;

(b) Fifty percent shareholder of the corporate respondent;

(c) Responsible for the management, direction and control of the corporate respondent; and

(d) The alter ego of the corporate respondent and a packer within the meaning of and subject to the provisions of the Act.

5. Respondents, in connection with their operation subject to the Act, were notified by certified mail received on July 15, 1997, as set forth in paragraph II(a) in the complaint that they were required to maintain a surety bond or its equivalent in the amount of $10,000 to secure the performance of its livestock obligations under the Act. Notwithstanding such notice respondents failed to obtain the bond and have continued to engage in the business of a packer buying livestock in commerce for slaughter without maintaining an adequate bond or its equivalent as required by the Act and regulations.

Conclusions

By reason of the facts found in the Findings of Fact herein, respondents have willfully violated section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, .30).

Order

Respondent Robersonville Meats, Inc., its officers, directors, agents and employees, successors and assigns, directly or indirectly through any corporate or other device, and respondent Oliver G. Meads, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are hereby jointly and severally assessed a civil penalty in the amount of one thousand dollars ($1,000.00). This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondents, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. §1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final and effective on February 12, 1998.-Editor]

In re: JAMES M. BRANTLEY, d/b/a B&B PACKING COMPANY.
P&S Docket No. D-98-0002.
Decision Without Hearing By Reason of Default filed April 1, 1998.

Failure to file an answer - Failure to maintain sufficient funds as deposit - Failure to pay when due the full purchase price of livestock - Cease and desist order - Civil Penalty.

Andre Allen Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), hereinafter the P&S Act, and the regulations promulgated thereunder (9 C.F.R. §201.1 *et seq.*), hereinafter the regulations, instituted by a Complaint and Notice of Hearing filed on November 20, 1996, by the Deputy Administrator, Packers and Stockyards Programs, Grain, Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, charging that Respondent wilfully violated the P&S Act. Copies of the Complaint and Notice of Hearing and the Rules of Practice (7 C.F.R. §1.130 *et seq.*) governing proceedings under the P&S Act were served on Respondent on November 26, 1997. Respondent was informed in a letter of service that an Answer should be filed pursuant to the Rules of Practice and that the failure to answer would constitute an admission of all material allegations contained in the Complaint and Notice of Hearing. Respondent did not file an answer within the time period prescribed in the Rules of Practice. As a result of Respondent's failure to file an Answer, the material facts alleged in the Complaint and Notice of Hearing are admitted.

Complainant has moved for the issuance of a Decision by Reason of Default without further procedure or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision and order is issued.

Findings of Fact

1. James M. Brantley, herein referred to as Respondent, is an individual doing business as B&B Packing Company with a business mailing address of Route 1, Box 2330, Bean Station, Tennessee 37708.

2. Respondent is and at all times material herein was:

a. Engaged in the business of buying livestock in commerce for the purpose of slaughter, manufacturing or preparing meat or meat food products for sale or shipment in commerce, and marketing meat and meat food products acting as a wholesale broker, dealer, or distributor in commerce; and

b. A packer within the meaning of and subject to the P&S Act.

3. In the transactions set forth in section II(a) of the Complaint and Notice of Hearing, Respondent issued checks in payment for livestock purchases which were returned unpaid by the bank upon which they were drawn because he did not have and maintain sufficient funds on deposit and available in the accounts upon which his checks were drawn to pay his checks when presented.

4. In the transactions set forth in section II(a) and (b) of the Complaint and Notice of Hearing, Respondent purchased livestock and failed to pay, when due, the full purchase price of that livestock.

Conclusions

By reason of Findings of Fact 3 and 4, Respondent has wilfully violated Sections 202(a) and 409 of the P&S Act (7 U.S.C. §§192(a), 228b) and section 201.43(b)(2) of the regulations (9 C.F.R. §201.43(b)(2)).

Order

Respondent, James M. Brantley, his officers, directors, agents and employees, successors and assigns, either directly or through any corporate device in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing insufficient funds checks; and
2. Failing to pay, when due, the full purchase price of livestock.

In accordance with Section 203(b) (7 U.S.C. §193) of the P&S Act, a civil penalty in the amount of $4,500.00 is assessed against Respondent.

This decision shall become final and effective without further proceedings thirty-five (35) days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within thirty (30) days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. §1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final and effective on May 13, 1998.-Editor]

CONSENT DECISIONS

(Not published herein.-Editor)

Orville E. Jones. P&S Docket No. D-95-0009. 1/6/98.

Steven Carpenter, d/b/a Steven Carpenter Farms. P&S Docket No. D-96-0058. 1/9/98.

Pajerski Foods, Inc., d/b/a Pork King Packing, Inc,. and Thomas Mileski. P&S Docket No. D-98-0003. 1/30/98.

S. Kelly Downey. P&S Docket No. D-98-0006. 1/30/98.

Smithfield Livestock, Inc. P&S Docket No. D-97-0008. 2/13/98.

William R. (Bill) Martin and Richard F. (Rick) Martin. P&S Docket No. D-96-0050. 2/27/98.

D & R Livestock, Inc., and Donnie Richards. P&S Docket No. D-97-0020. 3/25/98.

Michael K. Michael, Sr., d/b/a South Hill Livestock. P&S Docket No. D-97-0007. 4/15/98.

Tom Hodge. P&S Docket D-98-0004. 4/20/98.

Prindle Leasing Co., Inc., d/b/a Joseph Latella & Sons and Peter A. Latella, Sr. P&S Docket No. D-97-0018. 4/23/98.

Mark K. Holder, d/b/a Mark Holder Livestock. P&S Docket No. D-96-0055. 4/28/98.

John Wheeler. P&S Docket No. D-96-0040. 4/30/98.

Kenneth Wolfe. P&S Docket No. D-98-0005. 4/30/98.

John Ed Morken, d/b/a Northwestern Cattle Company. P&S Docket No. D-97-0001. 6/15/98.

Ned Maryott, d/b/a Maryott Livestock. P&S Docket D-98-0023. 6/22/98.

AGRICULTURE DECISIONS

Volume 57

January - June 1998
Part Three (PACA)
Pages 527-840

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

LIST OF DECISIONS REPORTED

JANUARY - JUNE 1998

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

REPARATION DECISIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: SCAMCORP, INC., d/b/a GOODNESS GREENESS.
PACA Docket No. D-95-0502.
Decision and Order filed January 29, 1998.

Failure to make full payment promptly — Willful, flagrant, and repeated violations — Civil penalties — License suspension — Promissory note as payment — Mitigating circumstances — Power of administrative law judges to reschedule hearing — Weight given to agency sanction recommendation — Jurisdiction of judicial officer to hear late appeal.

The Judicial Officer affirmed Judge Palmer's (Chief ALJ) Initial Decision and Order in which he found that Respondent committed violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce. The Judicial Officer found, however, that Respondent's violations of 7 U.S.C. § 499b(4) were willful, flagrant, and repeated. Based on the length of time during which Respondent's violations occurred, the number of Respondent's violations, the dollar amounts which Respondent failed to pay in accordance with the PACA, and the length of time that it took Respondent to achieve compliance with the PACA, the Judicial Officer increased the civil penalty imposed by the Chief ALJ from $30,000 to $82,500. An administrative law judge has broad discretion to govern the conduct of a proceeding from the time the proceeding is assigned to the filing of an appeal. The Chief ALJ did not err by rescheduling the hearing "in light of the possible government shutdown." PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance at all times with the payment provisions of the PACA. However, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts the Department's policy to encourage PACA violators to pay produce suppliers promptly. Rescheduling a hearing to give a PACA violator additional time to pay produce suppliers unnecessarily delays proceedings, which should be handled expeditiously. The current policy of the Judicial Officer with respect to "no-pay" and "slow-pay" cases may discourage the expeditious handling of these proceedings, which might delay or discourage the prompt payment of produce suppliers by a PACA violator. The Judicial Officer held that in future PACA disciplinary cases in which it is shown that a respondent has failed to pay in accordance with the PACA and a respondent is not in full compliance with the PACA within 120 days after the complaint is served on a respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. Respondent successfully converted the case to "slow-pay" by giving a promissory note to one of its produce sellers. Generally, a note given by a debtor for an existing debt does not extinguish the debt in the absence of an agreement to that effect and the debtor-maker bears the burden of proving that the parties intended that the note extinguish the underlying debt. Respondent proved that the parties intended that the promissory note extinguish the debt for produce. The Judicial Officer held that in future PACA disciplinary cases payment of an antecedent debt for perishable agricultural commodities with a promissory note will not constitute payment in accordance with section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)), even if a respondent can show that the parties agreed that the note would extinguish the debt and constitute payment and the agreement to accept the promissory note as payment was an arm's length transaction and not the product of a respondent's superior bargaining position. The Judicial Officer held where a respondent has failed to pay in accordance with the PACA but that respondent is in full compliance with the PACA by the date of the hearing, or in future cases, within 120 days after the complaint is served on a respondent, or the date of the hearing, whichever occurs first (a "slow-pay" case), a civil penalty may be imposed. The factors to be considered when deciding whether to impose a civil penalty or a license suspension in a "slow-pay" case

include: (1) the length of time a respondent was in violation of the PACA payment requirements; (2) the number of violations and the dollar amounts involved; (3) the roll-over debt, if any, incurred by the PACA violator; (4) the time that it takes the PACA violator to achieve compliance with the PACA; (5) the impact of the violations on the industry as a whole; and (6) whether the PACA violator's financial condition is such that the imposition of a civil penalty, in an amount that would operate as an effective deterrent to future violations of the PACA and would be appropriate under the circumstances of the case, would not substantially increase the risk that the PACA violator's future produce sellers may not be paid in accordance with the PACA. The Judicial Officer stated that a civil penalty would not be an appropriate sanction in a "no-pay" case because the PACA violator's failure to get back into compliance with the PACA would indicate that the violator continues to be financially irresponsible, and the imposition of a civil penalty in a "no-pay" case would require the PACA violator to pay the civil penalty rather than produce sellers to whom the PACA violator owes money; thereby thwarting one of the primary purposes of the PACA which is to ensure that commission merchants, dealers, and brokers make full payment promptly.

Kimberly D. Hart, for Complainant.
Michael J. Keaton, Glen Ellyn, IL, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 18, 1994.

The Complaint alleges that, during the period April 1993 through June 1994, Scamcorp, Inc., d/b/a Goodness Greeness [hereinafter Respondent], willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 35 sellers of the agreed purchase prices in the total amount of $634,791.13 for 165 transactions involving perishable agricultural commodities, which Respondent purchased and accepted in interstate commerce (Compl. ¶¶ III, V). Respondent filed an Answer and Affirmative Defenses [hereinafter Answer] on December 19, 1994, in which Respondent denies violating the PACA and the Regulations (Answer at 1-2).

However, on December 20, 1995, Respondent filed Respondent's Statement of Financial Position as of December 11, 1995 Supplemental Investigation and Request for Continuance of Hearing Date [hereinafter Respondent's First Statement of Financial Position] in which Respondent states that on September 14, 1995, Respondent owed produce sellers $278,833.56, but that Respondent had reduced its produce debt to $217,055.37 by December 11, 1995. In a letter filed December 20, 1995, and attached to Respondent's First Statement of Financial

Position, Respondent's counsel states that he provided Respondent's First Statement of Financial Position to Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] and Complainant's counsel for the purpose of keeping all concerned apprised of the progress of Respondent's efforts "to return to full compliance with the PACA."

On March 21, 1996, Respondent filed Respondent's Statement of Financial Position as of March 20, 1996 and Status on Request for Continuance [hereinafter Respondent's Second Statement of Financial Position] in which Respondent states that: (1) as of February 26, 1996, Respondent had paid all of its produce sellers except Made In Nature, Inc.; (2) subsequent to February 26, 1996, Made In Nature, Inc., invested in Respondent's operations; (3) Respondent used the capital invested by Made In Nature, Inc., to pay Made In Nature, Inc.; and (4) Respondent now has a credit balance of $5,446.95 with Made In Nature, Inc.

The Chief ALJ presided over a hearing on April 3, 1996, and April 4, 1996, in Chicago, Illinois. Ms. Kimberly D. Hart, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Mr. Michael J. Keaton, Esq., and Scott D. Verhey, Esq., represented Respondent.[1] On May 24, 1996, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order and Respondent filed Respondent's Trial Brief. On June 7, 1996, Complainant filed Complainant's Reply Brief and Respondent filed Respondent's Response to Complainant's Trial Brief.

On June 18, 1996, the Chief ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent violated the PACA by failing to make full payment promptly to 35 sellers for 165 lots of perishable agricultural commodities purchased in interstate commerce during the period April 1993 through June 1994, with a total amount of $634,791.13 overdue and unpaid on June 13, 1994; (2) concluded that Respondent fully paid all of its produce indebtedness, albeit late, by March 13, 1996, and is currently paying for produce promptly in accordance with the requirements of the PACA; and (3) assessed Respondent a civil penalty of $30,000 (Initial Decision and Order at 9, 16).

On July 24, 1996, Complainant appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory

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[1]On May 27, 1997, Mr. Alan Charles Raul, Esq., of Sidley & Austin, Washington, D.C., entered an appearance on behalf of Respondent (Letter from Alan Charles Raul to Kimberly D. Hart, dated May 23, 1997, and filed May 27, 1997).

proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On August 19, 1996, Respondent filed Respondent's Motion to Dismiss Appeal as Untimely Under 7 C.F.R. § 1.145 and to Enlarge Time to File Response Until After Resolution of This Motion [hereinafter Respondent's Motion to Dismiss Appeal]. On August 22, 1996, I issued an Informal Order stating:

> On August 19, 1996, Respondent filed Respondent's Motion to Dismiss Appeal as Untimely under 7 C.F.R. § 1.145 and to Enlarge Time to File Response Until After Resolution of this Motion (hereinafter Respondent's Motion to Dismiss Appeal). If Respondent's Motion to Dismiss Appeal is denied, the time for filing Respondent's response to Complainant's appeal petition shall be extended to 21 days after entry of a Ruling on Respondent's Motion to Dismiss Appeal.

On September 10, 1996, Complainant filed Complainant's Response to Respondent's Motion to Dismiss Complainant's Appeal as Untimely Filed, and on September 18, 1996, I issued a ruling in which I found that Complainant's appeal petition was timely filed, denied Respondent's Motion to Dismiss Appeal, and extended the time for Respondent's response to Complainant's appeal petition to October 9, 1996.[3] On September 27, 1996, Respondent filed Respondent's Motion for Reconsideration of Order Denying Motion to Dismiss Appeal as Untimely, and on October 22, 1996, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration of the Order Denying Motion to Dismiss Complainant's Appeal Petition as Untimely. On November 7, 1996, I denied Respondent's Motion for Reconsideration of Order Denying Motion to Dismiss Appeal as Untimely and extended the time for Respondent's response to Complainant's appeal petition to November 29, 1996.[4]

Respondent appealed the Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal and the United States Court of Appeals for the District of Columbia held that the ruling is not a final order and it was not

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

[3]*In re Scamcorp, Inc.*, 57 Agric. Dec. ___ (Sept. 18, 1996) (Ruling on Respondent's Motion to Dismiss Appeal).

[4]*In re Scamcorp, Inc.*, 55 Agric. Dec. 1395 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal).

demonstrated that the ruling was in clear violation of law. *Goodness Greeness v. Department of Agric.*, No. 96-1447 (D.C. Cir. Apr. 10, 1997) (Order).

On April 15, 1997, Complainant filed Status Report on Appeal Petition Filed by Respondent in the United States Court of Appeals in which Complainant informed me of the Order issued in *Goodness Greeness v. Department of Agric., supra*, and requested that I provide Respondent with an opportunity to file a response to Complainant's appeal petition. I provided Respondent with additional time within which to file a response to Complainant's appeal petition, and on August 29, 1997, Respondent timely filed Respondent's Brief in Opposition to Agency's Appeal of Chief ALJ Palmer's Decision and Order [hereinafter Respondent's Response].

On September 2, 1997, the case was referred to the Judicial Officer for decision. In early September 1997, Complainant's counsel telephoned the Office of the Judicial Officer and requested an opportunity to file a supplemental brief addressing the issue of the sanction, if any, to be imposed against Respondent. I informed Respondent's counsel of Complainant's request, and on September 10, 1997, Respondent filed Respondent's Objection to Agency's Request for Supplemental Briefing. On October 2, 1997, I issued a Ruling on Motion for Leave to File Supplemental Brief granting Complainant's request to file a supplemental brief and providing Respondent with an opportunity to file a reply to Complainant's supplemental brief. On November 17, 1997, Complainant filed Complainant's Supplemental Brief, and on December 19, 1997, Respondent filed Respondent's Brief in Reply to Agency's Supplemental Brief in Further Support of Its Appeal from Chief ALJ Palmer's Decision and Order.

Complainant's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed by the parties, and thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, I disagree with the amount of the civil penalty assessed against Respondent by the Chief ALJ and find that, under the circumstances of this case, the appropriate sanction is an $82,500 civil penalty. Nonetheless, I agree with most of the Chief ALJ's Findings of Fact, Conclusions of Law, and Discussion and have adopted the Initial Decision and Order as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

Complainant's exhibits are designated by the letters "CX" and Respondent's exhibits are designated by the letters "RX." The portion of the transcript that relates to that segment of the hearing conducted on April 3, 1996, is in a single

volume containing pages numbered 2 through 261. The portion of the transcript that relates to that segment of the hearing conducted on April 4, 1996, is in a single volume containing pages numbered 2 through 102. References in this Decision and Order to "Tr. Volume I" are to the volume of the transcript that relates to the April 3, 1996, segment of the hearing and references in this Decision and Order to "Tr. Volume II" are to the volume of the transcript that relates to the April 4, 1996, segment of the hearing.

PERTINENT STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall

not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(a) (1994); 7 U.S.C. §§ 499b(4), 499h(e) (Supp. I 1995).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . .

FINDINGS OF FACT

1. Respondent, Scamcorp, Inc., d/b/a Goodness Greeness, is a corporation organized and existing under the laws of the State of Illinois. [Respondent's] mailing address is 5959 South Lowe, Chicago, Illinois 60621-2832. [(Answer at 1; CX 2, 40.)]

2. Pursuant to the licensing provisions of the PACA, license number 911534 was issued to Respondent on August 5, 1991. [Respondent's] license has been renewed annually. . . . [(Answer at 1; CX 1.)]

3. The president of Respondent . . . is Robert Scaman, who together with his brothers, Rodney Scaman and Rick Scaman, all of whom were in their twenties, started Scamcorp, Inc., [in 1991]. The [Scaman] family has long been in the produce business, and [in approximately 1986], Robert Scaman became employed at another company as a buyer and salesperson. That company was bought . . . by a larger firm, and because he was not going to have a job, Robert Scaman and his two brothers decided to start Scamcorp, Inc. Rodney Scaman and Rick Scaman each own 15 per centum of the corporation. Rodney Scaman is a salesman for Scamcorp, Inc. Rick Scaman works outside Scamcorp, Inc., and . . . holds his shares as an investment. [Neither Robert Scaman, Rodney Scaman, nor Rick Scaman] had any managerial or financial experience when they started Scamcorp, Inc. (Tr. Volume I at 220–24.)

4. Respondent has 24 employees and specializes in organic . . . produce. . . . Respondent's produce comes from farms that use "natural farming" techniques in avoidance of pesticides . . . . Respondent is the second largest distributor [of organic produce] in [the United States]. Respondent's . . . share [of the organic produce market] in the City of Chicago is about 75 to 80 per centum. Respondent's . . . share [of the organic produce market] is over 75 percent in [an area] . . . consisting of the States of Illinois, Indiana, Ohio, Michigan, Kentucky, [and] Wisconsin and parts of [the States of] Iowa and Pennsylvania. . . . Respondent's customers consist of large chain stores, as well as health food stores and store front cooperatives in college towns. (Tr. Volume I at 224-28.)

5. After being founded on February 28, 1991, Respondent experienced tremendous growth. But in the summer of 1993, Respondent started having difficulty paying its bills. A certified public accountant was hired at that time, who, upon reviewing Respondent's books and records, identified a cash flow problem caused by [Respondent's] failure to collect some outstanding receivables. This [review] was the first time a professionally trained person had [examined] Respondent's books and records. Respondent next hired a bookkeeper and sought the counsel of others in the industry. For the reasons set forth in Finding [of Fact No.] 15, Respondent's financial systems were then reviewed and analyzed by Ms. Julie Moran, an expert on the financial operations of produce firms. She determined that Respondent had a number of uncollectible receivables; did not have the proper paper handling techniques in place; had grown beyond its capabilities; and lacked the proper infrastructure to support a business of its size. There were instances of Respondent paying some vendors twice and losing an invoice from another. During the next 6 months, in addition to hiring a bookkeeper, Respondent terminated unprofitable delivery routes and reduced overhead. (Tr. Volume I at 228-33; Tr. Volume II at 12-14, 37-40.)

6. On April 8, 1994, Complainant sent a certified letter to Robert Scaman, as president of Respondent, stating that "[a] recent review of the trust notices and reparation complaints filed under the Perishable Agricultural Commodities Act (PACA) against Scamcorp, Inc., indicates your firm is failing to make timely payments for fruits and vegetables" (CX 120). The letter set forth the prompt pay and trust requirements of the PACA and the pertinent provision in the Regulations defining "full payment promptly."

7. Complainant and Respondent have stipulated that Respondent violated the PACA by failing to make full and prompt payment in the amount of $634,791.13 to 35 sellers for 165 lots of perishable agricultural commodities purchased in interstate commerce [during the period] April 1993 [through] June 1994, as set forth in paragraph III of the Complaint (Tr. Volume I at 4-5).

8. The violations set forth in Finding [of Fact No.] 7 were found by Andrew

Furbee, an investigator employed by [the Agricultural Marketing Service, United States Department of Agriculture,] when he conducted an investigation of Respondent during the week of June 14, 199[4]. He also conducted three subsequent compliance investigations which took place in [August] and December 1995, and February 1996 (Tr. Volume I at 4, 19–21).

9. The compliance investigation conducted in [August] 1995 revealed that, between June 1994 and June 1995, Respondent had paid approximately $60[2],000 of the $634,791.13 produce debt [identified in the Complaint]. However, Respondent had incurred approximately $246,000 of debt for produce purchased from seven suppliers [during the period] November 1994 [through] August 1995, which had not been paid promptly, as required by the PACA [(CX 83)]. In other words, Respondent owed approximately $635,000 for produce in June 1994, but, by September 1995, had lowered the amount that was overdue to approximately $278,000. . . .

10. The compliance investigation conducted in December 1995 revealed that the remainder of the . . . $634,791.13 produce debt [identified in the Complaint] had been fully paid. . . . [The December 1995 compliance investigation also revealed that Respondent had paid approximately $82,000 of the $245,761.36 of roll-over debt found during the August 1995 compliance investigation, but had incurred new roll-over debt of $49,528.55 for produce received by Respondent from four produce sellers during the period August 1995 through December 1995 (CX 91–98, 102–105; Tr. Volume I at 20).]

11. The compliance investigation conducted in February 1996 revealed that Respondent had unpaid and past due produce debt with respect to only one supplier, Made In Nature, Inc., which totaled $206,000. All other suppliers had been fully paid. [(CX 119.)]

12. On March 13, 1996, Made In Nature, Inc., lent Respondent $235,385.29 [(RX 10)]. Of this amount, $200,000 was in cancellation of the produce debt Respondent owed Made In Nature, Inc., and the $35,000 balance was made available to Respondent for its other costs and expenses unrelated to its produce debt (Tr. Volume 1 at 192). The president of Made In Nature, Inc., Gerald Prolman, testified that in making this loan for which Made In Nature, Inc., received a promissory note (RX 10), Made In Nature, Inc., understood and fully intended to extinguish the produce debt owed it by Respondent, give up the security of Made In Nature, Inc.'s trust lien, and fully replace Respondent's original obligation to Made In Nature, Inc., with this new obligation (Tr. Volume I at 183-185[, 191-93,] 204-05, 210-18).

13. Pursuant to the promissory note given to Made In Nature, Inc., Respondent is required to pay $2,250 per week until the note is paid, or until the maturity date

of [the promissory note,] June 10, 1998, is reached, whichever comes first. As . . . security, Respondent gave Made In Nature, Inc., a first priority security [interest in Respondent's property, including Respondent's] goods, inventory, supplies, stock-in-trade, [equipment, trade dress, raw materials, work in progress, finished goods, material used or consumed in Respondent's business, accessories, parts, repossessions and returns thereto or therefor, accounts,] accounts receivable, [other receivables, general intangibles, chattel paper, documents, instruments, deposit accounts, money, contract rights, leases, permits, copyrights, patents, trade names and trademarks, and rights to payment of every kind, and all proceeds and products thereof] (RX 10). Robert Scaman also gave his personal guaranty of Respondent's debt to Made In Nature, Inc. (RX 10).

14. In making the loan, the president of Made In Nature, Inc., took into consideration the following facts:

a) Made In Nature, Inc., which is headquartered in California, sells organic produce it has either purchased from growers, sells for growers on commission, or is itself the grower pursuant to various investment agreements (Tr. Volume I at 165). Inasmuch as Respondent is the largest distributor in the Midwest and second largest in the [United States], its continued existence is extremely important to Made In Nature, Inc., and the small growers which it represents. The close of Respondent would devastate Made In Nature, Inc. (Tr. Volume I at 170). Although there are other potential outlets for [Made In Nature, Inc.'s] produce, Mr. Prolman does not feel [that these outlets] would be able to absorb all of [Made In Nature, Inc.'s] fruit and vegetables (Tr. Volume I at 193-94). . . . The loss of Respondent as an outlet would mean Made In Nature, Inc., would be "stuck with produce" (Tr. Volume I at 170-71), and cause repercussions up and down the marketing chain (Tr. Volume I at 170-71).

b) When Respondent encountered its financial problems, Mr. Prolman worked with Respondent on a daily basis, reviewed pertinent documents and monitored the situation (Tr. Volume I at 172-73). Mr. Prolman is impressed with Robert Scaman's honesty and the favors he performed for Made In Nature, Inc., which "helped build [Made In Nature, Inc.'s] brand in the Chicago area . . . ." (Tr. Volume I at 173, 212-13.)

c) [Made In Nature, Inc., discussed an] advance of money to Respondent . . . for sometime. Made In Nature, Inc., had expressed an interest in buying a portion of the equity . . . in Respondent. [Made In Nature, Inc., continues to be interested in buying an equity interest in Respondent] and

may convert the note into an equity interest by taking stock as payment [for the note]. . . . Made In Nature, Inc., has engaged in "due diligence" in respect to Respondent's viability and has concluded that [Respondent's] operators are hard working, trustworthy, and deserving of full confidence; [Respondent's] marketing concept is viable; [Respondent] is a profitable operation with a great future . . .; and Respondent is in the best position to seize the expanding organic food market due to its dominance of Chicago and the midwestern area (Tr. Volume I at 187-88, 205-09, 212-14, 216-17).

d) In deciding that Respondent was a profitable company, Mr. Prolman had Made In Nature, Inc.'s senior vice president, who is a highly trained analyst and who formerly headed up worldwide pineapple operations for Dole Fruit Company, review all [of Respondent's] records and books. He recommended to Mr. Prolman and to Dole Food Company that they participate financially in [Respondent]. Mr. Prolman concluded after he reviewed th[e] analysis [of Respondent], that Respondent has made money every month, is getting better and better, is paying down its debt, and is . . . viable . . . (Tr. Volume I at 207-08, 216-17).

15. Julie Moran became Respondent's business operations manager at the end of April 1994 (Tr. Volume II at 13, 30-31). Previously, she was general manager for Ocean Organic Produce, one of Respondent's suppliers (Tr. Volume II at 12, 31). The board of directors of Ocean Organic Produce asked Ms. Moran to evaluate Respondent because of a rumor that it was going out of business (Tr. Volume II at 12, 35). She did so and started to give Respondent advice based on her experience as a turnaround person, who had by then completed three successful business turnarounds of produce firms (Tr. Volume II at 33-34). Ms. Moran began her review of Respondent's records and business practices in the fall of 1993 and became Respondent's employee at the end of April 1994 (Tr. Volume II at 12). Ms. Moran concluded that Respondent's cash flow problems were the result of it being a new, rapid-growth firm that employed cash basis accounting, which can be extremely misleading to a new business (Tr. Volume II at 37). As the new business rapidly grows, more cash appears at first to be coming in[to the business] than is going out [of the business], until "things kind of catch up to themselves, then you have a cash flow problem" (Tr. Volume II at 38). Ms. Moran switched Respondent to accrual basis accounting, which allows one to know its payables in advance of actually paying them (Tr. Volume II at 38). The problems inherent in cash basis accounting are aggravated when employed by a small,

immature, growing company in that "it always seems like you're richer than you really are" (Tr. Volume II at 39).

16. Under Ms. Moran's financial guidance[, by the time of the hearing in this proceeding,] Respondent had gone from [having] negative equity to [either having] positive equity [or being within one month of having positive equity] (Tr. Volume II at 41). All produce suppliers are paid in accordance with "terms letters," which have now been obtained from them (RX 4; Tr. Volume II at 79-80). Respondent had a net profit of $50,000 for the month of January 1996; $50,000 for the month of February 1996; and $60,000 for the month of March 1996. For its fiscal year, which ended on February 29, 1996, Respondent had a $300,000 profit . . . (Tr. Volume II at 42-45). . . .

17. In the fiscal year which ended on February 29, 1996, Respondent had gross sales of $6,750,000 (Tr. Volume II at 32). Newly obtained customer accounts (Jewel Stores, Dominick's, and A&P) should increase Respondent's revenues, and [Ms. Moran estimated that,] if [Respondent's] business is not interrupted, Respondent should realize a net profit of $300,000 for the [fiscal] year [ending February 1997] (Tr. Volume II at 42-45). Respondent is paying $2,250 per week, or $117,000 per year, on the loan from Made In Nature, Inc. (RX 10). . . .

18. Respondent paid interest to those suppliers to whom [Respondent's] payments for produce were late, if the creditors asked for [interest] or were entitled to [interest] (Tr. Volume I at 248[-49]). Robert Scaman testified that business is now great (Tr. Volume I at [2]50). However, [Robert Scaman] still only takes a salary of $1,000 per week for an 80- to 100-hour week; . . . Rodney [Scaman] is paid $550 per week; and Rick [Scaman] does not receive any salary (Tr. Volume I at 244[-45]). None of the brothers has ever taken any profits out of the business for himself and current profits are being plowed back to increase assets (Tr. Volume I at 250-51). . . .

CONCLUSIONS

1. Respondent [willfully, flagrantly, and repeatedly] violated the PACA by failing to make full payment promptly to 35 sellers for 165 lots of [perishable agricultural commodities] purchased in interstate commerce during the period April 1993 through June 1994, with a total amount of $634,791.13 overdue and unpaid on June 13, 1994.

2. Respondent fully paid all of its produce indebtedness, albeit late, by March 13, 1996, and [at the time of the hearing in this proceeding was] currently paying for [perishable agricultural commodities] promptly in accordance with the requirements of the PACA.

3. The appropriate sanction to be imposed against Respondent for its

violations of the PACA is a civil penalty of [$82,500]. . . .

DISCUSSION

The PACA requires produce dealers who buy . . . [perishable agricultural commodities] in interstate commerce to make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had, or face sanction after an administrative hearing by the Secretary for unfair conduct. (7 U.S.C. §§ 499a, 499b, 499f, and 499h.) Until recently, the available sanctions were limited to publication of the facts and circumstances of the violation, suspension of the offender's [PACA] license for a period not to exceed 90 days, and . . . revocation [of the offender's PACA license]. (7 U.S.C. § 499h(a).) However, on November 15, 1995, the PACA was amended to add a new subsection (e) to 7 U.S.C. § 499h, which reads as follows:

> **(e) Alternative civil penalties**
>
> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

The plain meaning of this language is to give the Secretary greater flexibility in the sanctions that may be imposed for the various violations of the PACA.

. . . .

Mr. Lon F. Hatamiya, Administrator of [the] Agricultural Marketing Service, [United States Department of Agriculture, the agency] which administers the PACA, testified[, during a hearing conducted on 1995 legislation to amend the PACA, in favor of amendment of the PACA to add] monetary penalty provisions[, as follows]:

> In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other

disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

[*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 12 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 12.)]

Mr. Hatamiya was questioned about this statement by Congressman Bishop [as follows]:

MR. BISHOP. You want flexibility in the assessment of fees?

. . . .

[MR. HATAMIYA.] Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes. Essentially, yes.

[*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 34.)]

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the legislative hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary

penalty instead.

[*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 106.)]

. . . .

[N]o witness suggested that the amendment to assess civil penalties should be in any way limited. Charles Gray, on behalf of the American Frozen Food Institute, sought the very opposite result when he testified in favor of the proposed amendment [as follows]:

> AFFI also supports the concepts underlying proposed amendment to levy civil penalties in the event of a violation of the act. This alternative sanction will give the agency desperately needed flexibility.

[*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 63 (1995) (statement of Charles Gray, Director of Credit Administration for the J.R. Simplot Company Food Group). (RX 8 at 63.)]

Moreover, there was specific testimony that civil penalties be assessed in place of other sanctions in "slow-pay/no-pay" cases. Mr. Keith Eckel testified, on behalf of the American Farm Bureau [Federation], that slow payment and nonpayment for produce was a major problem in the industry that would not be solved by the repeal of the PACA (RX 8 at 61-62). When [Mr. Eckel was] asked by [Congressman Ewing] if he had specific recommendations to improve the PACA Program, he stated:

> MR. ECKEL. Mr. Chairman, if you look at the farm bureau testimony, you'll find, number one, that in the issue of the slow pay and no pay that I highlighted, we strongly support intermediary steps short of revocation of license. We think that makes sense for the industry, and we would suggest that a schedule of fines be used to do that.

[*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 71 (1995) (statement of Keith Eckel, President, Pennsylvania Farm Bureau). (RX 8 at 71.)]

Later, Congressman Pastor referred Mr. Hatamiya to Mr. Eckel's testimony

respecting slow payment and nonpayment in the context of the large number of trust notices that shippers file under the PACA:

> MR. PASTOR. To the administration, how difficult would it be to implement some kind of program that would try to solve this particular problem and maybe reduce the number of trust notices you have to deal with?
>
> MR. HATAMIYA. Well, I think it goes back to what we have in terms of an enforcement policy right now. The only alternative we have is either to suspend or revoke a person's license. There are no monetary penalties or fines that we can impose under the legislation. I think that's one area that if, in fact, you congressionally mandate and allow us to fine someone that's not paying promptly, then I think that would certainly assist in providing that quicker payment to whatever party involved.
>
> MR. PASTOR. So you think the idea of having some kind of fee schedule or fine schedule may—
>
> MR. HATAMIYA. I think that's exactly right. We don't think there's any public interest in revoking or suspending somebody's license. We think that they need to be a part of that business marketing chain. And I think that fee or fine schedule would obviously allow us to do it in a different sort of way or enforce it in a different sort of way.

[*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 81 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 81.)]

[The November 15, 1995, amendment to section 8 of the PACA, therefore, authorizes the Secretary to impose a civil penalty, in lieu of a suspension or revocation of an offender's PACA license, in cases in which the PACA licensee has failed to make full payment promptly, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).]

. . . .

[By the date of the hearing, Respondent paid all of its produce suppliers in

full,[5] with interest upon request, and Respondent was in compliance with the PACA.]

. . . .

A firm that owes nearly $635,000 to 35 sellers for [165 transactions involving perishable agricultural commodities] has committed [willful, flagrant, and repeated] violation[s] of the PACA. To discourage Respondent from future violations and to deter others from unfairly converting their [produce suppliers] into unwilling creditors, it is necessary to impose a penalty sufficient . . . to be an effective deterrent. . . .

As the new civil penalty language directs [(7 U.S.C. § 499h(e) (Supp. I 1995))], due consideration has been given to the size of [Respondent's] business, the fact that Respondent has 24 employees, and the seriousness, nature, and amount of the violation. Upon doing so, I have concluded that Respondent should [be assessed an $82,500] civil penalty. . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises 10 issues in Complainant's Appeal. First, Complainant contends that the Chief ALJ erred by postponing the original hearing date for the express purpose of granting Respondent additional time to pay its produce creditors. (Complainant's Appeal at 7-9.)

The record reveals that the Chief ALJ held a prehearing telephone conference with counsel for Complainant and Respondent on March 2, 1995, and that "[i]t was decided that a hearing should be scheduled in Chicago, Illinois, on October 11-13, 1995." (Summary of Prehearing Teleconference, filed March 2, 1995, at 1.) On September 14, 1995, the Chief ALJ held a telephone conference with counsel for Complainant and Respondent during which telephone conference he rescheduled the hearing for January 17-18, 1996, "[i]n light of the possible government shutdown." (Summary of Teleconference and Rescheduling of Hearing, filed September 14, 1995.) The Chief ALJ subsequently rescheduled the

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[5]Complainant has argued that the note taken by Made In Nature, Inc., did not extinguish the original produce debt, but merely suspended it by changing its payment terms retroactively. However, the parties have testified that it was their intent to extinguish the original debt, they specifically so agreed, and there is no contrary evidence. *See Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872 (1991).]

hearing in this proceeding three more times.[6] However, the Chief ALJ's rescheduling of the hearing subsequent to September 14, 1995, does not appear to be the subject of Complainant's Appeal.

The Administrative Procedure Act provides, subject to published rules of the agency, administrative law judges with broad authority to manage and govern adjudicatory proceedings (5 U.S.C. § 556(c)), and the Rules of Practice provide an administrative law judge assigned a proceeding with broad discretion to manage and govern the conduct of a proceeding from the time the proceeding is assigned to the administrative law judge to the filing of an appeal. Specifically, with respect to setting the time for hearing, the Rules of Practice provide:

§ 1.141 Procedure for hearing.

. . . .

(b) *Time, place, and manner.* (1) If any material issue of fact is joined by the pleadings, the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties. The Judge shall file with the Hearing Clerk a notice stating the time and place of the hearing. . . . If any change in the time, place, or manner of the hearing is made the Judge shall file with the Hearing Clerk a notice of such change, which shall be served upon the parties, unless it is made during the course of an oral hearing and made part of the transcript or recording, or actual notice is given to the parties.

. . . .

§ 1.144 Judges.

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[6]On December 21, 1995, the Chief ALJ issued an order stating "[i]n light of scheduling conflicts, the hearing scheduled for January 17-18, 1996, is hereby rescheduled for April 3-4, 1996, in Chicago, Illinois." (Rescheduling of Hearing, filed December 21, 1995.) On December 26, 1995, the Chief ALJ issued an order stating "[i]n response to Complainant's request for an earlier hearing date, the rescheduled hearing shall be held on February 21-22, 1996, in Chicago, Illinois." (Rescheduling of Hearing, filed December 26, 1995.) On December 28, 1995, the Chief ALJ issued an order stating "Mr. Keaton advised that he would be unavailable on February 21-22, 1996, the dates selected for the rescheduled hearing. The next available date suitable to all parties was April 3 and 4, 1996. Accordingly, the hearing is rescheduled to be held in Chicago, IL on April 3 and 4, 1996." (Summary of Teleconference and Rescheduling of Hearing, filed December 28, 1995.)

. . . .

(c) *Powers.* Subject to review as provided elsewhere in this part, the Judge, in any assigned proceeding, shall have power to:

(1) Rule upon motions and requests;

(2) Set the time, place, and manner of a conference and the hearing, adjourn the hearing, and change the time, place, and manner of the hearing[.]

7 C.F.R. §§ 1.141(b)(1) (footnote omitted), .144(c)(1)-(2).

Given the broad discretion vested in administrative law judges under the Rules of Practice to set times for hearings, change times for hearings, and adjourn hearings, which broad discretion is necessary in order for administrative law judges properly to manage and to govern proceedings, I do not find that the Chief ALJ erred by rescheduling the hearing from October 11-13, 1995, to January 17-18, 1996, "in light of the possible government shutdown."

Complainant contends that at least one of the reasons the Chief ALJ rescheduled the hearing was to give Respondent additional time within which to pay outstanding produce debt and to achieve compliance with the PACA prior to the hearing. Under Department policy, compliance by the start of the hearing converts the case from a "no-pay" case to a "slow-pay" case and the sanction from revocation of Respondent's PACA license to suspension of Respondent's PACA license. However, the Chief ALJ's September 14, 1995, order rescheduling the hearing states that the Chief ALJ rescheduled the hearing because of "the possible government shutdown." (Summary of Teleconference and Rescheduling of Hearing, filed September 14, 1995.)

This proceeding is not the first proceeding in which a complainant has alleged that an administrative law judge rescheduled a PACA disciplinary proceeding in order to give a respondent additional time within which to comply with the PACA. However, the record does not establish that the Chief ALJ rescheduled the hearing for an improper reason. Thus, I do not find error, but I disagree with rescheduling a hearing to give any respondent, not in compliance with the PACA, additional time to pay produce creditors and come into compliance with the PACA.

PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times. The Judicial Officer's policy, adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), has been to revoke the license of any PACA licensee who has failed to pay in accordance with the PACA and owes more than a *de minimis* amount to produce sellers by the date of the hearing

or, if no hearing is to be held, by the time the answer is due. 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.

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 of the PACA should be given an incentive to pay its produce suppliers promptly. Rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts Department policy, which is designed to encourage PACA violators to pay produce suppliers promptly. Further, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers unnecessarily delays these proceedings, which should be handled expeditiously, and is specifically contrary to the requirement in section 1.141(b) of the Rules of Practice (7 C.F.R. § 1.141(b)) that "the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties."

The Judicial Officer's current policy on "no-pay" and "slow-pay" cases discourages expeditious hearings, and, when hearings are delayed, prompt payment to produce sellers is delayed. Therefore, I am changing the Judicial Officer's "slow-pay"/"no-pay" policy. The new policy applies to all PACA disciplinary cases instituted after the date this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first.

The new "slow-pay/"no-pay" policy is as follows: In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance

with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and that respondent fails to file a timely answer to the complaint, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. As discussed in this Decision and Order, *infra*, pp. 54-57, in any "slow-pay" case in which the PACA licensee is shown to have violated the payment provisions of the PACA, a civil penalty will be assessed against the PACA licensee or the license of the PACA licensee will be suspended.

Full compliance requires not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpentino Bros., Inc., supra*, that a respondent have no credit agreements with produce sellers for more than 30 days.

The purpose of this new policy is to give PACA violators an incentive to pay produce suppliers promptly and to encourage the expeditious handling of these proceedings. While this new policy may have the effect of discouraging an administrative law judge from holding a hearing within 120 days of the date a complaint is served on a respondent, my experience has been that hearings in PACA disciplinary proceedings are rarely held within 120 days after the date the complaint is served on a respondent.

Second, Complainant contends that the Chief ALJ's finding that "[u]nder Ms. Moran's financial guidance, Respondent has gone from a negative equity to a positive equity" (Initial Decision and Order at 7) is not supported by the evidence (Complainant's Appeal at 10-12.)

I agree with Complainant. The Chief ALJ cites Ms. Moran's testimony at page

41 of volume II of the transcript as the basis for the finding that Respondent has gone from a negative equity to a positive equity. However, Ms. Moran did not testify that Respondent went from a negative equity to a positive equity, but instead testified as follows:

> [BY MR. KEATON:]
>
> Q. Okay. In your opinion, is Goodness Greeness in a financially sound position at this point in time?
>
> [BY MS. MORAN:]
>
> A. Goodness Greeness, probably for the first time in several years, if not right now, by the end of this month, will have a positive equity.

Tr. Volume II at 41.

Therefore, I have not adopted the Chief ALJ's finding that "Respondent has gone from a negative equity to a positive equity" and instead I find that "[u]nder Ms. Moran's financial guidance, by the time of the hearing in this proceeding, Respondent had gone from having negative equity to either having positive equity or being within one month of having positive equity" (Decision and Order, *supra*, p.).

Third, Complainant contends that "[t]here is no substantiating evidence contained in the record to support a finding that Respondent's profits for the next fiscal year will meet or exceed the profits from the previous fiscal year." (Complainant's Appeal at 12.) Moreover, Complainant contends that "Respondent's future financial position is irrelevant since the Secretary's concern is with Respondent's financial position at the time of the hearing." (Complainant's Appeal at 12.)

The Chief ALJ did not find, as Complainant contends, that "Respondent's profits will meet or exceed the profits from the previous fiscal year." Instead, the Chief ALJ found that Respondent "expects to have a $300,000.00 profit for the current fiscal year" (Initial Decision and Order at 8). The record (Tr. Volume II at 42-45) supports the Chief ALJ's finding regarding Respondent's expectation of profits for the fiscal year ending February 1997, and while I give very little weight to Respondent's expectation of future profit, I do not find that the Chief ALJ erred by making a finding concerning Respondent's expectation.

Fourth, Complainant contends that the Chief ALJ's finding that "[n]one of the brothers have ever taken any profits out of the business for themselves" (Initial Decision and Order at 8) is a mitigating circumstance which does not negate the

seriousness of Respondent's violations of the PACA (Complainant's Appeal at 12-13).

I agree with Complainant's contention that the policy of Robert, Rodney, and Rick Scaman not to take profits out of the business does not negate the seriousness of Respondent's failures to make full payment promptly in accordance with the PACA. However, the record (Tr. Volume I at 250-51) supports the Chief ALJ's finding with respect to the Scaman brothers' policy not to take profits out of the business, and the Chief ALJ did not indicate in the Initial Decision and Order that Robert, Rodney, and Rick Scaman's policy not to take profits out of the business negated the seriousness of Respondent's violations of the PACA. To the contrary, the Chief ALJ found that Respondent "has committed a serious violation of the PACA." (Initial Decision and Order at 16.)

Fifth, Complainant contends that the Chief ALJ erred by failing to conclude that Respondent's violations of the payment provisions of the PACA were willful, flagrant, and repeated. (Complainant's Appeal at 13-17.)

I agree with Complainant's contention that the Chief ALJ erred by failing to find that Respondent's violations were willful, flagrant, and repeated.

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.[7]

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[7]*See, e.g., Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Allred's Produce*, 56 Agric. Dec. ___ (Dec. 5, 1997) (concluding that respondent's failure to pay 19 sellers $336,153.40 for 86 lots of perishable agricultural commodities during the period of May 1993 through February 1996, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 16-17 (Nov. 6, 1997) (holding that respondents' failure to pay 7 sellers $192,089.03 for 46 lots of perishable agricultural commodities during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers $206,850.69 for 62 lots of perishable

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.[8] Willfulness is reflected by

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agricultural commodities during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers $238,374.08 for 174 lots of perishable agricultural commodities during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers $1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers $101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers $245,873.41 for 113 lots of perishable agricultural commodities during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

[8]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 27 (Dec. 5, 1997); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 18 (Nov. 6, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing,

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.[9] Respondent failed to make full payment promptly to 35 sellers of the agreed purchase prices in the total amount of $634,791.13 for 165 transactions involving perishable agricultural commodities which Respondent had purchased and accepted in interstate commerce. These failures to pay took place over the period April 1993 through June 1994.

Respondent knew, or should have known, that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over a 14-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not have sufficient capitalization; and consequently, could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.[10]

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or voluntary, as distinguished from accidental,' and that it is employed to characterize `conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

[9]*See Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 27-28 (Dec. 5, 1997); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 18-19 (Nov. 6, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

[10]*See In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 28-29 (Dec. 5 1997); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 19-20 (Nov. 6, 1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re*

Sixth, Complainant contends that the Chief ALJ erred by concluding that the promissory note entered into between Made In Nature, Inc., and Respondent constituted full compliance with the PACA by the time of the hearing in this proceeding. (Complainant's Appeal at 17-24.)

I disagree with Complainant's contention that Respondent was not in full compliance with the payment provisions of the PACA by the date of the hearing. A compliance investigation conducted in February 1996 revealed that Respondent had unpaid and past due produce debt with respect to only one supplier, Made In Nature, Inc., which totaled $206,000. All other suppliers had been fully paid. (CX 119.) On March 13, 1996, Made In Nature, Inc., lent Respondent $235,385.29 and, in exchange, took back a secured promissory note (RX 10). Of the amount loaned by Made In Nature, Inc., to Respondent, $200,000 was in cancellation of the produce debt Respondent owed Made In Nature, Inc., and the $35,000 balance was made available to Respondent for its other costs and expenses unrelated to its produce debt (Tr. Volume I at 192).

Generally, a note given by a debtor for an existing debt does not extinguish the debt in the absence of an agreement to that effect and the debtor-maker bears the burden of proving that the parties intended that the note extinguish the underlying debt.[11] Respondent has met its burden of proof. The

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Full Sail Produce, Inc., 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

[11] *See, e.g., The Emily Souder*, 84 U.S. (17 Wall.) 666, 670 (1873) (stating that the general commercial law of the world is that a promise to pay, whether in the form of notes or bills, is not itself payment in the absence of express agreement or local usage); *The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 561 (1866) (stating that established rule in this court is that a bill of exchange or promissory note given for a precedent debt does not extinguish the debt or operate as payment of the debt unless such was the express agreement of the parties); *The Kimball*, 70 U.S. (3 Wall.) 37, 45 (1865) (stating that by the general commercial law, in England and the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties); *Downey v. Hicks*, 55 U.S. (14 How.) 240, 249 (1852) (stating that a note of the debtor himself, or of a third party, is never considered as payment of a precedent debt, unless there is a special agreement to that effect); *Lyman v. Bank of the United States*, 53 U.S. (12 How.) 225, 243 (1851) (stating that acceptance of a note does not necessarily operate as satisfaction of a debt and whether or not there was an agreement at the time to receive the notes in satisfaction of the debt or whether the circumstances attending the transaction warranted an inference that the notes were received in satisfaction of the debt were questions for the jury); *Bank of the United States v. Daniel*, 37 U.S. (12 Pet.) 32, 57 (1838) (stating that it is generally true that giving a note for a preexisting debt does not discharge the original cause of action, unless it is agreed that the note shall be taken in payment); *Peter v. Beverly*, 35 U.S. (10 Pet.) 532, 567-68 (1836) (stating that it is a well settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt unless it is expressly agreed that it is received as payment); *Sheehy v. Mandeville & Jamesson*, 10 U.S. (6 Cranch) 253, 264 (1810) (stating that the principle is well settled that a note, without special contract, would not, of itself, discharge the

original cause of action, but if, by express agreement, the note is received as payment, it satisfies the contract); *United States v. Nill*, 518 F.2d 793, 798 (5th Cir. 1975) (holding that if there is an express agreement by a creditor to receive a note as absolute payment, it will be held to be an extinguishment or payment of the precedent debt); *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1086 (2d Cir. 1970) (stating that under the common law of Connecticut, the mere giving of a note does not constitute payment unless it is agreed that the note should be received as payment and the burden is on the defendant maker to establish that the parties intended the note as payment; the adoption of the Uniform Commercial Code by Connecticut does not appear to have changed the rule on the presumed intention of the parties except where a bank is the drawer, maker, or acceptor), *cert. denied*, 400 U.S. 1021 (1971); *Holcombe v. Solinger & Sons Co.*, 238 F.2d 495, 500 (5th Cir. 1956) (stating that the taking of a bill of exchange or promissory note for a debt will operate as payment if so intended); *Anthony P. Miller, Inc. v. Commissioner*, 164 F.2d 268, 269 (3d Cir. 1947) (stating that the legal rule is well recognized that the giving and acceptance of a negotiable instrument is conditional payment of the debt, but, if the parties agree, the acceptance of the negotiable paper will discharge the original debt altogether), *cert. denied*, 333 U.S. 861 (1948); *Taylor v. Tulsa Tribune Co.*, 136 F.2d 981, 983 (10th Cir. 1943) (stating that unless the parties intend otherwise, the taking of a note for a preexisting debt does not constitute payment or satisfaction of the debt, but the giving of a note with the intention or understanding that it is in payment extinguishes the original debt); *Union Cent. Life Ins., Co. v. Matthew*, 32 F.2d 97, 98-99 (9th Cir.) (holding that the taking of a note of the debtor is not payment, unless there is an agreement, express or implied, to take the note as payment and the burden of proving such agreement is on the debtor), *cert. denied*, 280 U.S. 528 (1929); *People's Nat. Bank of Hot Springs v. Moore*, 25 F.2d 599, 601 (8th Cir. 1928) (stating that the acceptance from a debtor of a bill of exchange, promissory note, or other promise to pay is not payment of the debt, unless there is an express agreement that it is received as payment, or unless there is clear and satisfactory proof of the intention that it is so received); *Union Electric Steel Co. v. Imperial Bank of Canada*, 286 F. 857, 861 (3d Cir. 1923) (stating that the general rule in the United States and in England is that the taking of a note for a preexisting debt is not payment unless there is an agreement, express or implied, to take the note as such); *Stewart v. Laberee*, 185 F. 471, 473 (9th Cir. 1911) (stating that, in the absence of an agreement between the parties that notes are received as payment of a debt, the common law rule prevails in nearly all states and is adopted in the federal courts that the original demand is not paid or extinguished by the note); *Beall v. Hudson County Water Co.*, 185 F. 179, 181 (C.C.D. N.J. 1911) (stating that the following are deemed to be settled law: (1) the acceptance of a promissory note from a debtor for a preexisting debt will not operate as a discharge or satisfaction of the debt, unless it is agreed that such shall be its effect; (2) a promissory note, as its name implies, is but a promise to pay, and, ordinarily, is no payment if it is not itself paid; (3) a promissory note may amount to payment if the creditor so intended, but such intention is not to be resolved against the creditor except by clear and convincing evidence; (4) the burden of proof is on the person who claims the benefit of the discharge); *Atlas S.S. Co., Ltd. v. Colombian Land Co.*, 102 F. 358, 359 (2d Cir. 1900) (stating that it has long been the settled rule in New York that taking a note, either of the debtor or of a third person, for a preexisting debt, is no payment, unless it be expressly agreed to take the note as payment); *The Frolic*, 20 Cas. 826 (C.C.D. La. 1870) (No. 11,856) (stating that in general, unless otherwise specifically agreed, the taking of a promissory note for a preexisting debt is treated as conditional payment only, but in some states, unless otherwise agreed, the taking of a promissory note is an absolute payment of the preexisting debt; in each case the rule is founded on a mere presumption of the supposed intention of the parties and is open to explanation and rebutter by establishing by proper proofs what the real intention of the parties was and this may be established not only by express words but by reasonable implication from the attendant circumstances); *Baker v. Draper*, 2 Cas. 458, 459 (C.C.D. Mass. 1860) (No. 766) (stating that at common law a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was

record establishes that Respondent and Made In Nature, Inc., intended that the promissory note executed by Respondent extinguish the debt for the produce purchased by Respondent from Made In Nature, Inc. Mr. Prolman, president of Made In Nature, Inc., specifically addressed the promissory note (RX 10) and Respondent's debt for produce, as follows:

BY MR. KEATON:

Q. Mr. Prolman, what do you recognize that document [referring to the promissory note (RX 10)] to be?

[BY MR. PROLMAN:]

A. That is a promissory note.

Q. Is that a document that you had a chance to be part of?

A. Yes.

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the intention of the parties at the time it was given); *Sutton v. The Albatross*, 23 Cas. 465, 467 (Case No. 13,645) (C.C.E.D. Pa. 1852) (stating that taking the note of hand of the debtor is not per se legal satisfaction, unless there is evidence that the parties intended it should operate as such); *Allen v. King*, 1 Cas. 483, 484 (C.C.D. Mich. 1846) (No. 226) (stating that where a bill has been received it is not a discharge of a preexisting debt, unless there is an agreement to that effect); *Gallagher v. Roberts*, 9 Cas. 1089, 1090 (C.C.D. Pa. 1808) (No. 5,195) (holding that a bill of exchange is not, in general, to be considered satisfaction of a precedent debt, unless it is paid and accepted as such); *Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872, 1873 (1991) (citing with favor a letter to respondent in which the United States Department of Agriculture stated that under the law, a note given by a debtor for an existing debt does not extinguish the debt in the absence of any agreement to that effect, but is considered to be a conditional payment of the amount due); *Federal Fruit & Produce Co. v. Sandy's Produce*, 24 Agric. Dec. 1121, 1123-24 (1965) (citing *American Jurisprudence* for the general rule that a note given by a debtor for a precedent debt will not be held to extinguish the debt, in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security or as an acknowledgement or memorandum of the amount ascertained to be due); *Cadenasso v. California-Mexico Distrib. Co.*, 2 Agric. Dec. 751, 753 (1943) (stating that with the exception of four states, it is generally held in the United States that a note given by a debtor to his creditor does not extinguish the debt in the absence of an express agreement to that effect; in the four excepted states (Indiana, Maine, Massachusetts, and Vermont) it is held that the giving of the note extinguishes the debt unless the contrary is agreed upon); 15 Samuel Williston & Walter H. E. Jaeger, *A Treatise on the Law of Contracts* § 1875A (3d ed. 1972) (stating that a negotiable bill or note is so far recognized as a specialty that one who is indebted by simple contract may merge and discharge the debt by his own negotiable instrument for the amount of the debt when the instrument is given and received as full satisfaction and whether it is so received depends upon the expressed intention of the parties).

Q. And in what capacity were you a party to that transaction?

A. I authorized it. I initiated it.

Q. Give us essentially what that document does. Is that really in essence to lend a set sum of money to this company, to Respondent?

A. That's exactly what it is. It's like a two part arrangement.

Q. When you say a two part arrangement, the one part being what and the second part being what?

A. Okay. The first part is that Made In Nature wanted to loan money to Goodness Greeness, to help them along with their development because they are doing very well as a company and have been for some time now. So the first part was to provide a loan.

The second part was so that they could pay for the invoices and they actually did that which paid all of our invoices, so at this point, all Goodness Greeness invoices are off our books. We're not carrying that any longer on our books. And any obligations they have are completely paid.

Q. Everybody has been referring to this [as a] conversion of a receivable, and there wasn't really any conversion. There was really just a severing of one obligation and a creation of a brand new obligation, is that right?

A. Correct.

Q. Now, you mentioned after this transaction, what is the account balance? The minute he signed that [referring to the promissory note (RX 10)], what was the account balance the Respondent had with you on those invoices?

A. Zero. They were considered paid. There was no more obligation under any of those invoices and we were completely satisfied.

Q. So there's really no, for lack of a better term, amortization, if you're familiar with that term, there's no re-amortization or re-payment structure,

this was simply a loan and a brand new obligation created, is that right?

A. That's correct.

Q. That's been your understanding of this transaction all along?

A. Yes, and it's exactly what we wanted to do.

. . . .

[BY MS. HART:]

Q. You testified earlier as to the promissory note, that there was a new obligation being created by that note and that it was not a case of re-amortization?

[BY MR. PROLMAN:]

A. You mean that it had nothing to do with the invoices?

Q. Exactly.

A. Yeah, once the invoices were deemed paid, this note is separate to that. This is just a note, a loan to their company, as if they went to a bank and got a loan.

Q. But would you still agree that it's still a debt of the company?

. . . .

THE WITNESS: Okay. I would think that notes are viewed as debts, yes.

. . . .

BY MR. KEATON:

Q. Mr. Prolman, when you mentioned the debt, that this note constitutes a debt of the Respondent to your company, you testified to that, correct?

[BY MR. PROLMAN:]

A. Yes.

Q. That debt, is that now considered produce debt or is that considered, I think you brought up the analogy of a bank loan, is that simply debt or is it produce debt?

A. The produce part was wiped off our books, so we no longer carry that. It has nothing to do with produce anymore. It's just a loan to Goodness Greeness and it's a note, and then there's terms and we carry that on, I forget exactly how it's characterized but it's as a note.

Q. So to your knowledge it's not carried on your books, the books of Made In Nature, any different than, say, if you were starting up a joint venture with another company, and it's just to see if you could try your hand in the organics industry, is that right?

A. Correct. It's in the assets column and it's money that we hope to receive over time.

. . . .

Q. By extending this note to Goodness Greeness and by investing the sum of money you have in the company to allow them, among other things, both operating capital and to use part of the proceeds of that note, to pay off your produce receivables, that note has now taken a back seat to its produce, the Goodness Greeness produce suppliers, is that correct?

A. That's right. We have full knowledge that we gave up all of our rights when we did that.

Q. Do you have any problem with that at all?

A. No, we don't or else I wouldn't have authorized the note.

Q. You went into this transaction with your eyes wide open, regarding I have no doubt in my mind I'm going to be pay [sic] by this company, regardless of the PACA trust?

A. That's correct. And I also communicated that to Miss Hart on the phone.

Q. I'm sorry. What was that?

A. I communicated that to Miss Hart on the phone.

Q. Prior to this hearing today?

A. Yes.

Q. Did she have any reaction to that?

A. She seemed surprised. She couldn't understand why I would be doing that.

. . . .

BY MS. HART:

Q. Mr. Prolman, you testified that you understood that once you loaned the money pursuant to the promissory note and that they took that money to pay off the produce debt and that the produce debt was wiped off of your records, that you understood that you took a back seat to other produce creditors.

[BY MR. PROLMAN:]

A. Correct.

Tr. Volume I at 183-85, 204-05, 211-14, 217.

Further, the promissory note states:

. . . This Note is being delivered to Holder [Made In Nature, Inc.] in satisfaction of accounts receivable held by Holder and otherwise payable by Obligor [Respondent] in a total amount equal to the face amount of this Note; upon delivery of this Note to Holder, such accounts receivable shall be canceled.

RX 10.

The promissory note is governed by, and construed according to the laws of, the State of California (RX 10). California law provides that the parties may agree that a note satisfies an obligation as follows:

§ 3310. Effect of instrument on obligation for which it was taken

. . . .

(b) Unless otherwise agreed . . ., if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken.

Cal. Com. Code § 3310(b) (West Supp. 1998).

Complainant states that in the context of a reparation proceeding Respondent's promissory note, accompanied by the manifest intent that the note satisfy the underlying indebtedness, would operate as payment under the PACA (Complainant's Appeal at 18-20). Further, Complainant states that the "[d]ischarge of an underlying debt by the giving and acceptance of a note (with the manifest intent that the note satisfy the underlying indebtedness) can certainly be accomplished in the disciplinary context." (Complainant's Appeal at 19-20.)

However, Complainant contends that under the circumstances in this case "where there has been a failure of payment, and the consequent institution of a disciplinary action, discharge of the underlying produce debt by any means other than actual payment does not conform to the original contractual obligation . . . and should not be deemed to amount to `payment' in law or in fact." (Complainant's Appeal at 20.)

I agree with Complainant that the goals of reparation proceedings are much different than disciplinary proceedings and that it may be necessary to view the issuance of a promissory note (with the manifest intent that the note satisfy the underlying indebtedness) as payment in accordance with the PACA in a reparation proceeding but not in a disciplinary proceeding. Further, I agree with Complainant that the substitution of one indebtedness (indebtedness for produce) with another indebtedness (a promissory note) should not, in PACA disciplinary cases, constitute payment in accordance with the PACA because, although the debt for produce has been discharged, the debt remains unpaid. However, in at least

three PACA decisions,[12] the Judicial Officer has stated that a note given by a debtor for an existing debt extinguishes the debt if there is an agreement to that effect. While all of these decisions were issued in PACA reparations proceedings, there is no indication in any of these decisions that the holding would not apply in PACA disciplinary proceedings. Further, the definition of *full payment promptly* in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) does not indicate that a promissory note extinguishes produce debt if there is an agreement to that effect for the purposes of a reparation proceeding but not for the purposes of a disciplinary proceeding. In light of the hoary court precedent, the Department's decisions in PACA reparation proceedings, and the definition of *full payment promptly* in section 46.2(aa) of the Regulations, I agree with the Chief ALJ's finding that Respondent paid its produce debt by the time of the hearing in this proceeding and that this case is a "slow-pay" case.[13]

Complainant further contends that the transaction between Made In Nature, Inc., and Respondent was not an "arms [sic] length transaction" and that

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[12]*Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872 (1991); *Federal Fruit & Produce Co. v. Sandy's Produce*, 24 Agric. Dec. 1121 (1965); *Cadenasso v. California-Mexico Distrib. Co.*, 2 Agric. Dec. 751 (1943).

[13]I am changing the Judicial Officer's policy to apply to all PACA disciplinary cases instituted after the date this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first. The new policy is as follows: In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and that respondent fails to file a timely answer to the complaint, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. As discussed in this Decision and Order, *infra*, pp. 54-57, in any "slow-pay" case in which the PACA licensee is shown to have violated the payment provisions of the PACA, a civil penalty will be assessed against the PACA licensee or the license of the PACA licensee will be suspended.

Full compliance requires not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpentino Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), that a respondent have no credit agreements with produce sellers for more than 30 days.

Respondent gained a superior bargaining position over Made In Nature, Inc., after Respondent failed to pay for produce in its possession (Complainant's Appeal at 20-24). Generally, produce sellers are not in an equal bargaining position with produce purchasers who are in possession of the produce seller's perishable agricultural commodities.[14] The burden is therefore on the produce purchaser to show that the agreement that the promissory note extinguishes the debt for produce is the result of an arm's length transaction and not the product of the produce purchaser's superior bargaining position. Respondent has met its burden of proof. Mr. Prolman testified that he initiated the loan and carefully examined Respondent's financial prospects prior to making the loan, as follows:

BY MR. KEATON:

Q. Mr. Prolman, what do you recognize that document [referring to the promissory note (RX 10)] to be?

[BY MR. PROLMAN:]

A. That is a promissory note.

Q. Is that a document that you had a chance to be part of?

A. Yes.

Q. And in what capacity were you a party to that transaction?

A. I authorized it. I initiated it.

. . . .

Q. And probably in the course of that, you've done quite a bit of due diligence as to why you think this company [Respondent] is viable going forward, is that right?

A. Yes, I have, extensively.

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[14] *See In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 122 (1984) (stating that after the buyer has the produce, the parties are no longer dealing on equal terms; the seller can no longer refuse to sell; the buyer is the only one with options, *i.e.*, he can pay, or not pay, as agreed).

Q. In assessing the value of this transaction, as I'm sure you have, what are the factors you've been looking at in terms of putting a value on your decision to buy into this company?

A. Many factors. One, the character of the operators. I have full confidence in them, I trust them and they're very hard working. Number two, it's a viable concept and although they had a difficulty in the past, as all start-up businesses do, they corrected it and it's a profitable operation. And we're very clear that it's got a great future to itself and we would like to be a part of that. In fact, we're trying hard to be a part of that. In fact, it's critical that we are connected because we rely on Goodness Greeness to move our merchandise. We'd be stuck if they didn't.

Q. In your opinion is the Respondent strategically positioned within the small segment of the industry to seize upon opportunities going forward?

A. I'm sorry. I didn't understand the question.

Q. Is the Respondent at this time in a very good position to seize opportunities with this market expanding in the future?

A. Oh, he's in the best situation to do that. He dominates the Chicago or Midwestern area completely. There was another mention that there might be other companies to serve the needs. There is none other. Actually there were some but they went out of business and stuck us and didn't pay us. There is nobody else here, and they provide a very, very important function to us in going to Jewel's and Dominick's and Treasure Island and all the health food stores that are in the area.

Tr. Volume I at 183, 186-88.

Further, Mr. Prolman testified that he had a senior vice president of Dole Fruit Company analyze Respondent's books before making the loan to Respondent, as follows:

BY MR. KEATON:

Q. Lastly, you mentioned, Miss Hart touched on it a little bit, but you mentioned there was a senior vice president that analyzed the books of this company, is that right?

[BY MR. PROLMAN:]

A. Yes.

Q. The senior vice president, what was he the senior vice president of, what company was that?

A. Made In Nature, Inc.

Q. At that time did that have any connection with Dole Fruit Company?

A. Yes.

Q. To your knowledge has Dole Fruit Company ever employed people that don't know what they're doing basically?

A. This senior vice president used to head up worldwide operations, all the pineapple operations for Dole Fruit Company around the world. He's a senior executive in the company.

Q. So there's no doubt in your mind that his findings and his conclusions and his beliefs based on his review of the documents is enough to support your opinion today?

A. I can tell you that he put his career on the line for those statements and that he believed in them.

Tr. Volume I at 216-17.

Further still, the promissory note, the collateral pledge and security agreement, and the guaranty (RX 10) all indicate that the loan and promissory note were the result of an arm's length transaction and not the product of Respondent's superior bargaining position over Made In Nature, Inc. Under these circumstances, I find that Respondent has proven that the agreement, in which the promissory note (RX 10) operates to extinguish the debt Respondent owed to Made In Nature, Inc., was the result of an arm's length transaction between Respondent and Made In Nature, Inc., and was not the product of Respondent's superior bargaining position over Made In Nature, Inc.

However, I agree with Complainant that a promissory note may, by agreement

of the parties, extinguish debt, but the debt should be viewed for the purposes of PACA disciplinary proceedings as unpaid. Therefore, I am adopting the following policy: In all PACA disciplinary cases for failure to pay in accordance with the PACA, payment of antecedent debt for perishable agricultural commodities with a promissory note executed after this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first, will not constitute payment in accordance with section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)), even if a respondent can show that the parties agreed that the promissory note would extinguish the debt and constitute payment and the agreement to accept the promissory note as payment was an arm's length transaction and not the product of a respondent's superior bargaining position.[15]

Seventh, Complainant contends that the Chief ALJ's assessment of a civil penalty is not consistent with the intent of Congress. (Complainant's Appeal at 24-31.) Specifically, Complainant contends: (1) that "a civil penalty as a sanction is not intended to be the primary or the sole sanction alternative available to the Secretary to address violations of the PACA" (Complainant's Appeal at 25); (2) that "[t]he civil penalty alternative is not intended to be utilized as a lesser form of sanction" (Complainant's Appeal at 25); (3) that revocation and suspension of a PACA license are not "excessive" sanctions (Complainant's Appeal at 25); (4) that a "civil penalty should be considered most especially where a violator has not engaged in a pattern of violation of the PACA over years but when the violation is of an isolated kind" (Complainant's Appeal at 30); and (5) that "[t]he sanction set by the [Chief ALJ] is not consistent with the gravity of Respondent's continued violations of the PACA, its years of failure to pay and of robbing produce sellers to pay past due produce debt, and should not be upheld" (Complainant's Appeal at 30-31).

As an initial matter, Complainant does not cite and I cannot locate any place in the Initial Decision and Order in which the Chief ALJ states that a civil penalty is intended to be the primary or the sole sanction alternative available to the Secretary to address violations of the PACA or that the civil penalty alternative is intended to be utilized as some form of minimum or lesser sanction. Moreover,

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[15]Complainant states that "'payment' normally has the connotation of payment in legal tender" and that "[d]ischarge of an underlying debt by the giving and acceptance of a note (with the manifest intent that the note satisfy the underlying indebtedness) can certainly be accomplished in the disciplinary context." (Complainant's Appeal at 19-20.) The Agricultural Marketing Service may wish to consider instituting a rulemaking proceeding to amend the definition of *full payment promptly* in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) to identify those circumstances in which payment in legal tender is required and those circumstances in which giving and accepting a promissory note, with the manifest intent that the note satisfy the underlying indebtedness, constitutes payment.

while the Chief ALJ states that the House Subcommittee on Risk Management and Specialty Crops of the House Committee on Agriculture considered a bill that would have repealed the PACA as excessive (Initial Decision and Order at 10) and states that an important segment of the produce industry sought repeal of the PACA for excessiveness in its administration (Initial Decision and Order at 14), the Chief ALJ does not state in the Initial Decision and Order that revocation and suspension of a PACA violator's license are excessive sanctions.

I agree with Complainant's contention that a civil penalty should be considered in circumstances in which a PACA violator has not engaged in a pattern of violations of the PACA over years. I also agree with Complainant that, during the period April 1993 through June 1994, Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 35 sellers of the agreed purchase prices in the total amount of $634,791.13 for 165 transactions involving perishable agricultural commodities, which Respondent purchased and accepted in interstate commerce. Further, while Respondent reduced the debt it owed to produce sellers during the period between June 1994 and March 13, 1996, Respondent incurred substantial roll-over debt during that time, which was not paid in accordance with the PACA. Specifically, a compliance investigation conducted in August 1995, revealed that Respondent had paid approximately $602,000 of the $634,791.13 produce debt identified in the Complaint, but had incurred roll-over debt of $245,761.36 for 75 lots of produce received by Respondent from seven produce sellers during the period November 1994 through August 1995 (CX 83; Tr. Volume I at 5, 19). A December 1995 compliance investigation revealed that Respondent had paid the remaining produce debt identified in the Complaint, had paid approximately $82,000 of the $245,761.36 of roll-over debt found during the August 1995 compliance investigation, but had incurred new roll-over debt of $49,528.55 for produce received by Respondent from four produce sellers during the period August 1995 through December 1995 (CX 91-98, 102-105; Tr. Volume I at 20). A compliance investigation conducted on February 26, 1996, revealed that Respondent owed $206,745.54 for 31 lots of produce purchased from one produce supplier, Made In Nature, Inc., during the period December 1994 through February 1996 (CX 109-119; Tr. Volume I at 21-22). Respondent did not pay the last of the roll-over debt and achieve compliance with the payment provisions of the PACA until March 13, 1996, when it gave Made In Nature, Inc., a promissory note (RX 10) which, as agreed by Made In Nature, Inc., and Respondent,

extinguished the debt Respondent owed to Made In Nature, Inc., for produce.[16]

However, I find that in "slow-pay" cases the imposition of a civil penalty in lieu of a suspension or license revocation should be considered. Neither section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995] nor the legislative history applicable to PACAA-1995 limits the Secretary's authority to impose a civil penalty for violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in lieu of a license revocation or suspension. Further, Mr. Lon Hatamiya, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, the agency which administers the PACA, testified, during a hearing conducted on 1995 legislation to amend the PACA, that it would often be in the public interest to impose a monetary penalty and allow a PACA violator to remain in business.[17] Mr. Hatamiya also submitted a written statement, made part of the record of the legislative hearing, in which he states that the sanctions of suspension or revocation of a PACA license are, at times, appropriate sanctions for egregious violations of the PACA, but that in other instances the public interest could better be served by imposing a monetary penalty rather than forcing the PACA violator out of business.[18]

It is my view that the imposition of a civil penalty in a "slow-pay" case would not only be a strong inducement to PACA violators to pay produce suppliers and attain full compliance with the payment requirements of the PACA, but also would serve as a significant deterrent to future violations by the PACA violator and others. Therefore, I am changing the policy of the Judicial Officer, and in any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but that the respondent is in full compliance

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[16]As discussed in this Decision and Order, *supra*, pp. 50-51, in all PACA disciplinary cases for failure to pay in accordance with the PACA, payment of antecedent debt for perishable agricultural commodities with a promissory note executed after this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first, will not constitute payment in accordance with section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)), even if a respondent can show that the parties agreed that the promissory note would extinguish the debt and constitute payment and the agreement to accept the promissory note as payment was an arm's length transaction and not the product of a respondent's superior bargaining position.

[17]*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 12, 34.)

[18]*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 106.)

with the PACA by the date of the hearing[19] (a "slow-pay" case), a civil penalty *may* be imposed. Full compliance requires not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpentino Bros., Inc., supra*, that a respondent have no credit agreements with produce sellers for more than 30 days. The factors to be considered when deciding whether to impose a civil penalty or a license suspension in a "slow-pay" case include: (1) the length of time during which a respondent was in violation of the payment requirements of the PACA; (2) the number of a respondent's violations and the dollar amounts involved; (3) the roll-over debt, if any, incurred by the PACA violator; (4) the time that it takes the PACA violator to achieve compliance with the PACA; (5) the impact of the violations on the industry as a whole; and (6) whether the PACA violator's financial condition is such that an appropriate civil penalty, large enough to be an effective deterrent to future violations of the PACA, would not substantially increase the risk that the PACA violator's future produce sellers may not be paid in accordance with the PACA.[20]

PACA disciplinary sanctions for failure to pay in accordance with the PACA are not punitive in nature. The PACA violator who has failed to pay in accordance with the PACA has done nothing worthy of punishment or even

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[19]See note 13 for the "slow-pay"/"no-pay" policy applicable to PACA disciplinary cases instituted after the date this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first.

[20]In *In re Ruma Fruit & Produce, Co.*, 55 Agric. Dec. 642 (1996), the complainant took the position that if a civil penalty were to receive any consideration, the record should be reopened to provide for a thorough analysis of respondent's financial circumstances and only if respondent is financially stable should the imposition of a civil penalty be considered. I found complainant's position perplexing because the new civil penalty authority requires neither analysis of financial circumstances nor a finding that a respondent is financially stable prior to the assessment of a civil penalty in lieu of a suspension or revocation. However, I have come to the view that a PACA violator's financial condition may be considered when determining whether to impose a civil penalty in lieu of a license revocation or suspension. A respondent's financial condition should be strong enough so that the imposition of a civil penalty, in an amount that would operate as an effective deterrent to future violations of the PACA and would be appropriate under the circumstances of the case, would not substantially increase the risk that the PACA violator's future produce sellers would not be paid in accordance with the PACA. (The burden of proof is on a respondent who seeks a civil penalty in lieu of a license suspension to show that the respondent's financial condition is such that the imposition of a civil penalty would not substantially increase the risk that future produce sellers would not be paid in accordance with the PACA.) While revocation and suspension of a PACA violator's license may result in the reduction of a PACA violator's ability, or the PACA violator's complete inability, to pay persons to whom the violator owes money for produce at the time of the revocation or suspension, a revocation eliminates the possibility of a PACA violator purchasing more perishable agricultural commodities and failing to pay future produce sellers and a suspension eliminates the possibility of a PACA violator purchasing more perishable agricultural commodities and failing to pay future produce sellers during the period of suspension.

remotely resembling a crime. The failure to pay in accordance with the PACA is *malum prohibitum*, not *malum in se*. There is nothing inherently evil in being unable to pay one's produce sellers promptly.

Therefore, if, in a "slow-pay" case, a PACA violator's financial condition is strong enough so that the imposition of a civil penalty (in an amount that would operate as an effective deterrent to future violations of the PACA and would be appropriate under the circumstances of the case) would not substantially increase the risk that the PACA violator's future produce sellers would not be paid in accordance with the PACA and would permit a PACA violator to stay in business, a civil penalty, rather than the suspension of the PACA violator's license, should be imposed. License suspension poses a risk that a PACA violator may not pay those who sell produce to the violator between the time of the hearing and the effective date of the sanction; thereby thwarting one of the primary purposes of the PACA. This risk may be reduced if, instead of having its license suspended, a PACA violator in a financially strong condition is assessed a civil penalty. Further, license suspension might pose a greater risk of putting the PACA violator out of business than would an appropriate civil penalty, and the Administrator of the Agriculture Marketing Service, United States Department of Agriculture, issued a written statement in connection with legislative hearings which culminated in PACAA-1995 that, at least in some instances, "the public interest could better be served not by forcing the [PACA] violator out of business, but by imposing a monetary penalty instead."[21]

I have also come to the view that a civil penalty would not be an appropriate sanction in a "no-pay" case in which the violations are flagrant or repeated because the PACA violator's failure to get back into compliance with the PACA promptly would indicate that the violator continues to be financially irresponsible and limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA.[22]

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[21] *Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA.) (RX 8 at 106.)

[22] *Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 18 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216, *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 785 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17,

Further, the imposition of a civil penalty in a "no-pay" case would require the PACA violator to pay the civil penalty rather than pay produce sellers to whom the PACA violator owes money and thereby thwart one of the primary purposes of the PACA which is to ensure that commission merchants, dealers, and brokers make full payment for perishable agricultural commodities promptly.[23]

Eighth, Complainant contends that the Chief ALJ erred by failing to consider evidence regarding Respondent's capitalization and financial status in determining whether a civil penalty is an appropriate sanction. (Complainant's Appeal at 31-39.) Specifically, Complainant contends: (1) that the Chief ALJ erred in ruling that Ms. Colson's testimony regarding Respondent's financial condition be stricken due to unfair surprise; (2) that the Chief ALJ erred in concluding that Respondent's financial condition was such that it could pay a civil penalty when that issue had been ruled as irrelevant for purposes of Ms. Colson's testimony and evidence; and (3) that the Chief ALJ erred in according weight to Respondent's unsubstantiated testimony regarding its financial condition when Complainant was prevented from introducing its testimony and evidence on Respondent's financial condition into the record (Complainant's Appeal at 39).

1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). *See also Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

[23] *See In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 19-20 (Dec. 5, 1997) (stating that the appropriate sanction for no-pay cases is license revocation; allowing a respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension when the respondent had failed to pay promptly for large produce purchases over a long period of time with substantial produce debt still owing would defeat the purposes of the PACA, would not protect produce sellers, and would not serve as a sufficient deterrent to others); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (stating that the appropriate sanction for no-pay cases is license revocation; allowing a respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension when the respondent had failed to pay promptly for large produce purchases over a long period of time with substantial produce debt still owing would defeat the purposes of the PACA, would not protect produce sellers, and would not serve as a sufficient deterrent to others), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997).

The record reveals that Respondent objected to, and the Chief ALJ excluded, evidence (testimony given by Ms. Colson, an auditor with the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, and CX 121 and 122) concerning Respondent's financial capitalization and financial status, based on surprise (Tr. Volume I at 89-97). However, Complainant filed Index to Compliance Investigation Exhibits and Potential Witness List on March 7, 1996, in which Complainant states that Complainant intends to call the following witnesses:

> Agency representative
> Auditor
> United States Department of Agriculture
> Agricultural Marketing Service
> Fruit and Vegetable Division
> PACA Branch
> Trade Practices Section
> Washington, D.C.
>
> -The designated agency representative is expected to testify as to analysis performed on [R]espondent's financial documents obtained during the three compliance investigations which reflect the financial stability of the [R]espondent

Index to Compliance Investigation Exhibits and Potential Witness List at 2.

Based on Complainant's March 7, 1996, filing, I find that Respondent had ample notice that Complainant would introduce evidence concerning Respondent's financial condition and the Chief ALJ's exclusion of Ms. Colson's testimony and CX 121 and CX 122, based on surprise, was error.

Complainant further contends that the Chief ALJ erred by basing his conclusion that Respondent can pay a $30,000 civil penalty on testimony provided by Ms. Moran and Mr. Robert Scaman because their testimony is "tainted by their obvious self-interest and the fact that neither witness produced one piece of documentary evidence to substantiate their bare allegations." (Complainant's Appeal at 39.) I infer that the Chief ALJ found Ms. Moran and Mr. Robert Scaman to be credible witnesses who are knowledgeable of the financial condition of Respondent. The record does not reveal otherwise, and I do not find that the Chief ALJ erred by basing his conclusion that Respondent can pay a $30,000 civil penalty on testimony given by Ms. Moran and Mr. Robert Scaman.

I reviewed the testimony given by Ms. Colson, CX 121, and CX 122 carefully and weighed this evidence against the evidence presented by Respondent

regarding Respondent's financial condition. While the issue is a close one, I find that Respondent has met its burden of proving that its financial condition is such that the imposition of a civil penalty, appropriate under the circumstances in this case and large enough to deter Respondent and others from future violations of the PACA, will not substantially increase the risk that Respondent's future produce sellers will not be paid in accordance with the PACA.

Ninth, Complainant contends that the Chief ALJ "erred in according no deference at all to the [a]gency's sanction recommendation." (Complainant's Appeal at 39.)

This case is governed by the Department's sanction policy in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides:

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

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

Moreover, since 1971, the Department has followed the policy of permitting, and in most types of cases encouraging, the complainant and the respondent to introduce evidence at administrative disciplinary proceedings to aid the administrative law judge and the judicial officer in determining what sanction to impose in the event that it is found that a violation occurred.[24]

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[24] *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. 42 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re R.H. Produce, Inc.*, 43 Agric. Dec. 511, 527-29 (1984); *In re Larry W. Peterman*, 42 Agric. Dec. 1848, 1850 (1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985); *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930, 1944 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 n.3 (1982); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1950 n.9 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 416 (1980); *In re Samuel Esposito*, 38 Agric. Dec. 613, 656-63 (1979); *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 177 n.6 (1978);

The recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[25] The Chief ALJ does not indicate that he gave "no deference at all to the [a]gency's sanction recommendation" as Complainant contends. Instead, the Chief ALJ states that he rejects Complainant's sanction recommendation and sets forth his reasons for his rejection of Complainant's sanction recommendation. I do not find, as Complainant contends, that the Chief ALJ gave no deference at all to the agency's sanction recommendation.

Ms. Clare Jervis, marketing specialist, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, testified that the Department recommended a 90-day suspension of Respondent's PACA license (Tr. Volume I at 107). While appropriate factors were taken into account in arriving at this recommendation, including the number of violations, the dollar amount of the violations, the period of time of the violations, the length of time it took Respondent to pay the produce debt identified in the Complaint, the results of the August 1995, December 1995, and February 1996 compliance investigations, and Respondent's improved payment practices (Tr. Volume I at 108), I am rejecting the agency's sanction recommendation in this case. Complainant has consistently taken the position that the promissory note issued by Respondent on March 13, 1996, to Made In Nature, Inc. (RX 10), does not constitute payment and that this case is a "no-pay" case (Complainant's Supplemental Brief at 4-5; Complainant's Appeal at 17-24). Despite this position (with which I disagree for the reasons set forth in this Decision and Order, *supra*, pp. 36-50), Complainant recommends a 90-day suspension of Respondent's PACA license. A suspension of a PACA violator's license in a "no-pay" case is contrary to long-standing Department policy which has been to revoke a PACA violator's license in a "no-pay" case. Had I agreed with Complainant's position that this is a "no-pay" case, I would have revoked Respondent's license.

In re Eric Loretz, 36 Agric. Dec. 1087, 1096 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1854-55 (1975); *In re J.A. Speight*, 33 Agric. Dec. 280, 310-13 (1974); *In re Professional Commodity Serv.*, 32 Agric. Dec. 585, 586-91 (remand order), *second remand order*, 32 Agric. Dec. 592 (1973), *final decision*, 33 Agric. Dec. 14 (1974); *In re George Rex Andrews*, 32 Agric. Dec. 553, 579 (1973); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 505 n.20, *reconsideration denied*, 31 Agric. Dec. 843, 847-50 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 n.39 (1971).

[25]*In re Allred's Produce*, 56 Agric. Dec. ___, slip op. 43 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

I disagree with Complainant's position that Respondent was not in compliance with the PACA by the date of the hearing and find that, under the circumstances of this "slow-pay" case (which are set forth in this Decision and Order, *supra*, pp. 52-53), a civil penalty is warranted. Complainant has, at least in part, based its recommendation that Respondent's PACA license be suspended for 90 days on Complainant's view that Respondent was not in compliance with the PACA at the date of the hearing (Tr. Volume I at 112-15). Therefore, I reject the agency's recommendation, and I am assessing Respondent an $82,500 civil penalty.

Tenth, Complainant contends that the Chief ALJ erred by failing to provide any basis for the $30,000 civil penalty (Complainant's Appeal at 43-44.) However, the Chief ALJ states in the Initial Decision and Order that he considered the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, as required by section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. I 1995)) (Initial Decision and Order at 16). I do not find that the Chief ALJ's failure to more fully explain the amount of the civil penalty he imposed to be error. However, I do find that the amount of the civil penalty imposed by the Chief ALJ to be far too low in light of the seriousness, nature, and amount of Respondent's violations.

Complainant and Respondent stipulated that Respondent violated the PACA by failing to make full and prompt payment in the amount of $634,791.13 to 35 sellers for 165 lots of perishable agricultural commodities purchased in interstate commerce during the period April 1993 through June 1994, as set forth in paragraph III of the Complaint.

Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. I 1995)) provides that the Secretary may assess a civil penalty of $2,000 for each violative transaction or each day the violation continues. Respondent engaged in 165 violative transactions and Respondent could be assessed a maximum civil penalty of $2,000 for each of these violative transactions, for a total civil penalty of $330,000.

Respondent's willful, flagrant, and repeated violations of the payment provisions of the PACA are serious, and they thwart one of the primary purposes of the PACA, *viz.*, the prompt payment of produce sellers. Respondent has 24 employees, and I find, based on Respondent's gross sales of approximately $6,750,000 during Respondent's fiscal year ending February 1996, that Respondent is a medium-sized business.

Based upon the seriousness, nature, and amount of Respondent's violations, the number of Respondent's employees, and the size of Respondent's business, I have assessed a civil penalty of $500 for each of Respondent's violative transactions. I believe that the circumstances of this case warrants the imposition of an $82,500 civil penalty against Respondent and that this civil penalty will serve as a

significant deterrent to future violations by Respondent and others.

The civil penalty must be paid within 90 days after the date that this Decision and Order is served on Respondent. If Respondent fails to pay the civil penalty within 90 days after service of this Decision and Order on Respondent, a 50-day[26] suspension of Respondent's PACA license shall take effect beginning 91 days after service of this Order on Respondent.

Respondent does not appeal the Initial Decision and Order and contends that the "Chief ALJ . . . was entirely correct in imposing a civil penalty of $30,000.00 in this case." (Respondent's Response at 32.) However, for the purpose of preserving the issue for appeal, Respondent restates its contention that Complainant's Appeal was filed after the Initial Decision and Order became final; therefore, the Judicial Officer has no jurisdiction to hear Complainant's Appeal (Respondent's Response at 3-4).

While I agree with Respondent that I have no jurisdiction to hear an appeal filed after an initial decision and order becomes final,[27] I disagree with

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[26]Ms. Clare Jervis, marketing specialist for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, testified that the Department recommends a 90-day suspension of Respondent's PACA license (Tr. Volume I at 107). However, Complainant has, at least in part, based its recommendation that Respondent's PACA license be suspended for 90 days on Complainant's view that Respondent was not in compliance with the PACA by the date of the hearing (Tr. Volume I at 112-15). As discussed in this Decision and Order, *supra*, pp. 36-50, I disagree with Complainant's view that Respondent was not in compliance with the PACA by the date of the hearing. Therefore, I reject the agency's recommendation, and I am imposing a 50-day suspension of Respondent's PACA license to take effect only if Respondent does not pay the civil penalty in accordance with this Decision and Order.

[27]*See In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final);

Respondent's contention that Complainant's Appeal was filed after the Initial Decision and Order became final. The reasons for my conclusion that Complainant's Appeal was timely filed are fully set forth in *In re Scamcorp, Inc.*, 57 Agric. Dec. ___ (Sept. 18, 1996) (Ruling on Respondent's Motion to Dismiss Appeal), and *In re Scamcorp, Inc.*, 55 Agric. Dec. 1395 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal), and no purpose would be served by reiterating those reasons in this Decision and Order.

For the foregoing reasons, the following Order should be issued.

Order

Respondent is assessed a civil penalty of $82,500 which shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and forwarded to, and received by, James Frazier, U.S. Department of Agriculture, Agricultural Marketing Service, Fruit & Vegetable Div., PACA Branch, 1400 Independence Ave., S.W., Room 2095-South Building, Washington, DC 20250-0242, within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-95-0502. In the event the PACA Branch does not receive a certified check or money order in accordance with this Order, a 50-day suspension of Respondent's PACA license shall take effect beginning 91 days after service of this Order on Respondent.

In re Veg-Pro Distributors, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

In re: SCAMCORP, INC., d/b/a GOODNESS GREENESS.
PACA Docket No. D-95-0502.
Ruling on Respondent's Motion for Temporary Stay of Dissemination of Decision filed February 10, 1998.

Kimberly D. Hart, for Complainant.
Michael J. Keaton, Glen Ellyn, IL, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

On January 29, 1998, I issued a Decision and Order in this proceeding: (1) concluding that Scamcorp, Inc., d/b/a Goodness Greeness [hereinafter Respondent], willfully, flagrantly, and repeatedly violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to make full payment promptly to 35 sellers for 165 lots of perishable agricultural commodities purchased in interstate commerce during the period April 1993 through June 1994, with a total amount of $634,791.13 overdue and unpaid on June 13, 1994; (2) assessing Respondent a civil penalty of $82,500 to be paid within 90 days after service of the Decision and Order on Respondent; and (3) providing for a 50-day suspension of Respondent's PACA license, if the $82,500 civil penalty is not paid within 90 days after service of the Decision and Order on Respondent. *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 18, 68 (Jan. 29, 1998).

On February 5, 1998, Respondent filed a motion seeking a stay of any publication or other dissemination of the January 29, 1998, Decision and Order. (Respondent's Request for Temporary Stay of Any Publication or Other Dissemination of Decision on Appeal Pending Expiration of Period for Further Appeal [hereinafter Respondent's Motion for Stay of Dissemination].) On February 6, 1998, the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a response opposing Respondent's Motion for Stay of Dissemination. (Complainant's Response to Respondent's Motion to Judicial Officer for Temporary Stay on Publication or Other Dissemination of the Decision and Order [hereinafter Complainant's Response to Respondent's Motion for Stay of Dissemination].) On February 6, 1998, the case was referred to the Judicial Officer for a ruling on Respondent's Motion for Stay of Dissemination.

The public nature of this proceeding, the requirement that evidence and documents in the proceeding be made available to the public, and the right of those regulated by PACA to be informed of PACA decisions, militate against granting Respondent's Motion for Stay of Dissemination.

United States Department of Agriculture [hereinafter USDA] disciplinary

proceedings instituted under the PACA in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter Rules of Practice] are public proceedings.

Moreover, the January 29, 1998, Decision and Order issued in this proceeding is a final agency decision,[1] and in accordance with the Freedom of Information Act, the decision must be made available to the public, as follows:

> **§ 552. Public information; agency rules, opinions, orders, records, and proceedings**
>
> (a) Each agency shall make available to the public information as follows:
>
> . . . .
>
> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting

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[1]Section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) provides that a party to the proceeding may file a petition to rehear or reargue the proceeding or to reconsider the decision of the judicial officer within 10 days after the date of service of such decision upon the party filing the petition. Nonetheless, section 1.145(i) of the Rules of Practice provides that the decision of the Judicial Officer is a final agency decision, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
>
> (i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

7 C.F.R. § 1.145(i).

> opinions, as well as orders, made in the adjudication of cases;
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> . . . .
>
> unless the materials are promptly published and copies offered for sale. . . . To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion. . . . However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. . . . A final order . . . that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
>
> > (i) it has been indexed and either made available or published as provided by this paragraph; or
> > (ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. § 552(a)(2) (Supp. II 1996).

United States Department of Agriculture regulations implementing 5 U.S.C. § 552(a)(2) require each agency within USDA to make final opinions available for public inspection and copying, unless they are promptly published and copies offered for sale (7 C.F.R. § 1.5(a)(1)).

Even in circumstances where an agency has failed to comply with 5 U.S.C. § 552(a)(2), the agency is required to make final opinions, as well as other agency records covered in 5 U.S.C. § 552(a)(2), available to the public in accordance with 5 U.S.C. § 552(a)(3) (Supp. II 1996),[2] which provides as follows:

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[2]*Irons v. Schuyler*, 465 F.2d 608, 614 (D.C. Cir.) (stating that the opinions and orders referred to in 5 U.S.C. § 552(a)(2), when properly requested, are required to be made available and that such requirement is judicially enforceable under 5 U.S.C. § 552(a)(3) even though the agency has failed to make the opinions and orders available as required by 5 U.S.C. § 552(a)(2)), *cert. denied*, 409 U.S. 1076 (1972); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969) (stating: (1) 5 U.S.C. § 552(a)(3) means that except with respect to records that the agency has made available under 5 U.S.C. § 552(a)(1) and (a)(2) in compliance with the Freedom of Information Act, the agency must make all other identifiable records available (unless exempted by 5 U.S.C. § 552(b)) or face judicial compulsion to do so; (2) if the agency refuses to comply with 5 U.S.C. § 552(a)(1) or (a)(2), it is then subject to suit under the processes spelled

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

. . . .

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Further, while the Freedom of Information Act exempts certain agency records from required release (5 U.S.C § 552(b)(1)-(b)(9)), the January 29, 1998, Decision and Order does not fall within any of the exemptions.

In addition, I agree with Complainant's contention that decisions issued by the Judicial Officer set policy for USDA and that persons regulated under the PACA have the right to be informed of decisions that may affect them. Further, a sanction imposed in a PACA disciplinary proceeding is not only designed to deter future violations by the person against whom the sanction is imposed, but also is designed to deter future violations by other potential PACA violators. Dissemination of a PACA decision issued in a disciplinary proceeding informs persons regulated by the PACA of USDA policies that may affect them and may deter future violations of the PACA.

Respondent contends that a stay of any publication or other dissemination of the January 29, 1998, Decision and Order would avoid a rush to file a petition for reconsideration or a petition for judicial review. However, the time for filing a petition for reconsideration under section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) and for filing a petition for judicial review is not related in any way to the dissemination of a final agency decision to persons other than the parties to the proceeding in which the decision is issued. Instead, a petition for reconsideration must be filed within 10 days after the date of service of the

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out in 5 U.S.C. § 552(a)(3); and (3) the only viable interpretation of 5 U.S.C. § 552(a)(3) is that the judicial process is available to compel the disclosure of agency records not made available under 5 U.S.C. § 552(a)(1) or (a)(2), as well as agency records referred to in 5 U.S.C. § 552(a)(3)).

decision upon the party filing the petition for reconsideration[3] and a petition for judicial review of the decision must be filed with the United States court of appeals wherein venue lies within 60 days after the entry of the decision.[4]

Further, Respondent indicates that a stay of the dissemination of the January 29, 1998, Decision and Order would maintain the status quo and states that a stay of dissemination would avoid irreparable harm to Respondent's business. Although Respondent's business may be affected by the dissemination of the January 29, 1998, Decision and Order, the Decision and Order has the same legal effect on Respondent whether it is disseminated to persons other than Respondent or not.

For the foregoing reasons, Respondent's Motion for Stay of Dissemination of the January 29, 1998, Decision and Order is denied.

In re: ANTHONY A. CAITO, PACA Docket No. APP-97-0002; JOSEPH A. CAITO, SR., PACA Docket No. APP-97-0003; JOSEPH A. CAITO, JR., PACA Docket No. APP-97-0004; THOMAS A. CAITO, PACA Docket No. APP-97-0005; JOSEPH T. KOCOT, PACA Docket No. APP-97-0006; and MAGDALINA M. MASCARI, PACA Docket No. APP-97-0007.
Decisions and Orders filed February 26, 1998.

Responsibly connected.

Each of the Petitioners was determined to be responsibly connected to Caito & Mascari, a company found to have willfully, flagrantly, and repeatedly violated section 2(4) of the PACA by reason of failure to make full payment promptly for produce purchases.

Timothy A. Morris, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioners.
Decisions and Orders issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative proceeding to determine whether or not the Petitioners, Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, Joseph T. Kocot, and Magdalina M. Mascari, were "responsibly

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[3]7 C.F.R. § 1.146(a)(3).

[4]28 U.S.C. § 2344.

connected" with Caito & Mascari, Inc. (hereinafter sometimes referred to as the "Company"), of Indianapolis, Indiana, a firm that was found to have committed willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act ("PACA"). The Respondent determined that the Petitioners were responsibly connected to the Company pursuant to section 1(9) of the PACA during the time the Company was found to have willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The violations of section 2(4) resulted from the Company's failure to make full payment promptly for produce purchases during the period from September 15, 1995, through May 1996, in the total amount of $997,652.91, of which, as of August 8, 1997, $169,869.92 remained unpaid. In addition, the Company failed to make full payment promptly for an additional $116,657.71 for produce purchased after May 1996.

The Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, determined that each of the Petitioners was "responsibly connected" pursuant to section 1(9) of the PACA, as corporate officers and/or shareholders of the Company.

These proceedings were initiated when the head of the PACA Branch's Trade Practices Section, Jane E. Servais, wrote a letter dated November 12, 1996, to each of the six Petitioners stating: (1) that an administrative complaint had been filed against Caito & Mascari, Inc., for failure to pay when due for produce in violation of the Act, and (2) that each Petitioner, along with all other officers, directors, and holders of more than ten percent of the stock in Caito & Mascari, Inc., was determined to be responsibly connected to the Company. In a letter dated December 11, 1996, attorney Stephen P. McCarron, Esquire, stated that he represented all the Petitioners except for Anthony A. Caito. In a letter dated December 17, 1996, Petitioner Anthony A. Caito denied that he was responsibly connected to Caito & Mascari, Inc. In a letter dated January 8, 1997, the five other Petitioners, through counsel, denied they were responsibly connected to Caito & Mascari, Inc. Mr. McCarron also began representing Petitioner Anthony Caito in the time period following Mr. McCarron's letter dated January 8, 1997.

The Chief of the PACA Branch, James R. Frazier, then wrote a letter dated February 14, 1997, to Mr. McCarron for each of the six Petitioners advising that the Complaint filed against Caito & Mascari, Inc., alleged a failure to make full payment promptly to 77 sellers for 295 lots of perishable agricultural commodities totaling $997,652.91. In each letter, Mr. Frazier further informed counsel for Petitioners that the Agency's records indicated that each Petitioner had taken an active role as an officer, director, and/or shareholder in the Company during the

period in which the alleged violations occurred and that each of them was accordingly determined to be responsibly connected.

On March 14, 1997, there were filed Petitions for Review on behalf of each of the six Petitioners. The Agency then filed documents on or about March 28, 1997, that comprised the Agency's record upon which the responsibly connected determination was made by the PACA Branch Chief for each of the Petitioners.

The Petitions were consolidated for a hearing which took place on August 26, 1997, in Indianapolis, Indiana, before Administrative Law Judge Dorothea A. Baker. At the hearing, Petitioners were represented by Stephen P. McCarron, Esquire, McCarron & Associates, Washington, D.C., and Respondent was represented by Timothy A. Morris, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Documents upon which the Chief of the PACA Branch relied in determining that a Petitioner was responsibly connected are identified as the Agency's Records (REC), while additional documents submitted by Respondent in the RC portion of the proceeding are referred to as Respondent's exhibits (AX), and documents submitted by a Petitioner are marked as Petitioner's exhibits (PX).

The disciplinary proceeding against Caito & Mascari, Inc., was conducted immediately prior to the "responsibly connected" proceedings. In 1996, the Uniform Rules of Practice were amended to provide for the joinder of disciplinary actions brought under the provisions of the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*) ("PACA" or "Act") and of hearings on the status of responsibly connected ("RC") individuals under that same statute. At the combined proceeding, the disciplinary and responsibly connected proceedings were heard sequentially but witnesses in the disciplinary portion were allowed to testify as to matters relating to the responsibly connected proceedings where appropriate. There is a single transcript for the disciplinary and for all six responsibly connected proceedings.

The Respondent corporation, Caito & Mascari, Inc., offered no evidence in the disciplinary case and premised upon the undisputed evidence, which had been adduced by the Complainant, a Bench Decision was issued finding that the Respondent corporation had willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act by virtue of its failure to abide by the pay requirement provisions of said Act. Accordingly, in said Bench Decision such findings were made and publication was included in the sanction Order. The Bench Decision became final September 30, 1997, and effective October 14, 1997.

As concerns the responsibly connected proceedings, in due course the parties filed initial briefs on or about October 30, 1997. Each party had until November 17, 1997, within which to file reply briefs. No reply briefs were received.

The Decisions and Orders, issued herein, will address each of the Petitioners' cases separately in the order of the Docket Number, after a review of the applicable statutory provisions. Also, certain Findings of Fact, applicable to each of the six Petitioners, will be set forth.

All Findings of Fact are premised upon a consideration of the evidence of record. All requests, motions and proposals of the parties have been considered. To the extent not adopted herein, they have been considered immaterial or not supported by the record.

DISCUSSION OF STATUTORY PROVISIONS

Under the PACA, it is unlawful for any licensee to employ an individual who has been found to have been responsibly connected with an entity that has been determined to have flagrantly and repeatedly violated the Act. Responsible connection is determined by the status of the individual in the violating entity. The Act provides that if one is an officer, director, partner, or shareholder owning more than 10 percent of the violating entity's stock, one is responsibly connected to that entity. A person who has been determined to be responsibly connected may not be employed by a licensee for one year in any capacity and may be employed in the second year only when the employing licensee puts up a bond in an amount satisfactory to the Secretary.

For many years the officer, director, partner, shareholder definition was the basis for a *per se* determination of responsible connection. In 1975, the Circuit Court of Appeals for the District of Columbia Circuit issued a decision in a review of a responsibly connected determination in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975). In that case, Mr. Quinn, the vice-president of a small Ohio corporation, challenged the responsibly connected determination of the Department on the grounds that he had throughout the time of his employment been a truck driver and produce salesman and that while he was vice-president of the entity found to have violated the PACA, he was only nominally an officer, as he had allowed the president and 100 percent shareholder of the corporation to use his name as a formality of incorporation and he never attended corporate meetings nor exercised any responsibility of a vice-president. In fact, his status as a truck driver and salesman changed in no way after he was named vice-president. The Circuit Court found the determination of responsible connection to be a rebutable presumption. The decision states:

> Undeniably, the Perishable Agricultural Commodities Act was designed to strike at persons in authority who acquiesced in wrongdoing as well as the

> wrongdoers themselves. But by the Secretary's construction of Section 1(9), it also smites one who was not only unaware of the wrongdoing but also powerless to curb it.

Id. at 755 (Footnotes omitted.).

Further case law indicated that the Agency's determination could be rebutted if the person could show that his title was nominal or that the Company was the *alter ego* of another. *Bell v. Department of Agriculture,* 39 F.3d 1199, 1201 (D.C. Cir. 1994). In addition, D.C. Circuit case law indicated there must be some "personal fault or a realistic capacity to counteract or obviate the fault of others" for a finding of responsible connection. *Minotto v. United States Dept. of Agriculture,* 711 F.2d 406, 408 (D.C. Cir. 1983).

After the *Quinn* decision, the Agency provided a process through which individuals could contest the determination of responsibly connected status. A non-APA proceeding was provided in which the allegedly responsibly connected individual (denominated "Petitioner" in the proceeding) challenged the Agency's determination. While some circuits held to the *per se* standard of the definition of "responsible connection" found in the PACA, the D.C. Circuit continued to adhere to the rationale of the *Quinn* decision.

Section 1(9) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a(b)(9), defines the term "responsibly connected." The definition was recently amended by section 12 of the Perishable Agricultural Commodities Act Amendments of 1995 (PACAA), Pub. L. 104-48, 109 Stat. 424, Nov 15, 1995, by adding a second sentence. The definition now reads as follows:

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker, as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this 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.

The amended definition provides that an individual determined to be responsibly connected must be provided an opportunity to show by a preponderance of the evidence that he/she (1) was not actively involved in the

violations of the entity and (2) was only nominally an officer, director, partner, or shareholder or was not an owner of an entity that is the *alter ego* of its owner.

This provision provides two (2) ways for a person to demonstrate that he is not responsibly connected: First, by showing that he was not in fact an officer, director or more than 10 percent shareholder; and second, by showing that even though named an officer, director or 10 percent shareholder, he is not responsibly connected because he was not actively involved in the violations, and the positions were nominal or the corporation was really the *alter ego* of others. The first method of avoiding responsible connection has been part of the Act for many years.

To avoid a responsibly connected finding, a person named as an officer, director or ten percent shareholder must first show that he was not "actively involved in the activities resulting in a violation." The legislative history does not supply any specific aid in interpreting this phrase. However, this part of the definition of "responsibly connected" was based on D.C. Circuit case law, and this case law provides some guidance to the meaning of this phrase. *Bell v. Department of Agriculture, supra.* However, the *Bell* decision is not dispositive of such issues as to whether knowledge alone of the violations is sufficient; whether the alleged responsibly connected person had a realistic capacity to counteract or obviate the violations; and, to what extent is "active" involvement in the activities resulting in the violations required. The Petitioners in the instant proceeding argue that more than some tangential activities, that somehow makes the violation possible, is required.

It must be kept in mind that the amendments changed section 1(9) to provide a person with the opportunity to rebut the presumption of responsible connection so long as the person was not "actively involved in the activities resulting in a violation of this Act," and such amendments must be interpreted consistent with the Court's recognition in *Quinn* that the PACA "was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves." *Quinn,* 510 F.2d at 755.

Consequently, any person meeting the definition of "responsibly connected" in the first sentence of section 1(9) may rebut this determination by demonstrating by a preponderance of the evidence that both requirements of the two-prong test have been satisfied. To satisfy the first prong, a Petitioner must demonstrate that he or she was not actively involved in the activities resulting in a violation of the Act. As the test is stated in the conjunctive "and," a Petitioner failing to satisfy the first prong cannot pass the test and does not even reach the second prong. If a Petitioner satisfies the first prong, however, then he or she also must meet at least one of two alternative requirements necessary to satisfy the second prong of the

test. A Petitioner also must prove that he or she either (1) was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or (2) was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners.

Findings of Fact With Respect to All Six Petitioners

The following Findings of Fact, unless otherwise indicated, are applicable to each of the six Petitioners, and are incorporated by reference in the Decisions issued as to each of the six Petitioners without repetition in each Decision.

1. Caito & Mascari, Inc., is a corporation organized and existing under the laws of the State of Indiana. Its business and mailing address was 1341 West 29th Street, Indianapolis, Indiana 46208. Pursuant to the licensing provisions of the PACA, license number 133842 was issued to Caito & Mascari, Inc., on May 17, 1951. This license terminated on May 17, 1997, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Caito & Mascari, Inc., failed to pay the required annual renewal fee.

2. On January 16, 1997, Caito & Mascari, Inc., filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq.*) in the United States Bankruptcy Court for the Southern District of Indiana. This Petition has been designated Case No. 96-12380-FJO-7.

3. On August 27, 1997, I issued a Bench Decision finding that Caito & Mascari, Inc., had committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and ordered that this finding be published. Specifically, it was found that (1) during the period September, 1995 through May, 1996, Caito & Mascari, Inc., failed to make full payment promptly to 77 sellers of the agreed purchase prices, or balances thereof, in the total amount of $997,652.91 of 295 lots of perishable agricultural commodities purchase, received, and accepted in interstate and foreign commerce; (2) as of August 8, 1997, Caito & Mascari, Inc., still had not paid at least $169,896.92 to 30 of the 77 sellers whose transactions account for $736,359.20 of the total $997,652.91 alleged in the disciplinary complaint filed by the Agency against Caito & Mascari, Inc., on November 7, 1996; and (3) Caito & Mascari, Inc., also failed to make full payment promptly to 6 of these 30 sellers for an additional $116,657.71 in perishable agricultural commodities purchased, received, and accepted after May 1996, and had not paid this amount as of August 8, 1997.

ANTHONY A. CAITO
PACA Docket No. APP-97-0002
Findings of Fact With Respect to Anthony A. Caito

1. Petitioner Anthony A. Caito is an individual whose home address is 310 Woodland East Drive, Greenfield, Indiana 46140. Anthony Caito is the nephew of Petitioners Joseph Caito, Sr., Thomas Caito, and Magdalina Mascari. He is the cousin of Petitioner Joseph Caito, Jr..

2. Petitioner Anthony A. Caito owned 0.31% of Caito & Mascari, Inc.'s stock. (REC-7, pp. 56, 63). He attended Caito & Mascari's annual shareholder's meeting held on March 12, 1995. (REC-2, pp. 1-3, 6).

3. Petitioner Anthony A. Caito started working for Caito & Mascari, Inc., in approximately 1962. Beginning in the late 1970s, he worked as salesman and a buyer for Caito & Mascari, Inc., and was responsible for Florida vegetables and citrus, Texas vegetables, local vegetables, and onions. (Tr. 104, 117). He resigned as a salesman and buyer for Caito & Mascari, Inc., on January 5, 1996. (REC-1, p. 6; REC-6, p. 10; Tr. 102).

4. Anthony A. Caito was vice-president of Caito & Mascari, Inc., from March 12, 1995, to January 4, 1996. (Tr. 102-105). In early 1995, there was a change in ownership of the Company. (Tr. 103). Mark Caito and Anthony N. Caito, cousins of Anthony A. Caito and major shareholders in the Company, sold their interest in the Company to Joseph T. Kocot. (Tr. 103). At a meeting of the Board of Directors of the Company on March 12, 1995, the Board of Directors elected Anthony A. Caito as the vice-president. Prior to the appointment as vice-president Anthony A. Caito was a buyer and a salesman for the Company. After his appointment as vice-president, Petitioner Anthony A. Caito's compensation did not increase even though he had been named as vice-president. Corporate documents confirming that he was vice-president include PACA license records (REC-1, pp. 7, 12, 20, 22); Caito & Mascari Inc.'s bankruptcy pleadings and schedules (REC-6, p. 19) and the Agenda for Caito & Mascari Inc.'s Annual Shareholders Meeting. (REC-2, pp. 1-3, 6). Petitioner resigned as corporate vice-president of Caito & Mascari, Inc., on January 5, 1996. (REC-1, p. 6; REC-6, p. 20; Tr. 102).

5. Anthony A. Caito had check writing authority for both the operations and the payroll accounts of Caito & Mascari, Inc. (Tr. 105). After Mark J. Caito and Anthony N Caito left the Company in January, 1995, he was one of only three persons authorized to sign checks on Caito & Mascari Inc.'s operations and payroll accounts. All checks required at least two signatures. (Tr. 170). Included in Respondent's exhibits are six payroll checks and two checks for PACA License renewal signed by Petitioner Anthony A. Caito. (REC-1, pp. 15, 19; REC-9).

6. Petitioner Anthony A. Caito was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA.

Conclusions
With Respect to Anthony A. Caito

Petitioner Anthony A. Caito was actively involved in the activities resulting in the PACA violations committed by Caito & Mascari, Inc. In order to rebut the presumption of responsible connection, a person must show that he or she "was not actively involved in the activities resulting in a violation 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." The record in this case reveals that Anthony A. Caito was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, he must be considered responsibly connected without consideration of the other factors set forth in section 1(9).

Although the legislative history of the 1995 amendments does not define active involvement, nevertheless guidance on this matter may be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm.

Petitioner Anthony A. Caito's attempts to disclaim responsibility for the activities leading to the violations are simply not persuasive. The record evidence does not support his contentions that he did not exercise any control in the Company nor did he have any power over payments made for produce that he purchased. He admits to being a signatory on the checks destined for the sellers of the products he purchased. However, he argues, that he had no control over whether the checks were mailed to the sellers. Moreover, it is contended that he resigned his position and left the Company on January 4, 1996, prior to "most" of the slow pay violations. Anthony A. Caito admits he was vice-president during the entire violations period, but argue he was a nominal officer and he denies that he participated in the management of the Company or that he had the power to do so. A guide to active involvement requires the examination of whether a Petitioner either had personal fault for the violations or if he failed to counteract or obviate the fault of others for the violations.

Personal fault is not required, although it certainly would be sufficient to establish that a Petitioner was actively involved. Given that Anthony A. Caito performed both acts of commission and omission, he was actively involved in the Caito & Mascari, Inc.'s violations of the Act.

Petitioner Anthony A. Caito's attempts to disclaim responsibilities for the activities leading to the violations are not persuasive. As a produce buyer for

Caito & Mascari, Inc., for twenty years for a wide array of produce, Petitioner Anthony A. Caito was closely involved in the Company's purchasing activities. Not only did he buy the produce, but he also had extensive responsibilities for approving invoices and writing checks on both the Company's operations and payroll accounts. (Tr. 105). His involvement covered the entire spectrum of a produce company's activities: - he bought the produce, he approved the invoices, he had the checks processed, and then he signed the checks. (Tr. 106-108). He was involved from the beginning to the end of the process. Although he claims that he had no role in running the Company, an employee and director of Caito & Mascari, Inc., with an affiliation with the Company exceeding fifty years, testified that in his extensive time with the Company, Caito & Mascari, Inc.'s president, vice-president and treasurer ran the Company as long as he could remember. (Tr. 125). The vice-presidency was never a do nothing position at Caito & Mascari, Inc., throughout its history, and contrary to Petitioner Anthony A. Caito's assertions, it was not when he occupied that position.

Petitioner Anthony A. Caito has failed to satisfy the requirements of the first prong of the test, namely he has not rebutted the presumption of responsible connection inasmuch as the record evidence indicates that he was responsibly connected with Caito & Mascari, Inc., during the time of the violations of the Act. His contentions that he was not actively involved or at fault for the violations; that his role as vice-president was merely nominal; and, that Caito & Mascari, Inc., was the *alter ego* of unnamed others are contentions are not supported by case law or the factual records.

Although the legislative history of the 1995 amendments does not clarify what is meant by the term nominal, nevertheless, recourse is again made to the decisions of the Court of Appeals for the District of Columbia Circuit, particularly *Bell v. Department of Agriculture,* 39 F.3d 1199 (D.C. Cir. 1994), wherein the Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. It was indicated by the Court that a person may show that he was only a nominal officer, director or shareholder by proving that he lacked an actual significant nexus with the violating Company. Where responsibility was not based on the individuals personal fault, it would have to be based on at least his failure to counteract or obviate the fault of others. Thus, personal fault is not required. Considerable evidence was presented during the hearing showing that Anthony A. Caito had a significant nexus with Caito & Mascari, Inc., as he performed important business and policy functions as corporate vice-president.

Petitioner Anthony A. Caito's explanations and description of his roles and functions with the Company are subject to doubt and have been given less than full

credence, particularly with respect to the degree of his participation in the Company's business decisions. At the hearing, he made the claim that he never discussed business with Caito & Mascari, Inc.'s president, secretary or treasurer. (Tr. 119). It is difficult to accept the premise that a man who has worked as a buyer for twenty years and who was responsible for a wide array of produce from key growing regions - Florida vegetables and citrus, Texas vegetables, local vegetables, and onions, never discussed business matters with the Company's president, secretary, or treasurer and/or director. It would be Petitioner's desire to portray a situation where he conducted the volume and type of business that he did with his suppliers without reference to business activities and conditions elsewhere in the corporation. Given the record evidence, this was an unlikely scenario.

The record evidence is sufficient in this case to establish that Petitioner Anthony A. Caito was aware of the Company's financial difficulties. For instance, his produce suppliers had occasionally mentioned to him that they had not been paid for produce purchased by Caito & Mascari, Inc. (Tr. 108). In a letter to the PACA dated December 17, 1996, Petitioner stated unequivocally that during the violations period, checks were being held for payment by the president, which suggests that he knew of the Company's payment problems. (REC-19, p. 1).

As previously mentioned, Petitioner Anthony A. Caito had extensive check writing responsibilities prior to January 1995, and was one of only three persons at Caito & Mascari, Inc., who was authorized to sign checks on both Caito & Mascari, Inc.'s operations and payroll accounts after that date. Among the checks signed by Petitioner Anthony A. Caito were six payroll checks and two checks for PACA license renewal. Case law has emphasized the importance of writing checks in the determination of responsible connection. *See, In re: Steven J. Rodgers,* PACA– APP Docket No. 96-0002, Slip Decision (August 22, 1997) and *Farley v. United States Dep't of Agric.,* 8 F.3d 26 (9th Cir. 1993). Therefore, Petitioner Anthony A. Caito's check writing and issuance authority for Caito & Mascari, Inc.'s operations and payroll accounts during the first four months of the violations period is sufficient to constitute an actual significant nexus which establishes that his functions and position in Caito & Mascari, Inc., were not nominal.

In his role as vice-president, buyer, and paymaster, Anthony A. Caito had every opportunity to take action to bring the corporation into compliance with the Act. He may not credibly contend that he was not actively involved in violations when he was buying the produce, when he knew that he was not paying accounts promptly, and when the responsibility for paying those accounts by check was his. Mr. Caito was an active participant in the operations of Caito & Mascari, Inc. It is improper for him to shirk his responsibilities for the violations of the Company by trying to pass his responsibilities to others who had less day-to-day, hour-to-

hour contact with the business than he did.

Petitioner Anthony A. Caito's suggestion that some unnamed others controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at the hearing and is rejected. No stockholders of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent ownership of the Company's stock Joseph Kocot was the largest stock owner in the Company. No one possessed a majority ownership interest which would have permitted him to control the corporation. Moreover, as noted by the Respondent, the evidence indicates that while the President of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval of major business decisions. Thus, decision making authority was distributed among many different people rather than being concentrated in anyone individual.

In light of the role that Mr. Anthony A. Caito played in the operations and financial affairs of the corporation, his claim that he was not actively involved in the activities resulting in the violations is not credible. However, assuming arguendo that Mr. Caito was considered not to be personally at fault for the activities resulting in the violations, he certainly had a "realistic capacity to counteract or obviate the fault of others" which he failed to exercise. *Bell v. Department of Agriculture, supra.* As a buyer and officer knowledgeable of the Company's financial inability to pay its produce creditors and as a Caito family member with life-long relationships with nearly every director and officer of Caito & Mascari, Inc., Anthony A. Caito had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari, Inc.'s directors and officers in the daily operations of the Company and in the board meetings. Through both his acts of commission and omission, Mr. Anthony A. Caito must be considered responsibly connected to Caito & Mascari, Inc.

For the reasons set forth above the Chief's determination that Petitioner Anthony A. Caito was responsibly connected was correct and is upheld and affirmed herein. Accordingly, the following Order is issued.

Order

The finding of the Chief of the Agency that Petitioner Anthony A. Caito was responsibly connected with Caito & Mascari, Inc. at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and hereby upheld and affirmed.

Accordingly, Petitioner Anthony A. Caito is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

JOSEPH A. CAITO, SR.
PACA Docket No. APP-97-0003
Findings of Fact With Respect to Joseph A. Caito, Sr.

1. Joseph A. Caito, Sr., is an individual whose home address is 5310 Channing Road, Indianapolis, Indiana 46226. Petitioner is the brother of Petitioners Thomas Caito and Magdalina Mascari, is the father of Petitioner Joseph A. Caito, Jr., and is the uncle of Petitioner Anthony A. Caito. (Tr. 76, 102). Petitioner began working for Caito & Mascari, Inc., in the 1940s and held a number of positions with the corporation including produce buying and delivery. (Tr. 121, 135). As of the hearing date, he was seventy-one years old. In 1981, he began to have heart problems and in 1991 he had a serious heart attack which involved open heart surgery. (Tr. 121-122). As a result of the surgery, he was unable to work for approximately a year. When he returned to the Company, he was relieved of all duties except those surrounding the processing of bananas which involved him working at the Company for two to four hours per day until the Company closed. From approximately 1992 until the Company stopped operating in 1996, Petitioner was Caito & Mascari, Inc.'s buyer for bananas. (REC-16; Tr. 122). He was also a buyer for Washington and Michigan apples as of the fall of 1996. (REC-15).

2. Petitioner owned nine percent of the stock in Caito & Mascari, Inc. (REC-6, p. 19; REC-7, pp. 56, 63). He attended Caito & Mascari, Inc.'s annual shareholder's meeting held on March 12, 1995. (REC-2, pp. 1-3, 6).

3. Beginning in March 1995, Petitioner was chairman of Caito & Mascari, Inc.'s Board of Directors through February, 1996. (REC-1, p. 1; REC-2, pp. 1-3, 6-9; REC-6, pp. 19-20; Tr. 124). As Chairman of Caito & Mascari, Inc.'s Board of Directors, Petitioner attended Caito & Mascari Inc.'s board meetings during that time period, including board meetings held on March 12, 1995, July 12, 1995, and October 25, 1995. (REC-2; Tr. 124-125). At these board meetings, Petitioner discussed business and financial matters affecting Caito & Mascari, Inc., made motions, seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 125, 128-130).

4. At the March 12, 1995, meeting of Caito & Mascari Inc,'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including (1) amending the corporation's Articles of Incorporation and Code of By-laws; (2) convening the Board of Directors on a

quarterly basis to review the budgetary progress of the Company; (3) how to cut Company expenses (including salaries, equipment, personnel, services, and customers); (4) cash flows and ways to improve the balance sheet; and (5) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7).

5. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the President the authority to suspend or terminate individuals. Petitioner made the motion to give the president the right to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131).

6. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner made the motion "to deny we owe but will settle with [Bob] Ramsier to keep Caito & Mascari, Inc. from additional losses" and seconded the motion to allow the corporation to take out loans. (REC-2, p. 9; Tr. 131-132).

7. Joseph A. Caito, Sr., resigned as a director and as Chairman of the Board of Directors in February 1996. (REC-6, pp. 19-20).

8. When Anthony A. Caito resigned as corporate vice-president of Caito & Mascari, Inc., he submitted his letter of resignation to Joseph A. Caito, Sr., as Chairman of the Board of Directors. (REC-1, p. 6).

9. When Caito & Mascari, Inc., needed to borrow money in November 1995, Joseph A. Caito, Sr., loaned the corporation $5,000.00 of his own money. (REC-10).

10. Petitioner Joseph A. Caito, Sr. was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA.

Conclusions
With Respect to Joseph A. Caito, Sr.

The Chief of the PACA Branch, Mr. Frazier, has determined that Petitioner, Joseph A. Caito, Sr., was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA by failing to make full payment promptly for produce purchases from September 1995 through May

1996, in the amount of $997,652.91, while still owing at least $169,896.92 as of the date of the disciplinary hearing. Mr. Caito denies he was actively involved in the actions resulting in violation and asserts that his role as Chairman of the Board of Directors with Caito & Mascari, Inc., was nominal only. He further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. However, the record indicates that Mr. Caito was actively involved in the activities resulting in the corporation's violations, that his positions were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Therefore, Joseph A. Caito, Sr., was responsibly connected with Caito & Mascari, Inc.

Joseph A. Caito, Sr., Was the Chairman of the Board of Directors of Caito & Mascari, Inc.

Section 1(9) of the PACA provides that "responsibly connected" persons include an "officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association." A person must fit at least one of these categories if he or she is to be considered responsibly connected. Joseph A. Caito, Sr.'s role as the Chairman of Caito & Mascari, Inc.'s Board of Directors during the first six months of the nine-month violations period is uncontested in this matter. Mr. Caito acknowledged at the hearing that he was the Chairman of Caito & Mascari, Inc.'s Board of Directors from March, 1995 through February, 1996. (Tr. 123-124). In addition to the PACA license record that unequivocally designated Petitioner as Chairman during that time period (REC-1, p. 1), numerous other corporate documents conclusively establish his status as Chairman of Caito & Mascari, Inc.'s Board of Directors, including the corporate minutes (REC-2, pp. 1-3, 6-9), bankruptcy documents filed by Caito & Mascari (REC-6, pp. 19-20), and corporate correspondence directed to him as Chairman of the board. (REC-1, p. 6). Accordingly, there is no question that Mr. Joseph A. Caito, Sr. was Chairman of Caito & Mascari, Inc.'s Board of Directors during the first six months of the violations period from September, 1995 through February, 1996.

Joseph A. Caito, Sr., Was Actively Involved in the Activities Resulting in the PACA Violations Committed by Caito & Mascari, Inc.

Following the 1995 amendments to the PACA, section 1(9) provides a person, who meets the initial criteria for responsible connection, with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "was

not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The record in this case reveals that Joseph A. Caito, Sr., was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, he must be considered responsibly connected with consideration of the other factors set forth in section 1(9).

The legislative history of the 1995 amendments does not define "active involvement." *See* H.R. Rep. No. 104-207,104th Cong., 1st Sess. (1995). However, guidance on this matter can be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm. While not using the "active involvement" language that appears in the statute, these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he was "without either personal fault or a realistic capacity to counteract or obviate the fault of others. *Quinn v. Butz,* 510 F.2d 743, 756 (D.C. Cir. 1975). *See also, Bell v. Department of Agriculture,* 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng,* 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agriculture,* 832 F.2d 601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dept. of Agriculture,* 711 F.2d 406, 408 (D.C. Cir. 1983).

One guide to active involvement, therefore, is examining whether a Petitioner either had "personal fault" for the violations or failed to "counteract or obviate the fault of others" for the violations. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that a Petitioner was actively involved. Given that Joseph A. Caito, Sr., performed both acts of commission and omission, he was actively involved in Caito & Mascari, Inc.'s violations of the Act.

After a career with Caito & Mascari, Inc., that spans over five decades in many positions including produce buyer and ultimately Chairman of the Company's Board of Directors, Petitioner's attempts to absolve himself of responsibility for the activities leading to the PACA violations are futile, premised upon the evidence of record. As a produce buyer for the Company, Mr. Caito was closely involved in the Company's procedures for buying produce and was certainly not innocently unaware of the Company's practices. He testified that he was at Caito & Mascari, Inc.'s business premises at least two to four hours each day after 1992. (Tr. 122). Furthermore, he admitted that he was aware of Caito

& Mascari's financial problems at least by 1993 -- well over a year before he became Chairman of the Company's Board of Directors.

Moreover, in his role as Chairman of the Company's Board of Directors, Mr. Caito attended and actively participated in all of the Company's board meetings from March 1995 through February 1996. The corporate minutes from the Board of Directors meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that Mr. Caito actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making process. (REC-2). At these board meetings, Petitioner discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., made motions, seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 125, 128-130).

At the March 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, Mr. Joseph A. Caito, Sr., discussed business and financial matters with the other board members including: (1) whether to convene the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (2) how to cut Company expenses (including salaries, equipment, personnel, services, and customers); (3) cash flows and ways to improve the balance sheet; and (4) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its creditors.

At the July 12, 1995, board meeting, Mr. Joseph A. Caito, Sr., again discussed such matters with the other board members. The business and financial matters discussed by Petitioner Joseph A. Caito, Sr., at that board meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). Mr. Caito himself made the motion to give the president the right to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). These discussions once again address the fundamental issues of corporate financial and management policy that determined the manner in which Caito & Mascari, Inc., would address its financial problems. Mr. Caito voted in all three of the votes taken. (REC-2, p. 8).

At the October 25, 1995, board meeting, Mr. Caito again discussed these types of financial issues with other board members, specifically addressing: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner made the motion "to deny we owe but will settle with [Bob] Ramsier to keep Caito & Mascari, Inc. from additional

losses" and seconded the motion to allow the corporation to take out loans. (REC-2, p. 9, Tr. 131-132). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that the Company owed him approximately $20,000.00 to $30,000.00 for work he had allegedly performed years earlier. (Tr. 94, 131, 148-149, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, Petitioner consciously chose to divert the financial resources available to the Company to pay its produce creditors. Mr. Caito's act in making the motion himself is especially significant given the scarce financial resources available to the corporation or paying its produce credits.

In his role as Chairman of the Board of Directors, Joseph A. Caito, Sr., had every opportunity to take action to bring the corporation into compliance with the Act. He may not credibly contend that he was not actively involved in violations when he knew that the Company was not paying its accounts promptly and when the Board of Directors was setting all major financial policy for Caito & Mascari, Inc. Mr. Caito was an active participant in the management of Caito & Mascari, Inc., and as such was actively involved in the activities resulting in violations of the PACA.

In light of the role that Petitioner played in making corporate financial policy for Caito & Mascari, Inc., as an active participant in the directors' meetings, Mr. Caito's claim that he was not actively involved in the activities resulting in the violations is not credible. However, assuming *arguendo* that he was considered not to be personally at fault for the activities resulting in the violations, he certainly had a "realistic capacity to counteract or obviate the fault of others" which he failed to exercise. *Bell v. Department of Agriculture, supra.* Armed with knowledge of the Company's financial inability to pay its produce creditors and as a Caito family member with over fifty years experience with the Company, Petitioner Joseph A. Caito, Sr., had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari, Inc., directors and officers. To suggest otherwise is to allow an individual with a half century of experience in the business, an intimate knowledge and understanding of the firm's produce debt, a participatory role in the day-to-day business and decisions of the Company, and a life-long relationship with the other directors and officers of the Company, to abdicate responsibility to ensure that a PACA licensee, abide by the law and deal honorably with produce creditors and others who dealt in good faith with Caito & Mascari, Inc. Through both his acts of commission and omission, Joseph A. Caito, Sr., must be considered responsibly connected to Caito & Mascari, Inc.

Joseph A. Caito, Sr.'s Contentions that He Was a Nominal Chairman of

the Board of Directors and That Caito & Mascari, Inc., Was the *Alter Ego* of Others Are Not Supported by Case Law or the Factual Record.

Joseph A. Caito, Sr.'s failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to his responsibly connected status inasmuch as he was actively involved in the activities resulting in violations of the Act. Mr. Caito, contending that he was not actively involved or at fault in the violations, goes on to assert that his role as Chairman of the Board of Directors was merely nominal or "honorary," and he suggests that Caito & Mascari, Inc., was the *alter ego* of unnamed "others." (Joseph A. Caito, Sr.'s Petition for Review, ¶ 3).

The 1995 amendments to section 1(9) of the PACA require a Petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "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(9) (emphasis added). It is evident from case law and the factual record that Petitioner's role as board Chairman was not nominal, that he himself was an owner, and that Caito & Mascari, Inc. was not the *alter ego* of any person.

Joseph A. Caito, Sr., Was Not a Nominal Chairman of Caito & Mascari, Inc.'s Board of Directors

Although the legislative history of the 1995 amendments does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the Court of Appeals for the District of Columbia Circuit. In its decision interpreting the PACA responsibly connected proceedings, *Bell v. Department of Agriculture, supra,* the Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The Court stated that a person may show that he was only a nominal officer, director, or shareholder:

> by proving that he lacked "an actual, significant nexus with the violating company." *Minotto,* 711 F.2d 409. Where responsibility was not based on the individual's "personal fault," *id.* at 408, it would have to be based on at least on his "failure to 'counteract or obviate the fault of others,'" *id.*

Bell v. Department of Agriculture, supra. As indicated by the *Bell* Court, the more than nominal nature of a Petitioner's corporate position may be established

by evidence showing that Petitioner either had "personal fault" or had failed to "counteract or obviate the fault of others" for the violations of the Act. In order to show that a position is more than nominal, personal fault is not required, although it certainly is sufficient. Considerable evidence was presented showing that Joseph A. Caito, Sr., had a significant nexus with Caito & Mascari, Inc., as he performed important business and policy functions as Chairman of the Board of Directors.

In applying this general standard, the *Bell* Court considered several important factors articulated in its earlier *Quinn* decision that led the Court to determine that the individual in question in that case, Carl Quinn, was only a nominal officer. Specifically, the Court considered that Mr. Quinn never had anything to do with policy or business decisions, he never had participated in the formal decision making structure of the company, he did not have access to company records, and he did not have any knowledge of the company's financial difficulties. *Id.* at 1202, 1204. This is not the case, however, with Petitioner Caito in the instant case.

First, unlike the Petitioner in *Quinn,* Mr. Caito was active in policy and business decisions and participated in the Company's formal decision making process. As discussed in detail above, he participated in multiple Board of Directors' meetings in which the six board members, including corporate officers Joseph Kocot and Joseph Caito, Jr., discussed crucial business and financial issues, made motions, and voted on those motions to create corporate policy. (REC-2). Mr. Caito acknowledged that he actively participated in these meetings by commenting on policy decisions and offering his opinion:

> Q Having been affiliated with the business for 40 years at least and being, as you said, the senior Caito, your opinion would matter for something, would it not? I mean, you have obviously been around a long time with the company.
> A Sometimes it would, and sometimes it wouldn't.
> Q You do not strike me as the kind of man who would hesitate to give his opinion, though.
> A Yes, I would give it. Sometimes -- you know, they don't do things today like they did 40 years ago.

(Tr. 129). Mr. Caito's attendance at these board meetings, discussion of the issues, making motions, and voting on every matter put to a vote forcefully demonstrate that he was not a passive observer in these board meetings.

Second, unlike the Petitioner in *Bell,* Joseph A. Caito, Sr., had full opportunity to gain access to all important corporate records. With his intimate knowledge of

the Company gained from fifty years of working for Caito & Mascari, Inc., and his position as the senior Caito family member, it is inconceivable that Mr. Caito would not have had full access to all corporate documents.

Third, unlike the Petitioner in *Bell,* Mr. Caito was aware of the Company's financial difficulties. The *Minotto* Court also weighed the Petitioner's knowledge of the Company's wrongdoings in the responsibly connected decision. In that case, however, the Petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at board meetings." *Minotto v. United States Dept. of Agriculture, supra.* Mr. Caito admitted that he was aware that Caito & Mascari, Inc., was having financial difficulties as early as 1993. (Tr. 133). The evidence also showed that there was a shareholders' meeting in 1994 at which the Company's shareholders were informed of financial problems resulting from a "substantial loss." (Tr. 145-146). As a nine percent stockholder in Caito & Mascari, Inc., Mr. Caito would most certainly have been aware of these problems. (REC-6, pp. 19-20). Finally, it is inconceivable that Joseph A. Caito, Sr., as the senior Caito family member with a life-long career in the Company, would not have knowledge of the financial health of the Company run by his family for generations.

Furthermore, the substantial rather than nominal nature of Petitioner's position as Chairman of the Board of Directors is supported by the recognition of others in the corporation of his authority. When vice-president Anthony A. Caito resigned as corporate vice-president of Caito & Mascari, Inc., he submitted his letter of resignation to Joseph A. Caito, Sr., as Chairman of the Board of Directors. (REC-1, p. 6). Petitioner's perceived role by others in Caito & Mascari, Inc., as a person to whom a personnel matter as serious as a resignation could be directed, further demonstrates that Joseph A, Caito, Sr., was not a nominal Chairman of Caito & Mascari's Board of Directors.

Finally, Mr. Caito's claim that his position as board chairman was nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995, in order to settle a law suit brought against the corporation, he loaned the corporation $5,000.00 of his own money. (REC-10). As indicated in Mr. Caito's testimony, his personal loan of the $5,000.00 was made in an effort to protect his interest in Caito & Mascari, Inc.:

Q Finally, in late 1995 you loaned the company $5,000? Is that correct?
A Yes.
Q $5,000 is not a small amount of money, is it?
A That's right.
Q Why did you choose to loan the company that much money?

violations of the PACA is a civil penalty of [$82,500]. . . .

DISCUSSION

The PACA requires produce dealers who buy . . . [perishable agricultural commodities] in interstate commerce to make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had, or face sanction after an administrative hearing by the Secretary for unfair conduct. (7 U.S.C. §§ 499a, 499b, 499f, and 499h.) Until recently, the available sanctions were limited to publication of the facts and circumstances of the violation, suspension of the offender's [PACA] license for a period not to exceed 90 days, and . . . revocation [of the offender's PACA license]. (7 U.S.C. § 499h(a).) However, on November 15, 1995, the PACA was amended to add a new subsection (e) to 7 U.S.C. § 499h, which reads as follows:

> **(e) Alternative civil penalties**
>
> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

The plain meaning of this language is to give the Secretary greater flexibility in the sanctions that may be imposed for the various violations of the PACA.

. . . .

Mr. Lon F. Hatamiya, Administrator of [the] Agricultural Marketing Service, [United States Department of Agriculture, the agency] which administers the PACA, testified[, during a hearing conducted on 1995 legislation to amend the PACA, in favor of amendment of the PACA to add] monetary penalty provisions[, as follows]:

> In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other

A It looked like I could see that would be a small price to pay and looked like success was around the corner. I thought that would be a small price to pay if it became very successful.
Q So you thought your $5,000 would have a good payoff for the future of the company?
A That's right.
Q So you were protecting an interest in the company going on, right?
A That's right.

(Tr. 135-136). Accordingly, Mr. Caito's personal interest in financially assisting the corporation is further evidence of his substantial involvement in the corporation as a director.

It is evident that Joseph A. Caito, Sr., unlike the Petitioner in *Quinn*, was closely involved in important corporate business and policy functions, which precludes a finding that he was only a nominal Chairman of the Company's Board of Directors. The only reasonable conclusion to be drawn from the evidence in the record is that he had "an actual, significant nexus" with Caito & Mascari, Inc., committed acts of commission in participating in the Company's violations of the Act, and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, Joseph A. Caito, Sr., has failed to demonstrate that he was a nominal Chairman of Caito & Mascari's Board of Directors.

The *Alter Ego* Defense is Unavailable to Petitioner Because He Is An Owner of the Company and Because Caito & Mascari, Inc., Was No the *Alter Ego* of Any Other Person.

Again, assuming *arguendo* that Mr. Caito was not actively involved or at fault in the violations of Caito & Mascari, Inc., section 1(9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The Court in *Bell* stated that a person might show that a corporation was the alter ego of its owners by showing that the sole stockholder of the corporation effectively retained the decision making power in all aspects of corporate decision making. *Bell v. Department of Agriculture, supra, at 1201* (quoting *Quinn v. Butz, supra,* at 758). Mr. Caito's suggestion that some unnamed "others" controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at hearing. (Joseph A, Caito, Sr., Petition for Review, ¶ 3).

First, no stockholder of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent of the Company's stock, Joseph Kocot was the largest stock owner in the Company. (REC-1; REC-3). No one possessed a majority ownership interest which would have permitted him or her to control the corporation.

Second, the evidence demonstrates that while the president of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval on major business decisions. (REC-2; Tr. 129-130, 134). Decision making authority was distributed among many different people rather than being concentrated in any one individual.

Third, Mr. Caito is barred from raising the *alter ego* defense due to his ownership of stock in Caito & Mascari, Inc. In *In re: Michael Norinsberg,* PACA-APP Docket No. 96-0009, Slip Decision (Oct. 21,1997), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 34. As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because of his 2.97914 percent ownership interest in the Company's outstanding stock, it is similarly unavailable to Mr. Caito with his nine percent ownership interest in Caito & Mascari, Inc.

Joseph A. Caito, Sr.'s allegation of Caito & Mascari, Inc., being the *alter ego* of "others" is both unsubstantiated and unavailable to him as an owner of the corporation. Accordingly, Mr. Caito's claim to this defense must be rejected.

As Chairman of Caito & Mascari, Inc.'s Board of Directors, Joseph A. Caito, Sr., was responsibly connected to the corporation during the first six months of the nine-month period of violations. He was actively involved in the activities resulting in the violations of the Act by virtue of his activities in buying produce for the corporation and active participation in the corporation's formal decision making process through the Board of Directors. He was not a nominal chairman of the board as demonstrated by his active involvement in the Company's business and policy decisions, his knowledge of the Company's payment problems, his access to corporate records, his activities in personnel matters, and his personal loan of $5,000.00 to the corporation. Mr. Caito was actively involved in the activities resulting in the violations.

He was not a nominal director of Caito & Mascari, Inc. He was himself an owner of the Company as a nine percent shareholder, and the Company was not the *alter ego* of any other person. For these reasons, the Chief's determination that Joseph A. Caito, Sr., was responsibly connected was correct and the following Order is issued.

Order

The finding of the Chief of the Agency that Petitioner Joseph A. Caito, Sr., was responsibly connected with Caito & Mascari, Inc., at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and hereby upheld and affirmed.

Accordingly, Petitioner Joseph A. Caito, Sr., is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

JOSEPH A. CAITO, JR.
PACA Docket No. APP-97-0004
Findings of Fact With Respect to Joseph A. Caito, Jr.

1. Joseph A. Caito, Jr., is an individual whose home address is 20 Forest Ridge Court, Fishers, Indiana 46038. Petitioner is the son of Petitioner Joseph A. Caito, Sr., is the nephew of Petitioners Thomas Caito and Magdalina Mascari, and is the cousin of Petitioner Anthony A. Caito. (Tr. 76, 102). He started working at Caito & Mascari, Inc., on a full-time basis in 1985. (Tr. 139). In 1991, he began calling customers and taking orders on the phone. He temporarily worked as a buyer of bananas for the Company in 1991, and he returned to phone sales as a full-time salesman for the Company in 1992. (Tr. 139-140). After March 1995, he worked as a Company buyer for produce, eggs, and milk. (Tr. 143, 180). Petitioner is listed as Caito & Mascari, Inc.'s contact person for telephone sales in the March, 1996 Red Book Credit Services (REC-16) and the fall 1996 Blue Book (REC-15).

2. Petitioner owned nine percent of Caito & Mascari, Inc.'s stock. (REC-6, p. 19; REC-7, pp. 56, 63). He attended Caito & Mascari, Inc.'s annual shareholder's meeting held on March 12, 1995. (REC-2, pp. 1-3, 6).

3. In March 1995, Petitioner Joseph A. Caito, Jr., was appointed secretary and treasurer of the Company by the Board of Directors. He received no additional compensation in his capacity as secretary and treasurer. Petitioner was corporate secretary of Caito & Mascari, Inc., from March 1995 to October 15, 1996, and he was treasurer from March 1995 through 1996. (REC-1, pp. 1, 7, 12, 20, 22; REC-2, pp. 1-3, 6-9; Tr. 140, 151). As corporate secretary, he signed the Bill of Sale for the sale of the Brickyard 400 Suite. (REC-5, p. 1). He took the corporate minutes at shareholder and Board of Directors' meetings. (Tr. 140). He

was paid an annual salary ranging from the high $30,000s to the low $40,000s by Caito & Mascari, Inc. (Tr. 154). On Caito & Mascari, Inc.'s 1995 U.S. Income Tax Return, Petitioner is listed as Caito & Mascari,'s Tax Matters Person. (REC-7, p. 2).

4. Joseph A. Caito, Jr., was one of only three persons authorized to sign checks on Caito & Mascari, Inc,'s operations and payroll accounts after January 1995. (Tr. 170-171). After one of the three authorized signers for these accounts, Anthony A. Caito, left Caito & Mascari, Inc., on January 5, 1996, Petitioner was one of only two persons authorized to sign checks on behalf of the corporation, and as all checks required two signatures, he signed every check after that date. (Tr. 170-173). Among the checks in evidence that were signed by Petitioner are checks for PACA License renewal (REC-1, pp. 11, 15; Tr. 157), at least eighteen payroll checks signed between September 14, 1995, and February 1, 1996 (REC-9; Tr. 166-167), at least eighty-one checks on Caito & Mascari, Inc.'s operations account to produce creditors from November 29, 1995, to April 24, 1996. (AX-2; Tr. 177).

5. Joseph A. Caito, Jr., became a member of the Board of Directors in March 1995. (Tr. 141). As a member of Caito & Mascari, Inc.'s Board of Directors, Petitioner attended board meetings from March 1995 to 1996, including board meetings held on March 12, 1995, July 12, 1995, and October 25, 1995. (REC-2; Tr. 148, 160). At these board meetings, Petitioner discussed business and financial matters affecting Caito & Mascari, Inc., made motions and seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 160-161, 179-180).

6. At the March 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including (1) amending the corporation's Articles of Incorporation and Code of By-laws; (2) convening the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (3) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (4) cash flows and ways to improve the balance sheet; and (5) the effect of the interest on shareholder loans on the Company's balance sheet. Petitioner made two motions and seconded another motion at this meeting. (REC-2, p. 7; Tr. 161).

7. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 162).

8. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion to sell corporate assets to raise money for the corporation. (REC-2, p. 9; Tr. 162).

9. When Caito & Mascari, Inc., needed to borrow money in November 1995, Joseph A. Caito, Jr., loaned the corporation $5,000.00 of his own money. (REC-11; Tr. 148, 168).

10. Joseph A. Caito, Jr., was the Caito & Mascari, Inc., representative who called the Illinois PACA office to discuss the payment problems facing the Company. (Tr. 197, 218).

11. Although Petitioner resigned as both a member of the Board of Directors and a corporate officer on October 15, 1996, he remained an employee of Caito & Mascari, Inc. (REC-1, pp. 2-4; REC-6, p. 20; Tr. 155).

12. Petitioner Joseph A. Caito, Jr., was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA.

Conclusions
With Respect to Joseph A. Caito, Jr.

The Chief of the PACA Branch, Mr. Frazier, has determined that Petitioner, Joseph A. Caito, Jr., was responsibly connected with Caito & Mascari, Inc during the time it was found to have violated the PACA by failing to make full payment promptly for produce purchases from September 1995 through May 1996, in the amount of $997,652.91, while still owing at least $169,896.92 as of the date of the disciplinary hearing. Mr. Caito denies he was actively involved in the actions resulting in violations and asserts that his roles as corporate secretary, treasurer, and director with Caito & Mascari, Inc., were nominal only. He maintains that from March 1995 forward, Petitioner was purchasing eggs and milk and not produce, that he made no credit decisions and was not involved in the finances of the Company. He further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. However, the record indicates that Mr. Caito was actively involved in the activities resulting in the corporation's violations, that his positions were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Therefore, Joseph A. Caito, Jr., was responsibly connected with Caito & Mascari, Inc.

Mr. Joseph A. Caito Jr.'s own written and oral words demonstrate that he is responsibly connected. In a letter dated October 21, 1996, he wrote to the PACA Licensing Section to request that his name be removed from Caito & Mascari, Inc.'s PACA license. (REC-1, p. 2). At the hearing, Mr. Caito testified as follows:

Q Now, you resigned as a corporate officer and director because you did not want to be responsibly connected to Caito & Mascari, did you not?
A Correct.
Q Let's take a look at this letter again. Could you please read the first sentence of this letter to Mr. Clancy on Page 2 of Exhibit 1?
A "Accept this letter as request for removal of my name as board of director and officer of Caito & Mascari, Inc., responsibly connected, effective October 15, 1996, as I have resigned from the office of secretary of the corporation and board of directors, giving my signed resignation to Joseph Kocot, president of Caito & Mascari."
Q So in this letter to the PACA, you indicate that you re resigning because you do not want to be responsibly connected after that time, correct?
A Right.
Q You do know that the period of violation for Caito & Mascari runs from September of 1995 through May of 1996, correct?
A Repeat that.
Q The period of violation at issue in the disciplinary complaint is September of 1995 through May of 1996.
A Right. Okay.
Q And that was at least four to five months prior to the time of your resignation of October 15, correct?
A Right.

(Tr. 155-156). It is apparent that at the time Mr. Caito wrote the letter dated October 21, 1996, he was operating with the understanding that while he had been responsibly connected up to that point, the removal of his name from Caito & Mascari, Inc.,'s PACA license would end his responsible connection to the Company.

Joseph A. Caito, Jr., Was the Secretary, Treasurer, and Director of Caito & Mascari, Inc.

Section 1(9) of the PACA provides that "responsibly connected" persons include an "officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association." A person must fit at least one

of these categories if he or she is to be considered responsibly connected. Joseph A. Caito, Jr.'s role as the secretary, treasurer, and director of Caito & Mascari, Inc. during the entire violations period is uncontested in this matter. He acknowledged at the hearing that he was the secretary, treasurer, and director of Caito & Mascari, Inc., from March 1995 through October 1996. (Tr. 141, 148, 160). In addition to the PACA license record that unequivocally designated Petitioner as the corporate secretary and treasurer during that time period (REC-1, pp. 1, 7, 12, 20), numerous other corporate documents conclusively establish his status as an officer and director of Caito & Mascari, Inc., including the corporate minutes (REC-2, pp. 1-3, 6-9), bankruptcy documents filed by Caito & Mascari, Inc. (REC-6, pp. 19-20), and corporate correspondence to the PACA. (REC-1, p. 22). Accordingly, there is no question that Joseph A. Caito, Jr., was secretary, treasurer, and director of Caito & Mascari, Inc., during the entire nine-month violations period from September 1995 through May 1996.

Joseph A. Caito, Jr., Was Actively Involved in the Activities Resulting in the PACA Violations Committed by Caito & Mascari, Inc.

Following the 1995 amendments to the PACA, section 1(9) provides a person who meets the initial criteria for responsible connection with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." (emphasis added). The record in this case reveals that Joseph A. Caito, Jr., was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, he must be considered responsibly connected without consideration of the others factors set forth in section 1(9).

The legislative history of the 1995 amendments does not define "active involvement." *See* H.R. Rep. No. 104-207, 104th Cong., 1st Sess. (1995). However, guidance on this matter can be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm. While not using the "active involvement" language that appears in the statute, these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he was "without either

personal fault or a realistic capacity to counteract or obviate the fault of others." *Quinn v. Butz,* 510 F.2d 743, 756 (D.C. Cir. 1975). *See also, Bell v. Department of Agriculture,* 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng,* 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agriculture,* 832 F.2d 601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dept. of Agriculture,* 711 F.2d 406, 408 (D.C. Cir. 1983).

One guide to active involvement, therefore, is examining whether a Petitioner either had "personal fault" for the violations or failed to "counteract or obviate the fault of others" for the violations. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that Petitioner was actively involved. Given that Joseph A. Caito, Jr., performed both acts of commission and omission, he was actively involved in Caito & Mascari, Inc.'s violations of the Act.

Mr. Caito's attempts to disclaim responsibility for the activities leading to the violations are not realistic and do not comport with the evidence of record. As one of the few persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts after January 1995, Mr. Caito signed dozens of checks on these two accounts during the violations period up until January 5, 1996 when he began signing every check for both these checking accounts. (Tr. 171-173). He also signed corporate documents in his capacity as an officer of the corporation (REC-5, p. 1) and actively participated in the Company's formal decision making process. Not only did Mr. Caito participate in quarterly Board of Directors' meetings at which high-level corporate business decisions and policies were made, but he also worked as a Company buyer for produce, eggs, and milk. (Tr. 143, 160-161, 179-180). With this participation in management decisions and extensive responsibility for payment of accounts, Mr. Caito possessed knowledge of the financial problems facing the Company and its inability to pay its produce creditors. (Tr. 145-146, 179).

Joseph A. Caito, Jr., was one of only three persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts. (Tr. 170-171). After one of the three authorized signers for these accounts, Anthony A. Caito left Caito & Mascari, Inc., on January 5, 1996, Petitioner was one of only two persons authorized to sign checks on behalf of the corporation, and as all checks required two signatures, he signed every check after that date. (Tr. 170-173). Among the checks in evidence that were signed by Mr. Caito are checks for PACA License renewal (REC-1, pp. 11, 15; Tr. 157), at least eighteen payroll checks signed between September 14, 1995, and February 1, 1996 (REC-9; Tr. 166-177), and at least eighty-one checks on Caito & Mascari, Inc.'s operations account to produce creditors from November 29, 1995, to April 24, 1996. (AX-2; Tr. 177). Petitioner acknowledges that he did sign checks but argues that he would "return

them to the bookkeeper" and he made no decision as to whether or not the checks should be sent to the payee.

Case precedent underscores the importance of writing checks in the determination of responsible connection. The fact that a person signs checks is reflective of that person's association with the financial affairs of a business. In *Bell v. Department of Agriculture, supra,* the Court stated that an important factor indicating that the appellant was nominal was the fact that he "never signed checks or agreements." 39 F.3d at 1200. In *Farley v. United States Dep't of Agric.,* 8 F.3d 26 (9th Cir. 1993), the Court ruled that the appellant was responsibly connected under the rebuttable presumption standard of the District of Columbia Circuit. In citing the factors which led to this decision, the Court noted that the appellant "had check writing and borrowing authority, both of which were exercised at least once."

Moreover, in his role as a member of Caito & Mascari, Inc.'s Board of Directors, Mr. Caito attended and actively participated in all of the Company's board meetings from March 1995 through October 1996. The corporate minutes from the Board of Directors' meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that Mr. Caito actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making process. (REC-2). At these board meetings, Petitioner discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., made motions, seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 160-161, 179-180).

At the March 12, 1995, board meeting, Mr. Caito, discussed business and financial matters with the other board members including (1) whether to convene the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (2) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (3) cash flows and ways to improve the balance sheet; and (4) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its creditors. Mr. Caito made two motions and seconded another motion at this meeting. (REC-2, p. 7; Tr. 161).

At the July 12, 1995, board meeting, Mr. Caito again discussed such matters with the other board members. The business and financial matters discussed by Petitioner at that board meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). Mr. Caito himself

made the motion to give the president the right to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). These discussions once again address the fundamental issues of corporate financial and management policy that determined the manner in which Caito & Mascari, Inc., would address its financial problems. Mr. Caito voted in all three of the votes taken. (REC-2, p. 8).

At the October 25, 1995, board meeting, Mr. Caito again discussed these types of financial issues with other board members, addressing: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion to allow the corporation to take out loans. (REC-2, p. 9). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that the Company owed him approximately $20,000.00 to $30,000.00 for work he had allegedly performed years earlier. (Tr. 94, 131, 148-149, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, Petitioner consciously chose to divert the financial resources available to the Company to pay produce creditors. Mr. Caito's seconding the motion to sell corporate assets to raise money for the corporation is especially significant given the scarce financial resources available to the corporation for paying its produce creditors.

In his role as director, corporate officer, buyer, and paymaster, Joseph A. Caito, Jr., had every opportunity to take action to bring the corporation into compliance with the Act. He may not credibly contend that he was not actively involved in violations when he knew that he was not paying accounts promptly and when the responsibility for paying those accounts by check was his. Mr. Caito was an active participant in the management of Caito & Mascari, Inc. He may not deny his responsibilities for the violations of the Company by trying to pass his responsibilities to others who had less day-to-day, hour-to-hour contact with the business than he did.

In light of the integral role that Mr. Caito played in the financial affairs of the corporation and his extensive participation in its decision making process as an officer and as the sole remaining family member, his claim that he was not actively involved in the activities resulting in the violations is not credible. However, assuming *arguendo* that Mr. Caito was considered not to be personally at fault for the activities resulting in the violations, he certainly had a "realistic capacity to counteract or obviate the fault of others" which he failed to exercise. *Bell v. Department of Agriculture, supra,* at 1201. Possessing the knowledge of the Company's financial inability to pay its produce creditors and as a Caito family member with life-long relationships with nearly every other director and officer of Caito & Mascari, Inc., Joseph A. Caito, Jr., had not only the capacity, but the

duty, to counteract the fault of the other Caito & Mascari, Inc., directors and officers in the daily operation of the Company and in the board meetings. Through both his acts of commission and omission, Mr. Caito must be considered responsibly connected to Caito & Mascari, Inc.

Joseph A. Caito, Jr.'s Contentions That He Was a Nominal Secretary,Treasurer, and Director and That Caito & Mascari, Inc., Was the *Alter Ego* of Others Are Not Supported by Case Law or the Factual Record.

Petitioner Joseph A. Caito, Jr.'s failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to his responsibly connected status as he was actively involved in the activities resulting in violations of the Act and was an officer, and director, of the corporation. Mr. Caito, contending that he was not actively involved or at fault in the violations, goes on to assert that his roles as secretary, treasurer, and director were merely nominal, and he suggests that Caito & Mascari, Inc., was the *alter ego* of unnamed "others." (Joseph A. Caito, Jr.'s Petition for Review, ¶ 3). However, this contention is not pursued by Petitioner on brief and does not have merit.

The 1995 amendments to section 1(9) of the PACA require a Petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "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(9) (emphasis added). It is evident f rom case law and the factual record that Joseph A. Caito, Jr.'s role as director and officer was not nominal, that he himself was an owner, and that Caito & Mascari, Inc., was not the *alter ego* of any person.

Joseph A. Caito, Jr., Was Not a Nominal Secretary, Treasurer, or Director of Caito & Mascari, Inc.

Although the legislative history of the 1995 amendments does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the Court of Appeals for the District of Columbia Circuit. In its most recent decision interpreting the PACA responsibly connected proceedings, *Bell v. Department of Agriculture, supra,* the Court of Appeals for

the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The Court stated that a person may show that he was only a nominal officer, director, or shareholder:

> by proving that he lacked "an actual, significant nexus with the violating company." *Minotto v. United States Dept. of Agriculture,* 711 F.2d 409 (D.C. Cir. 1983). Where responsibility was not based on the individual's "personal fault," *id.* at 408, it would have to be based on at least on his "failure to 'counteract or obviate the fault of others,'" *id.*

Bell v. Department of Agriculture, supra. As indicated by the *Bell* Court, the more than nominal nature of a Petitioner's corporate position may be established by evidence showing that Petitioner either had "personal fault" or had failed to "counteract or obviate the fault of others" for the violations of the Act. In order to show that a position is more than nominal, personal fault is not required, although it certainly is sufficient. Considerable evidence was presented showing that Joseph A. Caito, Jr., had a significant nexus with Caito & Mascari, Inc., as he performed important business and policy functions as corporate secretary, treasure, and director.

In applying this general standard, the *Bell* Court considered several important factors articulated in its earlier *Quinn* decision that led the Court to determine that the individual in question in that case, Carl Quinn, was only a nominal officer. Specifically, the Court considered that Mr. Quinn never had anything to do with policy or business decisions, he never had participated in the formal decision making structure of the company, he did not have access to company records, and he did not have any knowledge of the company's financial difficulties. *Id.* at 1202, 1204. This is not the case, however, with Joseph A. Caito, Jr.

First, unlike the Petitioner in *Quinn,* Mr. Caito was active in policy and business decisions and participated in the Company's formal decision making process. He admitted that he participated in Board of Directors' meetings in which other directors and officers made high-level decisions and policies regarding corporate finance from March 1995 through October 1996. (REC-2; Tr. 148, 160). Mr. Caito acknowledged that he actively participated in these meetings by interjecting suggestions and ideas (Tr. 142), and corporate records indicate that he made motions, seconded the motions of other directors, and voted on each motion put to a vote. (Tr. 160-161, 179-180).

Second, unlike the Petitioner in *Bell,* Mr. Caito had full knowledge of the Company's financial difficulties. The *Minotto* Court also weighed the Petitioner's knowledge of the Company's wrongdoings in the responsibly connection decision.

In that case, however, the petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at Board meetings." *Minotto v. United States Dept. of Agriculture, supra.* Mr. Caito admitted that he was aware that the firm was having financial problems in early 1994 when Caito & Mascari, Inc., held a shareholders meeting at which the Company's financials were reviewed with the shareholders, showing a "substantial loss," and he also admitted that at some time thereafter he became aware that creditors were not being paid on time. (Tr. 145-146, 179). As discussed above, Mr. Caito participated in the Board of Directors' meetings at which officers and directors discussed all aspects of the Company's operations, including its failing financial health (REC-2), and he was the Company's representative who called the PACA Branch prior to the investigation in May, 1996 to discuss the Company's payment problems. (Tr. 197, 218).

The circumstances surrounding his meeting with PACA investigator Wes Hammond in May 1996, also strongly support the fact that Mr. Caito had full knowledge of the Company's problems. When Mr. Hammond inquired about the Company's bookkeeping practices with regard to writing a check for an invoice, giving it a date, but then not mailing it in an attempt to make the Company's books look as if invoices were being paid on time, Mr. Caito was the representative from Caito & Mascari, Inc., who assisted Mr. Hammond and explained how the system was set up. (Tr. 239). Additionally, when Mr. Hammond met with Mr. Caito and Joseph Kocot at the end of the PACA investigation to discuss the results of the investigation, Mr. Caito acknowledged that the amounts found in the investigation were indeed past due, that there had been problems with payment, and that the Company was making efforts to pay off the debts. (Tr. 240-241).

Third, unlike the Petitioner in *Bell*, Mr. Caito had full access to a wide array of corporate documents as secretary and treasurer of Caito & Mascari, Inc. During the investigation of Caito & Mascari, Inc., Mr. Caito and Joseph Kocot provided PACA investigator Wes Hammond with all the necessary cooperate financial documents and these documents were located in the office shared by Mr. Caito and Company president Joseph Kocot. (Tr. 237). Furthermore, as discussed above, when Mr. Hammond requested clarification during his investigation with regard to the manner in which the Company's accounts payable ledgers were setup, it was Mr. Caito who was able to provide him with a detailed understanding of the substance and design of these financial records. (Tr. 239).

In *Bell,* the Court stated that another important factor indicating that the appellant was nominal was the fact that he "never signed checks or agreements." *Id.* at 1200. As discussed above, Joseph A. Caito, Jr., was one of only three

persons at Caito & Mascari, Inc., who were authorized to sign checks on both Caito & Mascari, Inc.'s operations and payroll accounts. After Anthony A. Caito left Caito & Mascari, Inc., on January 5, 1996, he was one of only two persons authorized to sign checks on behalf of the corporation, meaning that he signed every check after that date because both accounts required two signatures. (Tr. 171-173). Among the checks signed by Mr. Caito are checks for PACA License renewal (REC-1, pp. 11,15; Tr. 157), at least eighteen payroll checks signed between September 14, 1995, and February 1, 1996 (REC-9; Tr. 166-167), and at least eighty-one checks on Caito & Mascari, Inc.'s operations account to produce creditors from November 29, 1995 to April 24, 1996. (AX-2; Tr. 177).

As discussed above, case precedent strongly underscores the importance of writing checks in the determination of responsible connection. Joseph A. Caito, Jr.'s issuance of many of the checks for Caito & Mascari, Inc.'s operations and payroll checking accounts during the first four months of the violations period and all the checks on these accounts for the remaining five months of the violations period alone is sufficient to constitute an "actual, significant nexus" which establishes that his positions in Caito & Mascari Inc., were not nominal.

That Mr. Caito was not a nominal corporate officer is also demonstrated by his signing corporate documents such as the Bill of Sale for the sale of the Brickyard 400 Suite as an officer and taking the corporate minutes at both shareholder and Board of Directors' meetings. (REC-5, p. 1; Tr. 140). In its 1995 U.S. Income Tax Return, Caito & Mascari, Inc., listed Mr Caito as the Company's "Tax Matters Person." (REC-7, p. 2). Furthermore, Joseph A. Caito, Jr., was by no means an unskilled or untrained employee and officer. He has a bachelor's degree in Business Marketing and an associate's degree in Computer Technology, and his annual compensation from Caito & Mascari ranged from the high $30,000s to the low $40,000s. (Tr. 153-154).

Finally, Mr. Caito's claim that his positions as officer and director were nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995, in order to settle a law suit brought against the corporation, he loaned the corporation $5,000.00 of his own money. (REC-11). Mr. Caito's personal loan of the $5,000.00 was made in an effort to protect his interest in Caito & Mascari, Inc. Accordingly, Mr. Caito's personal interest in financially assisting the corporation is further evidence of his substantial involvement in the corporation as an officer and director.

It is evident that Joseph A. Caito, Jr., unlike the Petitioner in *Quinn*, was closely involved in important corporate business functions, which precludes a finding that he was only nominally an officer or director of the Company. The only reasonable conclusion to be drawn from the evidence in the record is that Mr. Caito had "an actual, significant nexus" with Caito & Mascari, Inc.,

committed acts of commission in participating in the Company's violations of the Act, and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, Joseph A. Caito, Jr., has failed to demonstrate that he was a nominal officer or director.

The *Alter Ego* Defense is Unavailable to Petitioner Because He Is An Owner of the Company and Because Caito & Mascari, Inc., Was Not the *Alter Ego* of Any Other Person.

Again, assuming *arguendo* that Mr. Caito was not actively involved or at fault in the violations of Caito & Mascari, Inc., section 1(9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The Court in *Bell* stated that a person might show that a corporation was the alter ego of its owners by "showing that the sole stockholder of the corporation 'effectively retained the decision making power in all aspects of corporate decision making.'" *Bell v. Department of Agriculture, supra, at 1201* (quoting *Quinn v. Butz, supra,* at 758). Mr. Caito's suggestion that some unnamed "others" controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at hearing. (Joseph A, Caito, Jr., Petition for Review, ¶ 3).

First, no stockholder of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent of the Company's stock, Joseph Kocot was the largest stock owner in the Company. (REC-1; REC-3). No one possessed a majority ownership interest which would have permitted him or her to control the corporation.

Second, the evidence demonstrates that while the president of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval on major business decisions. (REC-2; Tr. 129-130, 134). Decision making authority was distributed among many different people rather than being concentrated in any one individual.

Third, Mr. Caito is barred from raising the *alter ego* defense due to his ownership of stock in Caito & Mascari, Inc. In *In re: Michael Norinsberg,* PACA–APP Docket No. 96-0009, Slip Decision (Oct. 21, 1997), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 34. As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because

of his 2.97914 percent ownership interest in the Company's outstanding stock, it is similarly unavailable to Mr. Caito with his nine percent ownership interest in Caito & Mascari, Inc.

Joseph A. Caito, Jr.'s allegation of Caito & Mascari, Inc., being the *alter ego* of "others" is both unsubstantiated and unavailable to him as an owner of the corporation. Accordingly, Mr. Caito's claim to this defense must be rejected.

As director, secretary, and treasurer of Caito & Mascari, Inc., Joseph A. Caito, Jr., was responsibly connected to the corporation during the entire period of violations. He was actively involved in the activities resulting in the violations of the Act by virtue of his activities as a buyer of produce for the corporation, his activities writing checks on both the Company's operations and payroll accounts, and his active participation in the formal decision making process of the Company through the Board of Directors. He was not a nominal director, secretary, and treasurer as demonstrated by his active involvement in the Company's business and policy decisions; his knowledge of the Company's payment problems; his extensive check writing activities; his signing corporate documents; his designation as the corporation's "Tax Matters Person"; his substantial educational background and his salary; and, his personal loan of $5,000.00 to the corporation.

Mr. Caito was actively involved in the activities resulting in the violations. He was not a nominal officer or director of Caito & Mascari, Inc. He was himself an owner of the Company as a nine percent shareholder, and the Company was not the *alter ego* of any other person. For these reasons, the Chief's determination that Joseph A. Caito, Jr., was responsibly connected was correct and is hereby affirmed and upheld.

Accordingly, premised upon the record as a whole the following Order is issued.

Order

The finding of the Chief of the Agency that Petitioner Joseph A. Caito, Jr., was responsibly connected with Caito & Mascari, Inc., at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and hereby upheld and affirmed.

Accordingly, Petitioner Joseph A. Caito, Jr., is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

THOMAS A. CAITO
PACA Docket No. APP-97-0005
Findings of Fact With Respect to Thomas A. Caito

1. Thomas A. Caito is an individual whose home address is 4116 Winding Way, Indianapolis, Indiana 46220. Thomas A. Caito is the brother of Petitioners Joseph Caito, Sr., and Magdalina Mascari, and is the uncle of Petitioners Joseph A. Caito, Jr., and Anthony A. Caito (Tr. 76, 102). Thomas A. Caito began working at Caito & Mascari, Inc., when he was eighteen years old and continued to work there until the mid-1970s when he purchased a restaurant and left to start work in the restaurant business. He never worked at the Company thereafter, but, he continued to buy produce from Caito & Mascari, Inc., for his restaurant after he left until the Company ceased operations in 1996. (Tr. 77, 79).

2. Thomas A. Caito is a 5.66% shareholder in Caito & Mascari, Inc. (REC-6, pp. 19-20; REC-7, pp. 56, 63; Tr. 78, 97). He attended Caito & Mascari, Inc.'s annual shareholder's meeting held on March 12, 1995. (REC-2, pp. 1-3, 6).

3. As a member of Caito & Mascari, Inc.'s Board of Directors, Thomas A. Caito attended board meetings over a thirty-year period beginning in the 1960s and continuing until the Company ceased operations in 1996. (REC-1, pp. 16-24; REC-2, pp. 1-3, 6-9; Tr. 88). These board meetings included those held on March 12, 1995, July 12, 1995, October 25, 1995, and at least one more thereafter. (REC-2; Tr. 81, 96). At these board meetings, Petitioner discussed business and financial matters affecting Caito & Mascari, Inc., made motions and seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 86, 90-93).

4. At the March 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including (1) amending the corporation's Articles of Incorporation and Code of By-laws; (2) convening the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (3) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (4) cash flows and ways to improve the balance sheet; and (5) the effect of the interest on shareholder loans on the Company's balance sheet. Petitioner made one motion at this meeting. (REC-2, p. 7; Tr. 82, 91-92).

5. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or

terminate individuals. (REC-2, p. 8; Tr. 92-93).

6. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner made the motion to sell Connersville Property and Brickyard 400 Suite to raise money for the corporation. (REC-2, p. 9; Tr. 84, 94-95).

7. When Caito & Mascari, Inc., needed to borrow money in November 1995, Thomas A. Caito loaned the corporation $5,000.00 of his own money. (REC-12; Tr. 85).

8. Petitioner Thomas A. Caito was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA.

Conclusions
With Respect to Thomas A. Caito

The Chief of the PACA Branch, Mr. Frazier, has determined that Petitioner, Thomas A. Caito, was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA by failing to make full payment promptly for produce purchases from September 1995 through May 1996, in the amount of $997,652.91, while still owing at least $169,896.92 as of the date of the disciplinary hearing. Thomas A. Caito denies he was actively involved in the actions resulting in violations and asserts that his role as director with Caito & Mascari, Inc., was an honorary position derived from his stock ownership. He further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. However, the record indicates that Mr. Caito was actively involved in the activities resulting in the corporation's violations, that his positions were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Therefore, Thomas A. Caito was responsibly connected with Caito & Mascari, Inc.

Thomas A. Caito Was a Director of Caito & Mascari, Inc.

Section 1(9) of the PACA provides that "responsibly connected" persons include an "officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association." A person must fit at least one of these categories if he or she is to be considered responsibly connected. Thomas A. Caito's role as a member of Caito & Mascari, Inc.'s Board of Directors

during the entire violations period is uncontested in this matter. He acknowledged at the hearing that he had been a director of Caito & Mascari, Inc., for over thirty years, including the time period from March 1995 through May 1996. (Tr. 88). In addition to the PACA license record that shows him as a director (REC-1, p. 1), numerous other corporate documents conclusively establish Petitioner's status as a director of Caito & Mascari, Inc., including the corporate minutes (REC-2, pp. 1-3, 6-9) and bankruptcy documents filed by Caito & Mascari, Inc. (REC-6, p. 19). Accordingly, there is no question that Thomas A. Caito was a member of Caito & Mascari, Inc.'s Board of Directors for the violations period from September 1995 through May 1996.

Thomas A. Caito Was Actively Involved in the Activities Resulting in the PACA Violations Committed by Caito & Mascari, Inc.

Following the 1995 amendments to the PACA, section 1(9) provides a person who meets the initial criteria for responsible connection with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The record in this case reveals that Petitioner was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, Petitioner must be considered responsibly connected without consideration of the others factors set forth in section 1(9).

The legislative history of the 1995 amendments does not define "active involvement." *See* H.R. Rep. No. 104-207, 104th Cong., 1st Sess. (1995). However, guidance on this matter can be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm. While not using the "active involvement" language that appears in the statute, these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he was "without either personal fault or a realistic capacity to counteract or obviate the fault of others." *Quinn v. Butz,* 510 F.2d 743, 756 (D.C. Cir. 1975). *See also, Bell v. Department of Agriculture,* 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng,* 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agriculture,* 832 F.2d

601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dept. of Agriculture,* 711 F.2d 406, 408 (D.C. Cir. 1983).

One guide to active involvement, therefore, is examining whether a Petitioner either had "personal fault" for the violations or failed to "counteract or obviate the fault of others" for the violations. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that Petitioner was actively involved. Given that Thomas A. Caito performed both acts of commission and omission, he was actively involved in Caito & Mascari, Inc.'s violations of the Act.

Having spent thirty years on Caito & Mascari, Inc.'s Board of Directors, Thomas A. Caito's attempts to absolve himself of responsibility for the activities leading to the PACA violations are not persuasive. In his role as a corporate director, Mr. Caito participated in the Company's board meetings beginning in the 1960s, and his participation as a director continued during the period from September 1995 through May 1996 and thereafter. (Tr. 88). The corporate minutes from the Board of Directors' meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that Petitioner Thomas A. Caito actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making process. (REC-2). At these board meetings, Mr. Caito discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., made motions, and voted on all business decisions that were brought to a vote. (Tr. 86, 90-93).

At the March 12, 1995, board meeting, Mr. Caito, discussed business and financial matters with the other board members including (1) whether to convene the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (2) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (3) cash flows and ways to improve the balance sheet; and (4) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its creditors. Mr. Caito made one motion during this meeting (REC-2, p. 7) and he testified that he did make suggestions to the board regarding the need to cut expenses. (Tr. 91-92).

At the July 12, 1995, board meeting, Mr. Caito again discussed such matters with the other board members. The business and financial matters discussed by Petitioner at that board meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). These discussions once again address the fundamental issues of corporate financial and management policy that determined the manner in which Caito & Mascari, Inc., would address

its financial problems. Mr. Caito voted in all three of the votes taken. (REC-2, p. 8).

At the October 25, 1995, board meeting, Mr. Caito again discussed these types of financial issues with other board members, addressing: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion to allow the corporation to take out loans to settle a law suit brought against Caito & Mascari, Inc. (REC-2, p. 9). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that the Company owed him approximately $20,000.00 to $30,000.00 for work he had allegedly performed years earlier. (Tr. 94, 131, 148-149, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, Petitioner consciously chose to divert the financial resources available to the Company to pay produce creditors. The fact that Mr. Caito made the motion to sell corporate assets for this purpose is especially significant given the scarce financial resources available to the corporation for paying its produce creditors.

Thomas A. Caito's contention that his role was merely to "fill the board" and that he had no role whatsoever as a director in directing the way the Company should operate (Tr. 83) is directly contradicted by his own testimony:

Q You also testified that you had no role in the board's decision making process, correct?
A Not that I know of, no. I don't recall.
Q You voted, did you not, Mr. Caito?
A Yes, I voted.
Q And you made motions?
A Right.
Q And you discussed financial issues and business issues, correct?
A Yes.
Q If someone at one of these board meetings was to make a motion for something that you did not agree with, would you just sit silent, or would you say something?
A I would probably say something.
Q Would you be afraid that nobody would listen to you?
A No.
Q Do you felt[sic] that your opinion would be listened to by others, right?
A Yes.

(Tr. 90-91). Accordingly, Thomas A. Caito was not a passive director, but rather was one who was actively involved in making business and financial decisions for the corporation for over three decades -- including the nine months that comprise the violations period.

In his role as director, Thomas A. Caito had every opportunity to take action to bring the corporation into compliance with the Act. He may not credibly contend that he was not actively involved in violations when he knew that the Company was not paying its accounts promptly and when the Board of Directors was setting all major financial policy for Caito & Mascari, Inc. Mr. Caito was an active participant in the management of Caito & Mascari, Inc.

In light of the role that Thomas A. Caito played in making corporate financial policy for Caito &Mascari, Inc., his claim that he was not actively involved in the activities resulting in the violations is not credible. However, assuming *arguendo* that he be considered not to be personally at fault for the activities resulting in the violations, he certainly had a "realistic capacity to counteract or obviate the fault of others" which he failed to exercise. *Bell v. Department of Agriculture, supra,* at 1201. Armed with the knowledge of the Company's financial inability to pay its produce creditors and as a Caito family member with over 30 years involvement in the Company's Board of Directors, Mr. Caito had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari, Inc., directors and officers. Through both his acts of commission and omission, Thomas A. Caito must be considered responsibly connected to Caito & Mascari, Inc.

Thomas A. Caito's Contentions That He Was a Nominal Director and That Caito & Mascari, Inc., Was the *Alter Ego* of Others Are Not Supported by Case Law or the Factual Record.

Thomas A. Caito's failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to Petitioner's responsibly connected status as he was a director and actively involved in the activities resulting in violations of the Act. Mr. Caito, contending that he was not actively involved or at fault in the violations, goes on to assert that his role on the Board of Directors was merely nominal or "honorary," and he suggests that Caito & Mascari, Inc., was the *alter ego* of unnamed "others." (Thomas A. Caito's Petition for Review, ¶ 3).

The 1995 amendments to section 1(9) of the PACA require a Petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "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(9) (emphasis added). It is evident from case law and the factual record that Mr. Caito's role as a board director was not nominal, that he himself was an owner, and that Caito & Mascari, Inc. was not the *alter ego* of any person.

Thomas A. Caito Was Not a Nominal Director of Caito & Mascari, Inc.

Although the legislative history of the 1995 amendments does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the Court of Appeals for the District of Columbia Circuit. In its most recent decision interpreting the PACA responsibly connected proceedings, *Bell v. Department of Agriculture, supra,* the Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The Court stated that a person may show that he was only a nominal officer, director, or shareholder:

> by proving that he lacked "an actual, significant nexus with the violating company." *Minotto v. United States Dept. of Agriculture,* 711 F.2d 409 (D.C. Cir. 1983). Where responsibility was not based on the individual's "personal fault," *id.* at 408, it would have to be based on at least on his "failure to 'counteract or obviate the fault of others,'" *id.*

Bell v. Department of Agriculture, supra. As indicated by the *Bell* Court, the more than nominal nature of a Petitioner's corporate position may be established by evidence showing that Petitioner either had "personal fault" or had failed to "counteract or obviate the fault of others" for the violations of the Act. In order to show that a position is more than nominal, personal fault is not required, although it certainly is sufficient. Considerable evidence was presented showing that Thomas A. Caito had a significant nexus with Caito & Mascari, Inc., as he performed important business and policy functions on the Board of Directors.

In applying this general standard, the *Bell* Court considered several important factors articulated in its earlier *Quinn* decision that led the Court to determine that the individual in question in that case, Carl Quinn, was only a nominal officer. Specifically, the Court considered that Mr. Quinn never had anything to do with policy or business decisions, he never had participated in the formal decision making structure of the company, he did not have access to company records, and he did not have any knowledge of the company's financial difficulties. *Id.* at 1202,

1204. This is not the case, however, with Thomas A. Caito.

First, unlike the Petitioner in *Quinn,* Mr. Caito was active in policy and business decisions and participated in the Company's formal decision making process. As discussed in detail above, he participated in multiple Board of Directors' meetings in which the six board members, including corporate officers Joseph Kocot and Joseph Caito, Jr., discussed crucial business and financial issues, made motions, and voted on those motions to create corporate policy. (REC-2).

Second, unlike the Petitioner in *Bell,* Mr. Caito had full opportunity to gain access to all important corporate records. With his life-long relationships with most every member of the corporation's directors and officers, it is unlikely that Mr. Caito would not have had full access to all corporate documents that he wished to see.

Third, unlike the Petitioner in *Bell,* Mr. Caito was aware of the Company's financial difficulties. Like the *Bell* Court, the *Minotto* Court also weighed the Petitioner's knowledge of the Company's wrongdoings in the responsibly connected decision. In that case, however, the Petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at Board meetings." *Minotto v. United States Dep't of Agriculture, supra.* As evidenced by the testimony of multiple witnesses as well as the corporate minutes, the Company's financial problems were certainly well known to Caito & Mascari, Inc.'s shareholders, directors, and officers and were discussed at the board meetings. (REC-2, p. 7-9; Tr. 86, 90-93, 125, 128-130, 160-161, 179-180). The evidence also showed that there was a shareholders meeting in 1994 at which the Company's shareholders were informed of financial problems resulting from a "substantial loss." (Tr. 145-146). As a 5.66% stockholder in Caito & Mascari, Inc., Mr. Caito would most certainly have been aware of these problems by at least that time. (Rec.-6, p. 19).

Finally, Mr. Caito's claim that his position as director was nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995 in order to settle a law suit brought against the corporation, he loaned the corporation $5,000.00 of his own money. (REC-13). Accordingly, Mr. Caito's personal commitment toward financially assisting the corporation is further evidence that his involvement as a director of Caito & Mascari, Inc., was not nominal.

It is evident that Thomas A. Caito, unlike the Petitioner in *Quinn,* was closely involved in important corporate business and policy functions, which precludes a finding that he was only nominally a director of the Company. The only reasonable conclusion to be drawn from the evidence in the record is that Mr. Caito had "an actual, significant nexus" with Caito & Mascari, Inc., committed acts of commission in participating in the Company's violations of the

Act, and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, Thomas A. Caito has failed to demonstrate that he was a nominal director of Caito & Mascari, Inc.

The *Alter Ego* Defense is Unavailable to Petitioner Because He Is An Owner of the Company and Because Caito & Mascari, Inc., Was Not the *Alter Ego* of Any Other Person.

Again, assuming *arguendo* that Mr. Caito was not actively involved or at fault in the violations of Caito & Mascari, Inc., section 1(9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The Court in *Bell* stated that a person might show that a corporation was the alter ego of its owners by "showing that the sole stockholder of the corporation 'effectively retained the decision making power in all aspects of corporate decision making.'" *Bell v. Department of Agriculture, supra, at 1201* (quoting *Quinn v. Butz, supra,* at 758). Mr. Caito's suggestion that some unnamed "others" controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at hearing. (Thomas A, Caito's Petition for Review, ¶ 3). It was not a contention that was pursued on brief.

First, no stockholder of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent of the Company's stock, Joseph Kocot was the largest stock owner in the Company. (REC-I; REC-3). No one possessed a majority ownership interest which would have permitted him or her to control the corporation.

Second, the evidence demonstrates that while the president of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval on major business decisions. (REC-2; Tr. 129-130, 134). Decision making authority was distributed among many different people rather than being concentrated in any one individual.

Third, Mr. Caito is barred from raising the *alter ego* defense due to his ownership of stock in Caito & Mascari, Inc. In *In re: Michael Norinsberg,* PACA-APP Docket No. 96-0009, Slip Decision (Oct. 21, 1997), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 34.

As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because of his 2.97914 percent ownership interest in the Company's outstanding stock, it is similarly unavailable to Mr. Caito with his 5.66% ownership interest in Caito & Mascari, Inc.

Thomas A. Caito's allegation of Caito & Mascari, Inc., being the *alter ego* of "others" is both unsubstantiated and unavailable to him as an owner of the corporation. Accordingly, Mr. Caito's claim to this defense must be rejected.

As director on Caito & Mascari, Inc.'s Board of Directors, Thomas A. Caito was responsibly connected to the corporation during the entire period of violations. He was actively involved in the activities resulting in the violations of the Act by virtue of his thirty-year involvement on the Board of Directors and his active participation in the formal decision making process of the Company through the Board of Directors. He was not a nominal director as demonstrated by his active involvement in the Company's business and policy decisions, his access to corporate documents, his knowledge of the Company's payment problems, and his personal loan of $5,000.00 to the corporation.

Mr. Caito was actively involved in the activities resulting in the violations. He was not a nominal director of Caito & Mascari, Inc. He was himself an owner of the Company as a 5.66% shareholder, and the Company was not the *alter ego* of any other person. For these reasons, the Chief's determination that Thomas A. Caito was responsibly connected was correct and is affirmed and upheld herein. Accordingly, the following Order is issued.

Order

The finding of the Chief of the Agency that Petitioner Thomas A. Caito was responsibly connected with Caito & Mascari, Inc., at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and hereby upheld and affirmed.

Accordingly, Petitioner Thomas A. Caito is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

MAGDALINA M. MASCARI
PACA Docket No. APP-97-0007
Findings of Fact With Respect to Magdalina M. Mascari

1. Magdalina M. Mascari is an individual whose home address is 255 E.

Edgewood Avenue, Indianapolis, Indiana 46227. She is the sister of Petitioners Thomas Caito and Joseph Caito, Sr., and is the aunt of Petitioners Joseph Caito, Jr., and Anthony A. Caito. (Tr. 76, 102). Mrs. Mascari has been a member of Caito & Mascari, Inc.'s Board of Directors and an 18.5% shareholder in the Company since October 19, 1992. (REC-1, pp. I, 7, 12, 16, 20, 24, 26; REC-2, pp. 1-3, 6-9; REC-7, pp. 56, 63; Tr. 70). In 1938, she married Cosmos Mascari, an original co-owner of the firm. (Tr. 61). She inherited her husband's stock after his death. She assumed her directorship and acquired her ownership interest in the corporation following the death of her husband. Cosmos Mascari, in 1992. (Tr. 65).

2. Petitioner Magdalina M. Mascari never worked in the Company and at the time of Mr. Mascari's death she was seventy-eight years old. At the time of the hearing Mrs. Mascari was eighty-three years old..

3. As a member of Caito & Mascari, Inc.'s Board of Directors, Mrs. Mascari attended board meetings from 1992 through 1996, including board meetings held on March 12, 1995, July 12, 1995, and October 25, 1995. (REC-2, Tr. 71). At these board meetings, she discussed business and financial matters affecting Caito & Mascari, Inc., made motions and seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 73).

4. At the March 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) amending the corporation's Articles of Incorporation and Code of By-laws; (2) convening the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (3) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (4) cash flows and ways to improve the balance sheet; and (5) the effect of the interest on shareholder loans on the Company's balance sheet. Petitioner seconded motions in this meeting on three occasions. (REC-2, p. 7).

5. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. Petitioner seconded the motion to give the president the right to suspend or terminate individuals. (REC-2, p. 8).

6. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) the decision to deny the debt but to settle a claim

brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion "to deny we owe but will settle with [Bob] Ramsier to keep Caito & Mascari, Inc. from additional losses" and seconded the motion to allow the corporation to take out loans. (REC-2, p. 9).

7. When Caito & Mascari, Inc., needed to borrow money in November 1995, Magdalina M. Mascari loaned the corporation $10,000.00 of her own money. (REC-12; Tr. 85).

8. Although Petitioner Magdalina M. Mascari testified she did not remember attending shareholder or board meetings or signing documents, such lack of memory as a witness at the oral hearing does not mean she did not do such activities. Having heard the witness testify, I find that any lack of memory is overcome by other evidence of record. Moreover, I am not convinced there was the lack of memory Petitioner would have us believe.

Conclusions
With Respect to Magdalina M. Mascari

The Chief of the PACA Branch, Mr. Frazier, has determined that Petitioner, Magdalina M. Mascari, was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA by failing to make full payment promptly for produce purchases from September 1995 through May 1996, in the amount of $997,652.91, while still owing at least $169,896.92 as of the date of the disciplinary hearing. Mrs. Mascari denies she was actively involved in the actions resulting in violations and asserts that her role as director and 18.5% shareholder in Caito & Mascari, Inc., was nominal only. She further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. However, the record indicates that Petitioner was actively involved in the activities resulting in the corporation's violations, that Petitioner's positions were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Therefore, Magdalina M. Mascari was responsibly connected with Caito & Mascari, Inc.

Magdalina M. Mascari Was a Director and 18.5 Percent Shareholder of Caito & Mascari, Inc.

Section 1(9) of the PACA provides that "responsibly connected" persons include an "officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association." A person must fit at least one

of these categories if he or she is to be considered responsibly connected. Magdalina M. Mascari's role as a director and 18.5% shareholder of Caito & Mascari from October 19, 1992, through the present is uncontested in this matter. Mrs. Mascari acknowledged at the hearing that she has been a director and shareholder in Caito & Mascari, Inc., during that time period. (Tr. 62, 70). In addition to the PACA license record that unequivocally designated her as a director and 18.5% shareholder during that time period (REC-1, pp. 1, 7, 12, 16, 20, 24, 26), numerous other corporate documents conclusively establish her roles in Caito & Mascari, Inc., including the corporate minutes (REC-2, pp. 1-3, 6-9) and bankruptcy documents filed by Caito & Mascari, Inc. (REC-6, p. 19). Accordingly, there is no question that Magdalina M. Mascari was a director and 18.5% shareholder in Caito & Mascari, Inc., during the entire violations period from September 1995, through May 1996.

Magdalina M. Mascari Was Actively Involved in the Activities Resultingin the PACA Violations Committed by Caito & Mascari, Inc.

Following the 1995 amendments to the PACA, section 1(9) provides a person who meets the initial criteria for responsible connection with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The record in this case reveals that Petitioner Magdalina M. Mascari was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, Mrs. Mascari must be considered responsibly connected without consideration of the others factors set forth in section 1(9).

The legislative history of the 1995 amendments does not define "active involvement." *See* H.R. Rep. No. 104-207, 104th Cong., 1st Sess. (1995). However, guidance on this matter can be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm. While not using the "active involvement" language that appears in the statute, these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he was "without either personal fault or a realistic capacity to counteract or obviate the fault of others."

Quinn v. Butz, 510 F.2d 743, 756 (D.C. Cir. 1975). *See also, Bell v. Department of Agriculture,* 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng,* 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agriculture,* 832 F.2d 601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dep't of Agriculture,* 711 F.2d 406, 408 (D.C. Cir. 1983).

One guide to active involvement, therefore, is examining whether a Petitioner either had "personal fault" for the violations or failed to "counteract or obviate the fault of others" for the violations. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that a Petitioner was actively involved. Given that Magdalina M. Mascari performed both acts of commission and omission, she was actively involved in Caito & Mascari, Inc.'s violations of the Act.

In her role as a member of Caito & Mascari, Inc.'s Board of Directors, Mrs. Mascari began attending the Company's board meetings from 1993 onward. (Tr. 70). The corporate minutes from the Board of Directors' meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that Mrs. Mascari actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making process. (REC-2). At these board meetings, she discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 73).

At the March 12, 1995, board meeting, Mrs. Mascari, discussed business and financial matters with the other board members including: (1) whether to convene the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (2) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (3) cash flows and ways to improve the balance sheet; and (4) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its creditors. Mrs. Mascari seconded the motions of other directors on three instances during this meeting. (REC-2, p. 7).

At the July 12, 1995, board meeting, Mrs. Mascari again discussed such matters with the other board members. The business and financial matters discussed by Petitioner at that board meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). Mrs. Mascari seconded the motion to give the president the right to suspend or terminate individuals. These discussions once again address the fundamental issues of corporate financial and management policy that determined the manner

in which Caito & Mascari, Inc., would address its financial problems. Mrs. Mascari voted in all three of the votes taken. (REC-2, p. 8).

At the October 25, 1995, board meeting, Mrs. Mascari again discussed these types of financial issues with other board members, addressing: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Mrs. Mascari seconded the motions "to deny we owe but will settle with [Bob] Ramsier to keep Caito & Mascari, Inc., from additional losses" and to allow the corporation to take out loans to pay the settlement. (REC-2, p. 9). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that the Company owed him approximately $20,000.00 to $30,000.00 for work he had allegedly performed years earlier. (Tr. 94, 131, 148-149, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, Petitioner consciously chose to divert the financial resources available to the Company to pay produce creditors. Mrs. Mascari's seconding the motion is especially significant given the scarce financial resources available to the corporation for paying its produce creditors.

As an 18.5% shareholder, Magdalina M. Mascari also cannot credibly maintain that she was not actively involved in the activities that resulted in the Company's violations of the PACA. As set forth in the recent decision in the case of *In re: Steven J. Rodgers,* PACA APP Docket No. 96-0002, Slip Decision (August 22, 1997), stock ownership of twenty percent or greater is sufficient to establish that a Petitioner is responsibly connected. In *Martino v. United States Dep't of Agriculture,* 801 F.2d 1410 (D.C. Cir. 1986), the Court held that Petitioner's ownership of 22.2% of the Company's stock together with the fact that the Petitoner was neither enticed or coerced into the position at issue formed a sufficient nexus to establish that Petitioner was responsibly connected. The Court affirmed this holding in *Veg-Mix, Inc. v. United States Dep't of Agriculture,* supra, when it stated that "[i]n *Martino* we found that ownership of 22.2 per cent of the violating company's stock was enough support for a finding of responsible connection." The Court once again reaffirmed its position in *Siegel v. Lyng, supra,* when it stated that "[m]ost clearly in *Martino,* this Court held that approximately twenty per cent stock ownership would suffice to make a person accountable for not controlling delinquent management." *See also, Bell v. Department of Agriculture, supra.* Accordingly, Petitioner Magdalina M. Mascari's ownership of 18.5% of Caito & Mascari, Inc.'s stock by itself would establish that she was responsibly connected. However, when her substantial stock

ownership is considered together with her position as a member of the Company's Board of Directors, her responsibly connected status is conclusively ascertained.

In her role as director, and 18.5% shareholder, Magdalina M. Mascari had every opportunity to take action to bring the corporation into compliance with the Act. She may not credibly contend that she was not actively involved in violations when she knew that the Company was not paying its accounts promptly and when the Board of Directors was setting all major financial policy for Caito & Mascari, Inc. Mrs. Mascari was an active participant in the management of Caito & Mascari, Inc.

In light of the role that she played in making corporate financial policy for Caito & Mascari, Inc., as an active participant in the directors' meetings and her substantial ownership of stock in the corporation, Magdalina M. Mascari's claim that she was not actively involved in the activities resulting in the violations is not credible. However, assuming *arguendo* that she were considered not to be personally at fault for the activities resulting in the violations, she certainly had a "realistic capacity to counteract or obviate the fault of others" which she failed to exercise. *Bell v. Department of Agriculture, supra,* at 1201. Armed with knowledge of the Company's financial inability to pay its produce creditors and as a family member whose husband, father, and bothers had built the Company, she had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari directors and officers. Through both her acts of commission and omission, Magdalina M. Mascari must be considered responsibly connected to Caito & Mascari, Inc. On brief, Petitioner points out that Mrs. Mascari testified that she did not remember on occasion. Petitioner's supposed lack of memory at the oral hearing was not convincing. Whether or not Mrs. Mascari remembered her corporate activities at the time of her testimony at the oral hearing, the documentary data of record reveals her participation in the Company's affairs. Moreover, her testimony on cross-examination indicates she "supposed" or "guessed" that she had been a member of the Board of Directors since 1993 (Tr. 70); that she attended Board of Directors' meetings after the death of her husband in 1992 (Tr. 70); that "regular business" was discussed at the three different board meetings (Tr. 71); that she remembered motions which she seconded (Tr. 73); that she remembered discussion concerning the financial status of the Company; and, that she loaned the Company $10,000.00 because she wanted to see the Company stay in business (Tr. 74-75).

Magdalina M. Mascari's Contentions That She Was a Nominal Director and Shareholder and That Caito & Mascari, Inc., Was the *Alter Ego* of Others Are Not Supported by Case Law or the Factual Record.

Magdalina M. Mascari's failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to her responsibly connected status as she was actively involved in the activities resulting in a violation of the Act and was an officer, director, and owner of more than ten percent of the stock of the corporation. Mrs. Mascari, contending that she was not actively involved or at fault in the violations, goes on to assert that her role as director and shareholder of Caito & Mascari, Inc., was merely nominal, and she suggests that Caito & Mascari, Inc., was the *alter ego* of unnamed "others." (Magdalina M. Mascari's Petition for Review, ¶ 3). This argument was not pursued on brief and is not supported by the record herein.

The 1995 amendments to section 1(9) of the PACA require a Petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "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(9) (emphasis added). It is evident from case law and the factual record that Magdalina M. Mascari's roles as director and shareholder were not nominal, that she herself was an owner, and that Caito & Mascari, Inc., was not the *alter ego* of any person.

Magdalina M. Mascari Was Not a Nominal Shareholder or Director of Caito & Mascari, Inc.

Although the legislative history of the 1995 amendments does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the Court of Appeals for the District of Columbia Circuit. As discussed in detail above, there is strong case precedent that approximately twenty percent stock ownership in a violating Company is sufficient to establish responsible connection. *See, Bell v. Department of Agriculture, supra,* at 1199; *Siegel v. Lyng, supra; Veg-Mix, Inc. v. United States Dep't of Agriculture, supra; Martino v. United States Dep't of Agriculture, supra;* and *In re: Steven J. Rodgers, supra.* Without more, Mrs. Mascari's ownership of 18.5% of Caito & Mascari, Inc., is sufficient to establish that she is responsibly connected to Caito & Mascari, Inc. While her substantial stock ownership alone is enough to prove the point, Mrs. Mascari was also an active shareholder as indicated by her attendance at the March 12, 1995, shareholders meeting. (REC-2, p. 1-3, 6).

The Court of Appeals has also examined what is meant by "nominal" in ways

unrelated to stock ownership. In its most recent decision interpreting the PACA responsibly connected proceedings, *Bell v. Department of Agriculture, supra,* the Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The Court stated that a person may show that he was only a nominal officer, director, or shareholder:

> by proving that he lacked "an actual, significant nexus with the violating company." *Minotto v. United States Dept. of Agriculture,* 711 F.2d 409 (D.C. Cir. 1983). Where responsibility was not based on the individual's "personal fault," *id.* at 408, it would have to be based on at least on his "failure to 'counteract or obviate the fault of others,'" *id.*

Bell v. Department of Agriculture, supra. As indicated by the *Bell* Court, the more than nominal nature of a Petitioner's corporate position may be established by evidence showing that Petitioner either had "personal fault" or had failed to "counteract or obviate the fault of others" for the violations of the Act. In order to show that a position is more than nominal, personal fault is not required, although it certainly is sufficient. Considerable evidence was presented showing that Mrs. Mascari had a significant nexus with Caito & Mascari, Inc., as she performed important business and policy functions.

In applying this general standard, the *Bell* Court considered several important factors articulated in its earlier *Quinn* decision that led the Court to determine that the individual in question in that case, Carl Quinn, was only a nominal officer. Specifically, the Court considered that Mr. Quinn never had anything to do with policy or business decisions, he never had participated in the formal decision making structure of the company, he did not have access to company records, and he did not have any knowledge of the company's financial difficulties. *Id.* at 1202, 1204. This is not the case, however, with Petitioner Magdalina M. Mascari.

First, unlike the Petitioner in *Quinn,* Mrs. Magdalina M. Mascari was active in policy and business decisions and participated in the Company's formal decision making process. As discussed in detail above, she participated in multiple Board of Directors' meetings in which the six board members, discussed crucial business and financial issues, made motions, and voted on those motions to create corporate policy. (REC-2).

Second, unlike the Petitioner in *Bell,* Mrs. Mascari had full opportunity to gain access to all important corporate records. With her life-long relationships with most every member of the corporation's directors and officers, it is unlikely that Mrs. Mascari would not have had full access to all corporate documents that she wished to see.

Third, unlike the Petitioner in *Bell,* Mrs. Mascari was aware of the Company's financial difficulties. Like the *Bell* Court, the *Minotto* Court also weighed the Petitioner's knowledge of the Company's wrongdoings in the responsibly connected decision. In that case, however, the Petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at Board meetings." *Minotto v. United States Dep't of Agriculture, supra.* As evidenced by the testimony of multiple witnesses as well as the corporate minutes themselves, Caito & Mascari, Inc.'s financial problems were certainly well known to Caito & Mascari, Inc.'s shareholders, directors, and officers and were discussed at the board meetings. (REC-2, p. 7-9; Tr. 86, 90-93, 125, 128-130, 160-161, 179-180). The evidence also showed that there was a shareholders meeting in 1994 at which the Company's shareholders were informed of financial problems resulting from a "substantial loss." (Tr. 145-146). As a 18.5% stockholder in Caito & Mascari, Inc., Magdalina M. Mascari, would most certainly have been aware of these problems. (Rec.-6, p. 19).

Finally, Petitioner Magdalina M. Mascari's claim that her positions as director and shareholder were nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995 in order to settle a law suit brought against the corporation, she loaned the corporation $10,000.00 of her own money. (REC-13). As indicated in Mrs. Mascari's testimony, her personal loan of $10,000.00 was made in an effort to help the Company stay in business. (Tr. 75). Accordingly, Mrs. Mascari's personal commitment toward financially assisting the corporation is further evidence that her involvement as a director and shareholder of Caito & Mascari, Inc., was not nominal.

It is evident that Petitioner Magdalina M. Mascari, unlike the Petitioner in *Quinn,* was closely involved in important corporate business and policy functions, which precludes a finding that she was only nominally a director or shareholder of the Company. The only reasonable conclusion to be drawn from the evidence in the record is that she had "an actual, significant nexus" with Caito & Mascari, Inc., committed acts of commission in participating in the Company's violations of the Act, and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, Petitioner Magdalina M. Mascari has failed to demonstrate that she was a nominal director or shareholder.

The *Alter Ego* Defense is Unavailable to Petitioner Because She Is An Owner of the Company and Because Caito & Mascari, Inc., Was Not the *Alter Ego* of Any Other Person.

Again, assuming *arguendo* that Petitioner Magdalina M. Mascari was not actively involved or at fault in the violations of Caito & Mascari, Inc., section 1(9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The Court in *Bell* stated that a person might show that a corporation was the alter ego of its owners by "showing that the sole stockholder of the corporation 'effectively retained the decision making power in all aspects of corporate decision making.'" *Bell v. Department of Agriculture, supra, at 1201* (quoting *Quinn v. Butz, supra,* at 758). Mrs. Mascari's suggestion that some unnamed "others" controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at hearing. (Magdalina M. Mascari's Petition for Review, ¶ 3).

First, no stockholder of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent of the Company's stock, Joseph Kocot was the largest stock owner in the Company. (REC-1; REC-3). No one possessed a majority ownership interest which would have permitted him or her to control the corporation.

Second, the evidence demonstrates that while the president of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval on major business decisions. (REC-2; Tr. 129-130, 134). Decision making authority was distributed among many different people rather than being concentrated in any one individual.

Third, Mrs. Mascari is barred from raising the *alter ego* defense due to her ownership of stock in Caito & Mascari, Inc. In *In re: Michael Norinsberg,* PACA-APP Docket No. 96-0009, Slip Decision (Oct. 21, 1997), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 34. As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because of his 2.97914 percent ownership interest in the Company's outstanding stock, it is similarly unavailable to Mrs. Mascari with her 18.5% ownership interest in Caito & Mascari, Inc.

Magdalina M. Mascari's allegation of Caito & Mascari, Inc., being the *alter ego* of "others" is both unsubstantiated and unavailable to her as an owner of the corporation. Accordingly, her claim to this defense must be rejected.

As director and 18.5% shareholder of Caito & Mascari, Inc., Magdalina M. Mascari was responsibly connected to the corporation during the entire period of violations. She was actively involved in the activities resulting in the violations

of the Act by virtue of her active participation in the formal decision making process of the Company through the Board of Directors and her extensive stockholdings in the corporation. She was not a nominal director as demonstrated by her ownership of 18.5% of the Company's stock, and her active involvement in the Company's business and policy decisions through the Board of Directors, her access to corporate documents, her knowledge of the Company's payment problems, and her personal loan of $10,000.00 to the corporation.

Mrs. Mascari was actively involved in the activities resulting in the violations. She was not a nominal director or shareholder of Caito & Mascari, Inc. She was herself an owner of the Company as a 18.5% shareholder, and the Company was not the *alter ego* of any other person. For these reasons, the Chief's determination that Magdalina M. Mascari was responsibly connected was correct and is upheld and affirmed.

Order

The finding of the Chief of the Agency that Petitioner Magdalina M. Mascari was responsibly connected with Caito & Mascari, Inc., at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and is hereby upheld.

Accordingly, Petitioner Magdalina M. Mascari is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

Summary

In each of the six* Decisions and Orders set forth herein, the individual Petitioner has been found to have been responsibly connected to Caito & Mascari, Inc., during the period it was found to have violated the PACA. Such results are established by the evidence of record. Caito & Mascari, Inc., was a closely held corporation, doing millions of dollars of business. The owners, officers, and directors of the corporation were closely related, mostly as family members. Each would disclaim responsibility for the corporate violations when realistically none can do this. They each participated in the management, direction, and financial affairs of the Company and they worked closely together with full knowledge of the corporate activities.

Copies of these Decisions and Orders are to be served upon the parties.

*On April 30, 1998, Joseph T. Kocot, PACA Docket No. APP–97–0006, filed an appeal for review of the decision.

[These Decisions and Orders became final April 7, 1998, as to Anthony A. Caito, PACA Docket No. APP-97-0002; Joseph A. Caito, Sr.,PACA Docket No. APP-97-0003; Joseph A. Caito, Jr., PACA Docket No. APP-97-0004; Thomas A. Caito, PACA Docket No. APP-97-0005; and Magdalina M. Mascari, PACA Docket No. APP-97-0007.-Editor]

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Decision and Order filed March 2, 1998.

***Commercial bribery* — Burden of proof — Preponderance of the evidence — Substantial evidence — Credibility determinations — Deference to ALJ's findings — Jencks Act — ALJ bias — License revocation — Willful, flagrant, and repeated violations.**

The Judicial Officer affirmed the decision of Judge Bernstein (ALJ): (1) revoking JSG's PACA license for payments to the buying agents of its customers, in violation of 7 U.S.C. § 499b(4); (2) publishing the facts and circumstances of G&T's and Mr. Gentile's willful, flagrant, and repeated violations of the PACA; and (3) denying Mr. Gentile's PACA license application for engaging in practices of a character prohibited by the PACA. The legal standard for commercial bribery under the PACA is set forth in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992) and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). The relevant facts in *Goodman* and *Tipco* are similar to the facts in *JSG Trading Corp.* The standard of proof applicable to administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence and Complainant proved by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by engaging in commercial bribery. The Judicial Officer is not bound by an administrative law judge's credibility determinations. However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify and the record does not support reversal of the ALJ's credibility determinations. Section 9(b)(3) of the Perishable Agricultural Commodities Act Amendments of 1995 does not allow the payment of bribes by sellers of perishable agricultural commodities to employees or agents of purchasers of perishable agricultural commodities. Instead, section 9(b)(3) and the applicable legislative history make clear that section 9(b)(3) relates to promotional payments or volume discounts by sellers of perishable agricultural commodities to purchasers of perishable agricultural commodities. Cryptic notes taken of a telephone conversation are not Jencks Act statements and are not required to be produced in accordance with 7 C.F.R. § 1.141(h)(1)(iii).

Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality. However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair. There is no basis for JSG's allegation that the ALJ was biased toward or against any litigant.

Andrew Y. Stanton, for Complainant.
John V. Esposito and Mel Cottone, Hilton Head Island, SC, and Mark C.H. Mandell, Annandale, NJ, for Respondent JSG Trading Corp.
Sherylee F. Bauer, New York, NY, for Respondents Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The proceedings captioned PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526 are related disciplinary proceedings brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted By the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

PACA Docket No. D-94-0508 was instituted by a Complaint filed on November 8, 1993, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], and amended on April 8, 1994. The Amended Complaint alleges that Respondents, JSG Trading Corp. [hereinafter JSG], Gloria and Tony Enterprises, d/b/a G&T Enterprises [hereinafter G&T], Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Specifically, the Amended Complainant alleges that: (1) during the period from January 3, 1992, through February 24, 1993, JSG, G&T, and Mr. Gentile engaged in a scheme in which JSG made payments to G&T, under the direction, management, and control of Mr. Gentile, to induce G&T to purchase tomatoes from JSG on behalf of L&P Fruit Corp. [hereinafter L&P]; and (2) during the period from December 15, 1992, through February 24, 1993, JSG and Mr. Lomoriello engaged in a scheme whereby JSG made payments to Mr. Lomoriello to induce him to purchase tomatoes from JSG on behalf of American Banana Co., Inc. [hereinafter American Banana]. The Amended Complaint requests revocation of JSG's PACA license and publication of the violations committed by G&T and Messrs. Gentile and Lomoriello.

PACA Docket No. D-94-0526 was instituted by a Notice to Show Cause filed on February 8, 1994, by Complainant, challenging the PACA license applications of G&T and Mr. Gentile, based on their commission of the violations of the PACA

alleged in the Complaint filed in PACA Docket No. D-94-0508. The Notice to Show Cause requests that a finding be made that G&T and Mr. Gentile are unfit to be licensed under the PACA as commission merchants, dealers, or brokers because they have engaged in practices of a character prohibited by the PACA, and that G&T and Mr. Gentile should be refused a PACA license.

JSG, G&T, Mr. Gentile, and Mr. Lomoriello filed answers denying the material allegations in the Complaint and the Amended Complaint in the disciplinary proceeding captioned PACA Docket No. D-94-0508, as follows: (1) on November 18, 1993, JSG filed Answer of Respondent JSG Trading Corp; (2) on November 29, 1993, G&T filed Answer of Respondent Gloria and Tony Enterprises; (3) on December 20, 1993, Mr. Lomoriello filed Answer of Respondent Albert Lomoriello, Jr. d/b/a Hunts Point Produce Consultants and Transportation; (4) on June 6, 1994, JSG filed Answer of Respondent JSG Trading Corp. to Amended Complaint; (5) on June 6, 1994, Mr. Gentile filed Answer of Respondent Anthony Gentile to Amended Complaint; (6) on June 6, 1994, G&T filed Answer of Respondent Gloria and Tony Enterprises to Amended Complaint; and (7) on July 6, 1994, Mr. Lomoriello filed Answer of Respondent Albert Lomoriello, Jr. d/b/a Hunts Point Produce Consultants and Transportation Co. In the disciplinary proceeding captioned PACA Docket No. D-94-0526, G&T and Mr. Gentile filed a Joint Answer of Respondents Gloria and Tony Enterprises, Inc., and Anthony Gentile on February 18, 1994, denying the allegations in the Notice to Show Cause.

On February 23, 1994, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] determined that the factual issues in PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526 are similar and that consolidation would not prejudice JSG, G&T, Mr. Gentile, or Mr. Lomoriello [hereinafter Respondents] and granted Complainant's request for consolidation of the proceedings captioned PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526.[1]

On May 2, 1995, G&T filed a letter addressed to the ALJ stating that it wished to withdraw its PACA license application.[2] G&T, through counsel, confirmed it was withdrawing its license application during a May 8, 1995, telephone conference with the ALJ.[3] On May 11, 1995, Complainant filed Complainant's

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[1]Summary of Telephone Conference, filed February 25, 1994.

[2]Letter dated April 28, 1995, from Sherylee F. Bauer to Edwin S. Bernstein, filed May 2, 1995.

[3]Summary of Telephone Conference--Rescheduling of Hearing, filed May 8, 1995.

Motion to Withdraw Notice to Show Cause With Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises, and on May 12, 1995, the ALJ issued an Order Granting Complainant's Motion to Withdraw Notice to Show Cause. Mr. Gentile did not withdraw his PACA license application and the Order Granting Complainant's Motion to Withdraw Notice to Show Cause does not relate to or affect the Notice to Show Cause challenging the PACA license application filed by Mr. Gentile.[4]

The ALJ presided over an oral hearing in New York, New York, on December 5, 1995, through December 8, 1995, December 11, 1995, through December 15, 1995, December 19, 1995, through December 22, 1995, January 29, 1996, and March 19, 1996. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Mark C.H. Mandell, Esq., Annandale, New Jersey, represented JSG.[5] Sherylee F. Bauer, Esq., of Gersen, Baker & Wood LLP, New York, New York, represented G&T and Mr. Gentile. Mr. Lomoriello represented himself.

On October 31, 1996, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order; Mr. Lomoriello filed Post Hearing Brief of Respondent Albert Lomoriello, Jr.; Mr. Gentile filed Respondent Anthony Gentile's Post-Hearing Brief; and JSG filed Post Hearing Brief on Behalf of Respondent JSG Trading Corp. On November 27, 1996, Complainant filed Complainant's Reply Brief. On December 2, 1996, Mr. Gentile filed Respondent Anthony Gentile's Post-Hearing Reply Brief; and JSG filed Reply to Complainant's Post Hearing Brief on Behalf of JSG Trading Corp.

On June 17, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which he: (1) found that payments made by JSG to Messrs. Gentile and Lomoriello constituted commercial bribery; (2) found that Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) revoked JSG's PACA license; (4) ordered

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[4]The Order Granting Complainant's Motion to Withdraw Notice to Show Cause, filed May 12, 1995, specifically states:

> By letter, filed May 2, 1995, Sherylee F. Bauer, attorney for respondents, stated that Gloria & Tony Enterprises, Inc., d/b/a G&T Enterprises wish to withdraw their license application of January 7, 1994. In view of this, on May 11, 1995, Complainant filed a Motion to Withdraw Notice to Show Cause with Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises. Complainant noted that its Notice to Show Cause with respect to the license application of Anthony Gentile remains in effect.

[5]On July 11, 1997, Mr. John V. Esposito, Esq., and Mr. Mel Cottone, Esq., of the Law Offices of Cottone & Esposito, Hilton Head Island, South Carolina, entered an appearance on behalf of JSG.

that the finding that G&T, Mr. Gentile, and Mr. Lomoriello committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) be published; and (5) denied Mr. Gentile's application for a PACA license (Initial Decision and Order at 18, 46-47).

Mr. Lomoriello did not appeal the Initial Decision and Order, which was served on Mr. Lomoriello on June 30, 1997.[6] In accordance with the terms of the Initial Decision and Order (Initial Decision and Order at 47) and section 1.142 of the Rules of Practice (7 C.F.R. § 1.142), the Initial Decision and Order became final and effective as to Mr. Lomoriello on August 4, 1997.

On September 23, 1997, G&T, Mr. Gentile, and JSG appealed to,[7] and requested oral argument before,[8] the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557

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[6]Domestic Return Receipt for Article Number P 093 033 661.

[7]On January 9, 1998, Complainant moved for an order stating that the Initial Decision and Order became final as to G&T based on G&T's failure to appeal the Initial Decision and Order before it became final and effective (Motion for Order that the Initial Decision Became Final as to Gloria and Tony Enterprises, d/b/a G&T Enterprises, filed January 9, 1998). On January 28, 1998, G&T filed a response opposing Complainant's Motion for Order that the Initial Decision Became Final as to Gloria and Tony Enterprises, d/b/a G&T Enterprises, and stating that G&T had appealed the Initial Decision and Order on September 23, 1997 (Respondent Gloria & Tony Enterprises d/b/a G&T Enterprises Objection to Complainant's Motion, filed January 28, 1998).

Ms. Sherylee F. Bauer, Esq., counsel for G&T and Mr. Gentile, filed Respondent Anthony Gentile's Petition for Appeal on September 23, 1997. The first sentence of the appeal petition states "Respondent Anthony Gentile (hereinafter referred to as `Tony'), appeals from the June 17, 1997 Decision & Order of Edward [sic] S. Bernstein, Administrative Law Judge (hereinafter referred to as `ALJ')." (Respondent Anthony Gentile's Petition for Appeal at 1.) The last page of the appeal petition asks for relief for Mr. Gentile only and states that it is submitted by Gersen, Baker & Wood LLP "Attorneys for Respondent Anthony Gentile" (Respondent Anthony Gentile's Petition for Appeal at 22).

However, page 4 of Respondent Anthony Gentile's Petition for Appeal states "Tony Gentile and G&T request reversal of the ALJ's Decision and Order." Based on this sentence, I find that G&T appealed the Initial Decision and Order. Therefore, Complainant's Motion for Order That the Initial Decision Became Final as to Gloria and Tony Enterprises, d/b/a G&T Enterprises, filed January 9, 1998, is denied.

[8]JSG renewed its request for oral argument before the Judicial Officer on January 12, 1998 (Motion for Oral Argument, filed January 12, 1998), and on January 20, 1998, Complainant opposed JSG's renewed request for oral argument, stating that "[t]his is not a case in which there are novel legal issues or where the facts have not adequately been brought out." (Complainant's Opposition to Motion for Oral Argument by Respondent JSG Trading Corp. at 2, filed January 20, 1998.)

(7 C.F.R. § 2.35).[9] On November 7, 1997, Complainant filed Complainant's Response to Appeal Petitions,[10] and on November 13, 1997, the case was referred to the Judicial Officer for decision.

G&T's, Mr. Gentile's, and JSG's requests for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), are refused because the parties have thoroughly briefed the issues in this proceeding and the issues are controlled by established precedents. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

Complainant's exhibits are designated by the letters "CX"; JSG's, G&T's, and Mr. Gentile's exhibits are designated by the letters "RX"; Mr. Lomoriello's exhibits are designated by the letters "RL"; and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

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[9]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

[10]On February 2, 1998, Complainant filed Notice of Changes to Transcript Citations in Complainant's Response to Appeal Petitions and Complainant's Response to Appeal Petitions. Complainant asserts that the only difference between Complainant's Response to Appeal Petitions, filed November 7, 1997, and Complainant's Response to Appeal Petitions, filed February 2, 1998, are transcript citations and that the transcript citations in Complainant's Response to Appeal Petitions, filed November 7, 1997, are incorrect, and the transcript citations in Complainant's Response to Appeal Petitions, filed February 2, 1998, are correct. References in this Decision and Order to Complainant's Response to Appeal Petitions are to Complainant's Response to Appeal Petitions, filed February 2, 1998.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

. . . .

(d) Withholding license pending investigation

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10

per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . . . If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . ., the Secretary may refuse to issue a license to the applicant.

7 U.S.C. §§ 499b(4), 499d(d) (1994 & Supp. I 1995).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

. . . .

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the [PACA].

7 C.F.R. § 46.26.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . .

Findings of Fact

1. Respondent, JSG Trading Corp., is a corporation organized and existing under the laws of the State of New Jersey. JSG's business mailing address is PACA Hosing Building, Suite A, 33 Newman Springs Road, Tinton Falls, New Jersey 07724. PACA license number 880547 was issued to JSG on January 19, 1988. This license has been renewed annually. . . . Since January 1992, Steve Goodman has been president, treasurer, and a holder of 75 per centum of the stock of JSG and his wife, Jill Goodman, has been vice-president, secretary, and a holder of 25 per centum of the stock of JSG. Prior to January 1992, Jill Goodman was the sole officer and shareholder of JSG. [(CX 1B.)]

2. Mr. Goodman began JSG in 1988 (Tr. 2154). As of February 1993, JSG had $36,000,000 in annual sales and employed six or seven produce buyers (Tr. 77). All of the buyers had joint account arrangements with JSG by which they earn a percentage of the profits derived from their sales (Tr. 2080-81). Mr. Goodman is JSG's only tomato buyer and seller (Tr. 77). Mr. Goodman earns 50 per centum of the profits derived from his sales (Tr. 2079). Tomato transactions constitute about 40 per centum of JSG's business (Tr. 78).

3. Respondent, Anthony Gentile, is an individual whose business mailing address is 119 Third Avenue, Hadley, New York 12835. Mr. Gentile is not licensed under the PACA, but, at all times material [to this proceeding], was

operating subject to the PACA. [(Answer of Respondent Anthony Gentile to Amended Complaint ¶ 5.)]

4. On January 12, 1994, Complainant received an application for a PACA license from Mr. Gentile (CX 2). Complainant determined that, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), Mr. Gentile should be refused a license because Complainant concluded that Mr. Gentile engaged in practices [of a character] prohibited by the PACA [(Notice to Show Cause ¶ V)].

5. Respondent, Gloria and Tony Enterprises, d/b/a G&T Enterprises, is a corporation organized and existing under the laws of the State of New York. G&T's business mailing address is 119 Third Avenue, Hadley, New York 12835. PACA license number 890233 was issued to G&T on November 14, 1988. [(Answer of Respondent Gloria and Tony Enterprises to Amended Complaint ¶ 4.)] This license expired on November 11, 1990, when G&T advised that it had ceased operation subject to the PACA and failed to pay the required annual renewal fee (CX 1). [Gloria] Gentile[, Mr. Gentile's wife,] owns 100 per centum of G&T's stock (CX 1). At all times material [to this proceeding], G&T was operating subject to the PACA under the direction, management, and control of Mr. Gentile (Tr. 2948). G&T was formed for tax purposes (Tr. 448, 2829, 2948, 3216).

6. On January 12, 1994, Complainant . . . received an application for a PACA license from G&T (CX 1). G&T withdrew its license application . . . [(Letter dated April 28, 1995, from Sherylee F. Bauer to Edwin S. Bernstein, filed May 2, 1995)]. Subsequently, Complainant moved to withdraw its Notice to Show Cause [challenging the PACA license application filed by G&T (Complainant's Motion to Withdraw Notice to Show Cause With Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises, filed May 11, 1995) and Complainant's challenge to G&T's PACA license application was dismissed (Order Granting Complainant's Motion to Withdraw Notice to Show Cause)].

7. Mr. Gentile became involved in the tomato business when he was a boy and developed great expertise in buying and selling tomatoes (Tr. 2160[-61]). Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman[, managed the sales operation, and was the tomato buyer] at L&P, a [produce] dealer located at the Hunts Point Market in Bronx, New York (Tr. 442). . . . Mr. Gentile had a joint account arrangement with L&P, and Mr. Gentile would share profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Joint account arrangements are very common in the New York produce industry (Tr. 446, 2894). During the period in which Mr. Gentile was the head salesman for L&P, he was "on the walk," a term used at the Hunts Point Market, which means that he was a salesman who was present on the street

(Tr. 2170). While Mr. Gentile was buying tomatoes for L&P, he was considered by [many at] the Hunts Point Market to be the person with the most knowledge and influence in that market regarding tomatoes (Tr. 2160-61).

8. During 1986, Mr. Gentile began to establish a relationship with Mr. Goodman, who was then working for another produce dealer (Tr. 2154-55). Mr. Gentile taught Mr. Goodman the tomato business (Tr. 2930). Mr. Goodman soon sold a large volume of tomatoes to L&P through Mr. Gentile (Tr. 217[0-]71).

9. Mr. Gentile left "the walk" late in 1990 or early in 1991 because he became ill (Tr. 2909). However, from that time through the date of the hearing [in this proceeding], Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446). After Mr. Gentile left "the walk," he continued to be compensated on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

10. Dirtbag Trucking Corporation [hereinafter Dirtbag] was a corporation which was formed in 1989 when Mr. Goodman decided to enter the trucking business (Tr. 2089-90). In November 1989, Mr. Goodman and Mr. Gentile each were issued 75 shares of Dirtbag's stock (RX 2; Tr. 2102-03). In January 1991, Mr. Goodman and Mr. Gentile each loaned Dirtbag $40,000 to enable Dirtbag to purchase two trucks (RX 4 and 5; Tr. 2121, 2780). In return for the loans, [Messrs. Goodman and Gentile each] obtained a security interest in Dirtbag's assets. The security agreements required Dirtbag to repay the loans by August 18, 1994 (RX 4 and 5). However, Dirtbag never repaid the loans (Tr. 2130, 2499). Dirtbag never had its own office, but was operated from JSG's office (Tr. 2047). Dirtbag always had a cash flow problem. JSG . . . advanced money to Dirtbag [on a number of occasions] (CX 55 at 1-[3]; Tr. 2049), often paying Dirtbag's creditors directly (Tr. 1585). Dirtbag was never a very profitable company (Tr. 1564, 2495-96). In fact, Mr. Goodman called Dirtbag "a loser" (Tr. 2149). Mr. Goodman became very disgusted with Dirtbag because it was not making money, and he sold Dirtbag's trucks (Tr. 2050). The last truck was sold in 1994 (Tr. 2498).

11. In approximately January 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to [Mrs. Gentile] (RX 2; Tr. 2827). On February 20, 1991, Mrs. Gentile entered into a written agreement to sell her 75 shares of Dirtbag stock to Mr. Goodman for $80,000 (RX 3; Tr. 2926). The agreement provides that the stock would be placed in escrow with JSG's attorney, Mr. Mandell, and that Mr. Goodman would pay $25,000 per year to Mrs. Gentile in monthly installments for the next two years. After each $25,000 payment, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The agreement also provides that the final payment of $30,000 would be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final $30,000, Mr. Gentile's $40,000 loan to

Dirtbag would be released or assigned to Mr. Goodman. [(RX 3.)] Mrs. Gentile was paid the $80,000 by either Mr. Goodman or JSG, and she authorized [three] releases of [25] shares of stock [each] on December 30, 1991, February 14, 1993, and February 2, 1994 (RX [3] at 3-3b; Tr. 2942-43).

12. Respondent, Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., is an individual whose business mailing address is 219 Eden Road, Stamford, Connecticut 06907 [(Letter from Albert Lomoriello to Ms. Favors, filed November 29, 1993; Tr. 1244-45)]. Mr. Lomoriello is not licensed under the PACA, but, at all times material [to this proceeding], was operating subject to the PACA.

13. In approximately December 1991, Mr. Lomoriello became employed by American Banana, a produce firm located at the Hunts Point Market (Tr. 1256). Demetrius Contos, American Banana's vice-president, wanted Mr. Lomoriello to expand American Banana's business [(Tr. 313-16)]. Mr. Lomoriello was to receive 40 per centum of the profits on the produce that he purchased and to be liable for 40 per centum of the losses (Tr. 1245-46). Mr. Lomoriello purchased tomatoes from JSG for American Banana (Tr. 1263).

14. In approximately January 1993, the United States Department of Agriculture [hereinafter USDA] received a telephone complaint about JSG (Tr. 69, 81). The caller said that Mr. Goodman had been making payments to Mr. Gentile while Mr. Gentile was buying for L&P (Tr. 84). Ms. Joan Colson[, an auditor for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service,] and Mr. David Nielson[, a PACA Branch employee under Ms. Colson's supervision,] were assigned to audit JSG for Complainant [(Tr. 69-70)]. On February 25, 1993, Ms. Colson and Mr. Nielson met with Mr. Goodman, who provided JSG's records (Tr. 78).

15. JSG maintains a file jacket for each [produce] transaction. The file number on the jacket includes a two-letter prefix which corresponds to the buyer's initials. All documents related to the transaction are filed in the jacket and information regarding the transaction is recorded on the front and back portions of the [file] jacket. (Tr. 80.)

16. . . . Ms. Colson and Mr. Nielson [examined JSG's file jackets relating to JSG's sales to L&P and] found 81 file jackets that raised questions about improper payments (CX 8-CX 42; Tr. 109). [All 81 of these] file jackets concern sales of tomatoes to L&P by Mr. Goodman and the numbers [on each of these file jackets are] prefixed "SG" for "Steve Goodman" (Tr. 80). Each file jacket has handwritten notations on its front and back covers and contains documents pertinent to the transactions [to which the file jacket relates] (Tr. 80, 131-32). These file jackets also contain a total of 35 checks or check skirts showing payments from JSG to "A. Gentile" (Tr. 111-13). The reverse side of the checks

[are endorsed] "A. Gentile, payable to JSG Trading" (Tr. 122). These endorsements were actually written by Marsha Levine, JSG's bookkeeper (Tr. 1705).

17. The [top portion of the] back cover of [each of] the 81 file jackets show revenues [from the produce transactions to which the file jacket relates] and the [bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates]. The expenses sections list checks issued to "A. Gentile." The notations regarding these checks correspond to actual checks . . . payable to "A. Gentile" [or the check skirts applicable to checks payable to "A. Gentile"] which were found in the file jackets. (Tr. 127-30.)

18. At first, Mr. Goodman told Ms. Colson and Mr. Nielson that ["A. Gentile" was a fictitious name and that he] (Mr. Goodman) would give receipts to Ms. Levine for various functions, such as having his car washed, and she would expense them to the files [using the name, or notation, "A. Gentile"] (Tr. 129, 1038-39). . . . [Mr. Goodman] later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039). Mr. Goodman stated that JSG utilized "A. Gentile," a person's name, on the checks to enable Ms. Levine to endorse and redeposit the checks (Tr. 1039).

19. Mr. Goodman told Ms. Colson . . . that the use of checks to "A. Gentile," which were redeposited into JSG's account, was his method of keeping track of, or making up, losses that he incurred from sales to L&P. [Mr. Goodman] also told [Ms. Colson] that if a file contained checks to Mr. Gentile that were not redeposited into JSG's account, that money was for services that Mr. Gentile had provided to him. (Tr. 242.)

20. Some of the file jackets reflecting JSG's sales to L&P contain a slip of paper on which the check to "A. Gentile" is noted (e.g., CX 13B at 8; Tr. 137). Ms. Levine told Ms. Colson and Mr. Nielson that she wrote this information to indicate JSG's expense for the file jacket (Tr. 137).

21. Ms. Colson prepared a table reflecting the numbers of the JSG files that she randomly selected, the numbers of the checks issued by JSG that they contain, and the total amounts that each file shows as payments to "A. Gentile" (CX 7; Tr. 110).

22. When asked by Ms. Colson about notations written in the corners of the backs of file jackets, such as "Tony $2.00" (CX 13B at 1; Tr. 132-33), Mr. Goodman stated that he makes many notes on his file jackets (Tr. 132-33). With respect to each of these files, the number of boxes of tomatoes in the load multiplied by the amount noted on the back of the file jacket associated with the name "Tony" equals the amount of money shown on the file jacket as an expense

relating to "A. Gentile" (Tr. 145-46).

23. JSG maintains a Closed File Journal (CX 53). Each week, after a JSG file was closed, Ms. Levine would summarize that file's information in the journal (Tr. 226). The "Open SC" column refers to "open split commissions" (Tr. 226). Mr. Goodman stated that the "Open SC" column reflects what he paid to someone who provided a service to him (Tr. 227). All of the references to payments to "A. Gentile" in JSG's file jackets are noted in JSG's Closed File Journal under the "Open SC" column corresponding to the date that the transaction occurred (Tr. 228). The relationships between payments to "A. Gentile" recorded in the file jackets and the listings in the "Open SC" column in JSG's Closed File Journal are set forth in a table prepared by Ms. Colson (CX 52; Tr. 228-35).

24. JSG also maintains a General Ledger Chart of Accounts (CX 6; Tr. 106-07). This computer-generated record lists accounts contained in JSG's general ledger, the number assigned to each account, and a description of the account (Tr. 107). Account number 108 is "LOANS & EXCHANGES" [(CX 6)]. This account records loans made by JSG (Tr. 2053-54).

25. JSG also maintains a General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146). This computer-generated document describes how JSG's financial transactions are maintained in JSG's general ledger (Tr. 1765). JSG's General Ledger Journal Entry Edit Report reflects that Ms. Levine recorded 16 of the 35 checks made payable to "A. Gentile" in JSG's loans and exchanges account as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3).

26. Ms. Colson obtained a spreadsheet from Ms. Levine or from JSG's accountant, Mr. Daily, which details the 1992 transactions in JSG's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns, reflecting various individuals or firms to whom JSG had loaned money (Tr. 2054-56). [The eight] "A. Gentile" checks [issued in 1992 which are] described in the General Ledger Journal Entry Edit Report as "L/E Tony" and a $38,475.30 boat payment to Midlantic Bank, are noted in the column headed "L&P," and reflect a reduction of Mr. Gentile's [debt] payable to JSG (CX 55 at 1-3; Tr. 161, 215-16).

27. Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about JSG's loans and exchanges account and the spreadsheet that reflected that account (CX 55 at 1-3). Ms. Colson took . . . notes during that conversation (CX 76). Mr. Daily told Ms. Colson that "L/E" in JSG's records refers to JSG's loans and exchanges account and "Tony" refers to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily stated that Mr. Gentile had a loan with JSG (CX 76; Tr. 158) and that Mr.

Daily included the amounts of the checks for "L/E Tony" in the spreadsheet under the column headed "L&P" (CX 76; Tr. 160, 1617-21). On April 1, 1993, Ms. Colson requested Mr. Daily to provide an audit trail for the spreadsheet (CX 77; Tr. 159 . . .). Mr. Daily enclosed this information in a May 13, 1993, letter (CX 75). The audit trail restates the information contained in the spreadsheet (CX 55 at [4]-6; Tr. 166).

28. JSG maintains an Accounts Receivable Aged Analysis Report, a computer-generated report showing the status of JSG's accounts receivable for its customers on a monthly basis. . . . (CX 51; Tr. 252). The report indicates that when L&P was rebilled for a product (such as on CX 25B at 1, where L&P was rebilled from $5,001.35 to $3,251.75), the rebilled price would be noted in the Accounts Receivable Aged Analysis Report for L&P, and a credit memo would be issued canceling L&P's accounts receivable for the original price (CX 51 at 117; Tr. 254). None of the 16 "A. Gentile" checks found by Ms. Colson that are referenced in the General Ledger Journal Entry Edit Report as "L/E Tony" are listed in JSG's Accounts Receivable Aged Analysis Report (Tr. 258). All of the remaining 19 "A. Gentile" checks found by Ms. Colson (such as on CX 25B at 1 for $129.60), are listed in the Accounts Receivable Aged Analysis Report for L&P, with the amount of the check noted as a "customer charge" and the check itself noted as "payment received" (Tr. 256-57).

29. JSG's General Ledger Journal Entry Edit Reports for 1992 and 1993 show that JSG issued checks as payments to Mr. Gentile (Tr. 171-93). These checks are described in the General Ledger Journal Entry Edit Reports as follows: check number 3941 for $467.59 as "Steve's Loan, Tony's Boat" (CX 54 at 1-[2]); check number 1847 for $38,475.30 as "L/E Tony" (CX 54 at [3-5]); check number 3899 for $806.51 as "Steve's Loan Tony's Car" (CX 54 at [6-9]); check number 3975 for $806.51 as "Steve's Loan Tony's Car" (CX 54 at [10-14]); check number 4051 for $800 as "L/E Dirtbag for Tony's Car" (CX 54 at [14]-17); and check number 2151 for $3,317 as "Steve's Loan Tony's Watch" (CX 54 at 18). [JSG's General Ledger Journal Entry Edit Reports also show] a JSG payment of $6,400 as "L/E Tony" (CX 54 at 19).

30. JSG's records show that JSG check number 1847, dated June 5, 1992, was issued to Midlantic National Bank for $38,475.30 (CX 54 at 3; Tr. 182). Midlantic National Bank's records reveal that this check was in payment for a boat loan owed by Mr. Goodman (CX 73; Tr. 186). The boat was a Trojan model that Mr. Goodman had purchased in 1987 for approximately $45,000 to $50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). In August 1992, Mr. Goodman sold the boat, then titled to Mr. Goodman's wife, Jill, to Mr. Gentile for $10,000 (CX 57). The boat

needed work but was described by Mrs. Gentile as "nicely laid out" (Tr. 2930). Mr. Gentile told Louis Beni, [secretary-treasurer] of L&P . . ., that he was getting a very good price for the boat (Tr. 2888).

31. JSG's records contain check numbers 3899 [and] 3975 . . . issued to Mercedes-Benz Credit Corporation [and check number 4051 issued to Dirtbag for "L/E Dirtbag for Tony's Car"] (CX 54 at 6, 10, 14-15; Tr. 198). Documents obtained from Mercedes-Benz Credit Corporation show that a new 1990 Mercedes 300 SEL was leased to Mr. Gentile on May 11, 1990, for 48 months, with monthly payments of $798.99, for a total of $38,351.52 (CX 56 at 3-5; Tr. 198-99). Although a corporate resolution was prepared by Dirtbag and signed by Mr. Goodman and Mr. Gentile, which authorized Mr. Gentile to lease the car on behalf of Dirtbag (CX 56 at 2), the documents reflecting the lease do not mention Dirtbag. When Mr. Goodman presented the leased Mercedes to Mr. Gentile, Mr. Goodman placed a large red ribbon on it (Tr. 2828, 2838[-39]).

32. JSG check number 2151, dated July 28, 1992, for $3,317, was issued to a jewelry store in payment for a Rolex watch which Mr. Goodman gave to Mr. Gentile. Mr. Goodman testified that the watch was a gift. (RX 40; Tr. 2478-[80].)

33. JSG's payroll records for 1992 show that Mrs. Gentile received wages (CX 50 at 1-2; Tr. 26[5-]66). [Two of the] check stubs . . . for these payments to Mrs. Gentile contain the letters "comm" which refers to "commission" (CX 50 at 3-12; Tr. 268).

34. [After] Ms. Colson [left JSG's premises and] returned to Washington, D.C., she found that several JSG file jackets relating to sales to L&P contain statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). Two of the file jackets containing statements [from G&T] also contain adding machine tapes (CX 44B at 20, CX 46 at 5) which [reflect] amounts that correspond to the total of the packages noted in the G&T statements multiplied by 5¢ per package (Tr. 272-8[3]). File jacket [number SG 4222] in which [a G&T] statement was found shows a payment to "A. Gentile" which corresponds to the [total] . . . on the adding machine tape ([CX 44B at 1-2;] Tr. 281). The "A. Gentile" notation also corresponds to the [amount of the] check [payable] to Mrs. Gentile [found in the file and the amount] noted in JSG's payroll records [as wages paid to Mrs. Gentile] ([CX 44A at 1, CX 50 at 1;] Tr. 281-82). Many of JSG's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jacket numbers containing the notations "Tony 5¢" are the same numbers as those in G&T's statements (Tr. 283). The checks to Mrs. Gentile and their relationships to the files noted in G&T's statements are listed in a table prepared by Ms. Colson (CX 43).

35. JSG's records also contain 22 file jackets concerning JSG's sales of

tomatoes to American Banana which have notations on the backs of the file jackets similar to those reflecting sales to L&P (CX 63A-CX 69A; Tr. 5[49]-51). The notations indicate that payments per box were made to "Al" as well as to "HPT" or "Hunts Point Produce" in an amount equal to the amount of the notation multiplied by the number of boxes sold to American Banana. The file jackets contain seven JSG checks totaling $9,733.45 made payable to Hunts Point Produce Co. . . . (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4; Tr. 550, 553-54).

36. These 22 JSG file jackets also contain several invoices from Hunts Point Produce Co. to JSG in amounts that correspond to the amounts of the checks [issued to Hunts Point Produce Co.] The [Hunts Point Produce Co.] invoices contain JSG file numbers which correspond to the file numbers that were written on checks [payable to Hunts Point Produce Co. or check skirts applicable to checks payable to Hunts Point Produce Co. that were found in the file jackets] (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5; Tr. 554-59). Ms. Colson prepared a table that summarizes this information (CX 62).

37. Ms. Colson recognized that the address of Hunts Point Produce Co. [was also] Mr. Lomoriello's [address] (Tr. 559-60). In answer to Ms. Colson's question as to why Mr. Lomoriello was receiving money from JSG, Mr. Goodman replied that Mr. Lomoriello gave inside information to Mr. Goodman and performed various tasks for him at the Hunts Point Market (Tr. [559-]60).

38. JSG's Closed File Journal, under the "Open SC" column, reflects the amounts of the checks written by JSG to Hunts Point Produce Co. (CX 53; Tr. 604-05). Ms. Colson prepared a table showing the references in JSG's Closed File Journal for the payments to Hunts Point Produce Co. (CX 71; Tr. 629-30).

39. Ms. Colson and another PACA official interviewed Mr. Contos, American Banana's vice-president. Mr. Contos stated that Mr. Lomoriello was compensated by receiving 40 per centum of the profits on his transactions (Tr. 607). Mr. Contos [stated that if] Mr. Lomoriello [was receiving payments from JSG for produce sold to American Banana, he (Mr. Contos) expected Mr. Lomoriello] to repay American Banana 60 per centum of the money that he had received from JSG (Tr. 607).

40. Ms. Colson and her associate, Mr. Summers, also interviewed Patrick Prisco, L&P's president (Tr. 637). Mr. Prisco was unaware that JSG's payments to Mr. Gentile were being recorded in JSG's files associated with JSG's sales to L&P (Tr. 458[-64]).

Conclusions and Discussion

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. 2163 (May 29, 1929). Passage of the PACA was in response to the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. No. 71-1041[, at 1] (1930). The PACA's primary purpose is to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856[, 857-58] (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584[, 587] (6th Cir. 1971). "Accordingly, certain conduct by commission merchants, dealers, or brokers is declared to be unlawful." *O'Day, supra*, 536 F.2d at 858. Enforcement is effectuated through a system of licensing with penalties for violations. H.R. Rep. No. 71-1041, [at 3] (1930). *See also In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

The issue presented is whether Respondents have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by engaging in commercial bribery.

While the PACA does not expressly prohibit commercial bribery, two decisions by the Judicial Officer of the Department of Agriculture in 1990 and 1991 held that commercial bribery violates section 2(4) of the PACA (7 U.S.C. § 499b(4)). Both cases were affirmed by the [United States] Court of Appeals [for the Fourth Circuit] and appealed to the Supreme Court of the United States, which denied certiorari. The decisions are *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). Since the issuance of these decisions, the produce industry has been on notice that commercial bribery is prohibited by the PACA.

In both *Goodman* and *Tipco*, the respondents, produce dealers, entered into an arrangement with the produce buyer for a supermarket chain to pay the buyer 25 cents for each box of produce that he purchased from the [respondents]. The supermarket chain had no knowledge of this arrangement. The Judicial Officer found these actions to be willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and ordered the respondents' licenses revoked, explaining:

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

> `. . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. `No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell, the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . .' 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3d ed. 1968).

In re Sid Goodman & Co., supra, 49 Agric. Dec. at 1185-86; *In re Tipco, Inc., supra*, 50 Agric. Dec. at 884-85 (*citing In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-29 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979)).

The Judicial Officer expressed concern that commercial bribery by one firm in a market will inevitably lead to bribery by many firms, in an effort to compete. He stated:

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

In re Sid Goodman & Co., supra, 49 Agric. Dec. at 1186; *In re Tipco, Inc., supra*, 50 Agric. Dec. at 885 (*citing In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *remanded*, 820 F.2d 1103 (9th Cir. 1987), *reprinted in* 51 Agric. Dec. 619 (1992)).

The Judicial Officer provided the following guidelines:

> The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another--a duty to only deal with one another at arm's length. Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (e.g., more than a pen, calendar or lighter).

In re Tipco, Inc., supra, 50 Agric. Dec. at 882-83 (footnotes and citations omitted).

The present case is in all material respects similar to *Goodman* and *Tipco*. That Mr. Gentile and Mr. Lomoriello were not "employees" of their principals is not a material distinction. As in *Goodman* and *Tipco*, JSG was obligated to refrain from making payments to Mr. Gentile and Mr. Lomoriello since such payments would encourage Mr. Gentile and Mr. Lomoriello to purchase tomatoes from JSG. JSG could only make such payments with its customers' permission. Even if it received permission, JSG should not have made more than *de minimis* payments to Mr. Gentile and Mr. Lomoriello. The payments [made by JSG to Messrs. Gentile and Lomoriello] were more than *de minimis*. Therefore, these payments constitute commercial bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Conclusions Regarding Credibility

USDA obtained and carefully analyzed JSG's records. These records support [Complainant's] contentions that JSG bribed Mr. Gentile, a buyer of tomatoes for L&P, and that JSG bribed Mr. Lomoriello, a buyer of tomatoes for American Banana. . . . JSG's file jackets, accounts, checks, and other records fully document and support [Complainant's] allegations of bribery.

I find Complainant's lead investigator and principal witness, Ms. Joan Colson, to be completely credible. She had no motive to be untruthful, her testimony is consistent, and her testimony is supported by her written notes, as well as by

Respondents' records.

I find Complainant's other witnesses to be truthful. I find Carlos Valencia to be a truthful witness and where his testimony conflicts with Mr. Lomoriello's testimony, I find Mr. Valencia to be the more believable witness.

Respondents' witnesses are not very believable. JSG's bookkeeper/office manager, Marsha Levine, and JSG's accountant, Thomas Daily, tried to explain away the overwhelming documentary evidence that supports Complainant's allegations, but their explanations are not convincing. They seemed to be suffering as they testified and strained to show that their records did not support the conclusion that JSG bribed Mr. Gentile and Mr. Lomoriello. Although I could not conclude from their demeanor that either Mr. or Mrs. Gentile were being untruthful, their testimonies seem illogical and, therefore, are not believable. By his demeanor, Al Lomoriello was not believable. I also conclude that he manufactured documents after the fact.

However, the pivotal witness for Respondents was Steve Goodman. Mr. Goodman is an articulate, personable, and persuasive individual. These are traits that have enabled him to become an effective and extremely successful salesman. He is rarely at a loss for explanations. Just listening to Mr. Goodman, one wants to believe him. However, an analysis of the evidence and the application of logic render many of Mr. Goodman's critical explanations unbelievable.

I believe Mr. Goodman's testimony that he is meticulous about his record keeping. He testified:

> There were so many files. . . . All I can say is all my notations are identical . . . the notations - my paperwork, like I said, it's kind of like the McDonalds of the produce business, it's always the same . . . .

Tr. 2268.

Mr. Goodman later reiterated this theme, stating:

> . . . What I'll do a lot of times is I write everything on my files so this way when I come back to them 15 days later, 20 days later, 30 days later, it's very important for me to keep a good accurate account of everything I've done . . . .

Tr. 2368.

I believe this testimony that Mr. Goodman's notations on his file jackets were meticulous and accurate. Mr. Goodman was constantly making oral agreements,

mostly by telephone, talking to many people about various lots of tomatoes each day. Thus, he realized that to be successful and effective he needed to write down his prices, his costs and all data relevant to transactions on the file jackets, including the amounts that he paid to Mr. Gentile and to Mr. Lomoriello for each transaction.

Mr. Goodman's careful record keeping supports [Complainant's] allegations of bribery.

In attempting to rebut [Complainant's] allegations, Mr. Goodman adopted an opposite tact, trying to explain that things were vague and imprecise in other respects. I found this testimony, which conflicted with his meticulous record keeping, to be unbelievable.

Thus, Mr. Goodman testified that money that was paid to Mr. Lomoriello was for various jobs, but Mr. Goodman did not know which [jobs]. He testified:

> . . . It was not my policy that I would write down what Al did for me. I knew what Al did.

Tr. 2196.

Talking about "clips," [Mr. Goodman's] explanation for some of the payments, Mr. Goodman stated:

> The way that was kept track of and how much it worked out to Gloria stock and a clip balance and things like that and the circular checks, I only -- I bought and sold the produce. I really don't have a clear understanding -- I think Marsha could explain that better or already has explained it for the time being better than I am.

Tr. 2279.

He further testified about "clips":

> I never asked Marshal [sic] how she was doing it but obviously I am not dumb. I knew we were doing it. We were keeping a running balance some place. I never knew of any journals or ledgers, or how she was doing it, but I knew that she was keeping track of this for me. . . .

Tr. 2180.

[Mr. Goodman's portrayal of his understanding of jobs for which JSG paid Mr. Lomoriello and the manner of keeping accounting for "clips"] is totally inconsistent with Mr. Goodman's meticulous record keeping style, as well as his style of being an effective, controlling, "hands on" manager.

Discussion of the Evidence

I. JSG's Payments to Mr. Gentile.

Complainant has provided extensive evidence that in 1992 and early 1993, JSG made numerous payments to Mr. Gentile either directly, or through his wife, Gloria Gentile, or through G&T, a corporation owned by Mrs. Gentile and established only for tax purposes (Tr. 448, 2829, 2948, 3216). At the time that these payments were made, Mr. Gentile was buying tomatoes from JSG for L&P (Tr. [2170-]71).

JSG's payments to Mr. Gentile included: (1) The use and eventual purchase of Mr. Goodman's boat at a price substantially below its value; (2) Mr. Gentile's use of a valuable Mercedes automobile paid for by JSG; (3) a Rolex watch; (4) payments to Mr. Gentile through Mrs. Gentile; and (5) payments to Mr. Gentile in the form of 35 JSG checks.

A. The Boat.

The boat that was loaned and then sold to Mr. Gentile was purchased in 1987 by Mr. Goodman for approximately $45,000 to $50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). Mrs. Gentile testified that, although the boat needed work, it was "nicely laid out" (Tr. 2930).

While Mr. Gentile was using the boat, JSG's records indicate that JSG considered it to be Mr. Gentile's boat. JSG's General Ledger Journal Entry Edit Report for 1992 and 1993, and the check stubs of the JSG checks noted in the report, show that check number 3941 for $467.59 was issued on [January 24,] 1992, for "Steve's Loan Tony's Boat" (CX 54 at 1-2). When Mr. Daily, JSG's accountant, was asked about this entry at the hearing, he explained that "Tony" referred to Tony Gentile (Tr. 1559).

[On June 5,] 1992, JSG issued check number 1847 for $38,475.30 to Midlantic National Bank (CX 54 at 3; Tr. 182) in final payment for a loan made to Mr. Goodman to purchase the boat (CX 73 [at 11]; Tr. [185-]86). At that time, the record owner of the boat was Jill Goodman, Steve Goodman's wife (CX 73). Soon

after JSG satisfied the boat's $38,475.30 loan balance, Mr. Goodman sold the boat to Mr. Gentile for $10,000 (CX 57). Mr. Gentile told Louis Beni, [secretary-treasurer] of L&P, that he was getting a very good price on the boat (Tr. 2888). . . . By permitting Mr. Gentile to use Mr. Goodman's boat, which cost $45,000 to $50,000 in 1987, since 1990, and then selling it to [Mr. Gentile] for a mere $10,000 in 1992, immediately after having satisfied a bank loan balance of $38,475.30, JSG and Mr. Goodman made a substantial unlawful payment to Mr. Gentile.

B. The Mercedes.

On May 11, 1990, a new Mercedes automobile was leased to Mr. Gentile (CX 56 at 3-5; Tr. 198-99). The lease was for 48 months, with monthly payments of $798.99, for a total of $38,351.52 (CX 56 at 5). Mr. Gentile was authorized to lease the car by Dirtbag Trucking, a corporation which Mr. Goodman and Mr. Gentile jointly owned (RX 2; Tr. 2102-03).

Dirtbag never had its own offices, but was operated from JSG's office (Tr. 2047). [While JSG's records only show three checks issued by JSG that are directly linked to payment of the lease for the Mercedes (CX 54 at 6, 10, 14-15; Tr. 198),] Dirtbag constantly experienced cash flow problems and JSG . . . advanced money to [Dirtbag on a number of occasions] (CX 55 at 1-[3]; Tr. 2049). JSG often paid Dirtbag's creditors directly (Tr. 1585). When Mr. Daily discovered these advances, he was concerned that Dirtbag's independence for tax purposes would be compromised (Tr. [1593-]94). Mr. Goodman called Dirtbag "a loser" (Tr. 2149).

However, despite Dirtbag's constant financial problems and dependence upon JSG for financial support, Mr. Goodman, on behalf of Dirtbag, presented Mr. Gentile with the leased Mercedes in 1990. . . . When asked at the hearing why a less expensive car was not leased, Mr. Goodman explained:

[BY MR. STANTON:]

Q. Any particular reason why a Mercedes was the car that was leased rather than a Chevy, a Ford?

[BY MR. GOODMAN:]

A. Yes, we work hard and we like the best.

Tr. 2787.

It is . . . doubtful that Mr. Gentile ever used the Mercedes for Dirtbag's business. Mr. Gentile testified that he drove the Mercedes to work at the Hunts Point Market (Tr. 2838). Mrs. Gentile testified that she did not know for what aspects of Dirtbag's business Mr. Gentile could have used the Mercedes (Tr. 2936). Additionally, when Mr. Goodman presented the Mercedes to Mr. Gentile, he placed a large red ribbon on it (Tr. 2828, 2838[-39]). [Mr. Goodman's act of adorning the car with a ribbon] also implies that the car was a gift.

Thus, the payments of approximately $38,000 made by JSG to provide Mr. Gentile with the Mercedes also were unlawful.

C. The Rolex Watch.

[JSG check number 2151, dated July 28, 1992, for $3,317, was issued to a jewelry store in payment for a Rolex watch.] In approximately August 1992, Mr. Goodman gave the Rolex watch to Mr. Gentile (RX 40; Tr. 2478). Mr. Goodman admitted that he gave the watch to Mr. Gentile as a gift (Tr. 2479). Although Mr. Goodman said he was motivated by his friendship with Mr. Gentile, the [act of] bestowing such an expensive present upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P also was unlawful.

D. The Payments to Mrs. Gentile and to G&T.

JSG's payroll records for 1992 indicate that Mrs. Gentile was receiving . . . wages from JSG (CX 50 at 1-2; Tr. [265-]66). [Two of] the check stubs [relating to checks issued to Mrs. Gentile] indicate that the checks were written for "comm" which Ms. Levine stated refers to "commission" (CX 50 at 3-12; Tr. 268). Ms. Levine explained that Mrs. Gentile was paid for providing services to JSG as an informant (Tr. [270-]71).

The amounts of the checks to Mrs. Gentile relate to deductions of 5¢ [for each] box . . . of tomatoes sold by JSG to L&P. In several JSG file jackets relating to sales to L&P, Ms. Colson found what appeared to be statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). In two of the file jackets that contain G&T statements, Ms. Colson found adding machine tapes (CX 44B at 20, CX 46 at 5) that seemed to add packages, corresponding to the number of packages noted in the G&T statements, and multiply the total [number of packages] by 5¢ per package (Tr. 272-8[3]). Ms. Colson also noticed that file jacket [number SG 4222] in which [a G&T] statement was found shows a payment to "A. Gentile" which corresponds to the amount on the adding machine tape ([CX 44B at 1-2;] Tr. 281). The amounts of the

"A. Gentile" payments shown on the file jackets also correspond to the amounts of checks to Mrs. Gentile noted in JSG's payroll records (Tr. 281-82). Ms. Colson further noticed that many of JSG's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jackets containing the notations "Tony 5¢" have the same numbers as those on the statements of G&T (CX 44[B at 1-2]; Tr. 283).

After Ms. Colson presented this evidence at the hearing, Ms. Levine provided a completely different explanation for the checks payable to Mrs. Gentile. According to Ms. Levine, Mr. Goodman ordered JSG's employees to write "Tony 5¢" on every L&P file jacket to pay Mrs. Gentile for his purchase of her stock in Dirtbag (Tr. 1715).

However, JSG's claim that the checks to Mrs. Gentile were for her Dirtbag stock is inconsistent with the fact that the checks are listed in JSG's payroll records as [wages and the fact that two of the check stubs indicate that the checks issued to pay Mrs. Gentile were for] commissions. At the hearing, Ms. Levine stated that noting the checks to Mrs. Gentile on JSG's payroll records . . . was an error (Tr. 1941). However, this explanation was never given to Ms. Colson. This alleged error also came as a complete surprise to Mr. Daily, who testified that he had sent 1099 tax forms to Mrs. Gentile in 1991 and 1992, based upon his assumption that she was a salaried employee of JSG (Tr. 1541-42, 1595). In mid-1993, after Mr. Daily [submitted] JSG's tax return for 1992, he was told by Ms. Levine that Mrs. Gentile was not an employee (Tr. 1561-62). Ms. Levine testified that when Mr. Daily heard this, he "went through the roof" because the 1099 tax forms had been improperly issued (Tr. 1940). Mr. Daily then was requested to file an amended personal tax return for Mr. Goodman, which he did just before the hearing (Tr. 1601-02).

Ms. Levine's contention that she erred in noting Mrs. Gentile's "[wages]" in JSG's [payroll] records is further contradicted by her testimony that, as of late 1992, before she allegedly learned of her error in treating the payments to Mrs. Gentile as [wages], . . . Ms. Levine was aware that Mr. Lomoriello could not be entered in JSG's books as a wage earning employee, or else JSG would [be required] to send a 1099 tax form to Mr. Lomoriello (Tr. 1965).

The record does contain evidence that 75 shares of Dirtbag stock were transferred by Mrs. Gentile to Mr. Goodman. In early 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX [2 at 7-9a]; Tr. 2827), and on February 20, 1991, Mrs. Gentile agreed in writing to sell the 75 shares to Mr. Goodman for $80,000 ([RX 3 at 1;] Tr. 2926). The agreement (RX 3 at 1) provided that the stock would be placed in escrow with JSG's attorney and that Mr. Goodman would pay $25,000 per year to Mrs. Gentile in monthly

installments for the next 2 years. After the payment of each $25,000, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The final payment of $30,000 was to be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final $30,000, Mr. Gentile's $40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. Mrs. Gentile authorized [three] releases of [2]5 shares of stock [each] on December 30, 1991, February 14, 1993, and February 2, 1994 (RX [3] at 3-3b; Tr. 2942-43).

However, Respondents presented no evidence that Dirtbag was worth $80,000 during the period from 1991 through 1994. To the contrary, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984[-85], 2049, [2148-]49, [2495-]96). Even if the JSG checks to Mrs. Gentile, calculated by deducting 5¢ for each box of tomatoes sold to L&P, did amount to $80,000, the payment was still unlawful. Mr. Gentile had only loaned Dirtbag $40,000 and had invested [approximately] $7,000 in a new truck (Tr. [2782-]83). JSG's payments, therefore, would have included a profit of approximately $33,000, which would have been unjustified, given Dirtbag's unprofitable status.

The payment of $80,000 was also improper because, as Mr. Goodman acknowledged, if JSG [sold] more [tomatoes to] L&P during the period that the 5¢ per box deductions were to be made, Mrs. Gentile would receive the $80,000 more quickly (Tr. 2495). Mr. Gentile, thus, had an incentive to purchase as many of JSG's tomatoes as possible. In addition, Mr. Goodman stated that Mrs. Gentile's final 25 shares of Dirtbag stock would not be released from escrow until 1994, to coincide with the end of Mr. Gentile's lease of the Mercedes (Tr. [2494-]95). [The coincidence of the release of the stock and the end of the lease] would permit Mr. Gentile's continued use of the car, since it would remain deductible by Dirtbag as a business expense as long as Mrs. Gentile retained ownership of some of the stock (Tr. 1680).

Further evidence of unlawful payments to Mr. Gentile is a January 30, 1992, JSG check made payable to G&T in the amount of $5,600 (RX 34). Ms. Levine contended this check was in payment for services rendered by Mrs. Gentile to JSG and Mr. Goodman, although Ms. Levine never knew what kind of services these were (Tr. 2042-43). Mrs. Gentile said the $5,600 was for checking out tomato fields in Florida, where she and Mr. Gentile had their winter home (Tr. 2911). However, Mrs. Gentile admitted that she and Mr. Goodman never had any written agreement as to exactly what she would do and how much she would be paid (Tr. 293[2]-34). No documentation was ever provided to justify the $5,600 payment. I conclude that this $5,600 payment also was a bribe.

E. The 35 Checks to "A. Gentile."

JSG's unlawful payments to Mr. Gentile also include 35 checks, totaling $62,535.60 (CX 7), which JSG issued to "A. Gentile." JSG refers to these checks as "circular checks" because they were redeposited to JSG's bank account. However, JSG's records show that the 35 checks were treated as if Mr. Goodman was sharing his profit with Mr. Gentile. Further, 16 of the checks were shown in JSG's records as reducing [the debt] that Mr. Gentile owed to JSG.

The 35 checks to "A. Gentile" were found in file jackets that Ms. Colson examined (CX 8-CX 42; Tr. 109-13). All of the file jackets concern sales of tomatoes by JSG to L&P. Mr. Goodman represented JSG in all of the transactions since all of the file numbers contain the prefix "SG" (Tr. 80). Each file jacket contains handwritten notations and supporting documents ([CX 8-CX 42;] Tr. 132). The reverse sides of the 35 checks contain the endorsement "A. Gentile, payable to JSG Trading," which Ms. Levine wrote (Tr. 122, 1705). Some of the file jackets also contain a slip of paper on which the payment to "A. Gentile" is noted (CX 13B at 8; Tr. 137). Ms. Levine told Ms. Colson that she recorded this information to indicate JSG's expenses for the file jacket (Tr. 137).

[The top portion of the back cover of each of the 81 file jackets show revenues from the produce transactions to which the file jacket relates and the bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates] (Tr. 127). The revenues sections show the amounts that JSG's customer was billed for the produce and how much the customer paid (Tr. [127-]28). The expenses sections show from whom JSG purchased the produce, the date of purchase, the seller's invoice number, the date that JSG made payment, JSG's check number, and the amount of the check. The expenses sections also show incidental expenses, such as freight. The expenses sections for the files in question show payments to "A. Gentile" in the same amounts as the [checks to] "A. Gentile" found by Ms. Colson (Tr. 128[-30]).

When Ms. Colson asked Mr. Goodman what "A. Gentile" listed on the file jackets meant, Mr. Goodman was evasive. At first, he stated that he would give Ms. Levine receipts for various functions, such as having his car washed, and she would expense them to the files and that "A. Gentile" was a fictitious name (Tr. 129, [1038-]39). He later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039).

Mr. Goodman told Ms. Colson that the checks payable to "A. Gentile," which were deposited into JSG's account, were his way of keeping track of, and making up, losses that he incurred from sales to L&P and that if checks payable to Mr.

Gentile were not deposited into JSG's account, they were for services that Mr. Gentile had provided to him (Tr. 242).

Ms. Colson asked Mr. Goodman about notations written in the corners on the back of the 35 file jackets . . . (CX 13B at 1; Tr. 132-33). Mr. Goodman again was evasive, stating that he made many notes on his file jackets (Tr. 132-33). The number of boxes of tomatoes in the load, multiplied by the amount noted on the back of the file jacket, associated with the name "Tony" equals the amount on the file jacket shown as an expense to "A. Gentile" (Tr. 145[-46]).

1. The 35 Checks Were Treated as a Profit Split Between Mr. Goodman and Mr. Gentile and 16 of the Checks Were Treated as a Reduction of the Debt Which Mr. Gentile Owed to JSG.

JSG's records show that the 35 "A. Gentile" checks obtained by Ms. Colson were treated as a profit split between Mr. Goodman and Mr. Gentile. Further, 16 of the 35 checks were shown in JSG's records as reducing [the debt owed by] Mr. Gentile [to JSG].

JSG's Closed File Journal contains a column entitled "Open SC" which refers to "open split commissions." At the end of each week, Ms. Levine would reduce Mr. Goodman's profit by the amounts set forth in the "A. Gentile" checks (Tr. 1890-97). All 35 of the "A. Gentile" checks were noted in JSG's Closed File Journal under the "Open SC" column corresponding to the dates of the transactions (Tr. 228-29). This evidence [establishes] that JSG was treating these 35 checks to "A. Gentile" as a sharing of Mr. Goodman's profit.

Further, Ms. Colson found that 16 of the 35 checks were treated in JSG's records as payments to reduce a [debt] that Mr. Gentile owed to JSG. In JSG's General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146), a computer-generated document that reflects how JSG's financial transactions are recorded in JSG's general ledger (Tr. 1765), Ms. Colson found that the 16 checks were entered into a JSG account described as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3). The number of the account [under which the 16 checks were entered] is "108," which is identified in JSG's [General Ledger] Chart of Accounts as loans and exchanges (CX 6).

During Ms. Colson's investigation, she obtained a spreadsheet from Ms. Levine or from Mr. Daily detailing the 1992 transactions in JSG's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns reflecting various individuals or firms to whom JSG had loaned money (Tr. 2054-56). One of these columns is entitled "L&P" (Tr. 160[-01], 1617-21). Ms.

Colson found that [the eight checks issued in 1992 to] "A. Gentile" described in the General Ledger Journal Entry Edit Report as "L/E Tony" and the $38,475.30 boat payment to Midlantic Bank, are noted in the [1992] spreadsheet as a reduction of Mr. Gentile's [debt] payable to JSG (CX 55 at 1-3; Tr. 161, 215-16).

Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about JSG's loans and exchanges account and the spreadsheet that reflects the account (CX 55 at 1-[3]). Ms. Colson took . . . notes during this conversation (CX 76). Mr. Daily stated that with respect to "L/E Tony," "L/E" referred to JSG's loans and exchanges account and "Tony" referred to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily told Ms. Colson that Mr. Gentile had a loan payable to JSG (CX 76; Tr. 158). The references to "L/E Tony" contained in JSG's general ledger were set forth in the column in the spreadsheet under the heading "L&P" (CX 76). Mr. Daily also provided an audit trail which supported the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

At the hearing, Mr. Daily claimed that when Ms. Colson asked him what "L/E Tony" meant, he told her "these entries look like there's a loan to Tony, but that I would have to look into it" (Tr. 1520). However, Ms. Colson's notes of their March 11, 1993, telephone conversation indicate that Mr. Daily unambiguously stated that the "L/E" reference designated a loan to Mr. Gentile. The notes read: "Q. If the check stub denotes `L/E Tony' then this would be a loan to Mr. Gentile and show up under L&P on the L/E schedule. - That's correct." (CX 76.)

Mr. Daily also testified at the hearing that, after Ms. Colson's investigation, he spoke with Ms. Levine about the "L/E Tony" references and he decided to remove them from the "L&P" column in the spreadsheet (Tr. 1532[, 1656-57]). However, Mr. Daily never informed Complainant that the information contained in the spreadsheet or in the audit trail would be changed to remove the "L/E Tony" references from the "L&P" column (Tr. 634-35, 1657), nor did JSG ever make available or submit into evidence a revised version of the spreadsheet reflecting these alleged changes (Tr. 1660). I, therefore, conclude that Mr. Daily treated the "L/E Tony" references as reductions of [debts] that Mr. Gentile owed to JSG.

It is clear that 16 of the 35 "A. Gentile" checks were treated by JSG as reductions of Mr. Gentile's [debt] payable to JSG. The other 19 checks also constitute a sharing of Mr. Goodman's profits on the sales [of tomatoes] to L&P. All of these checks evidence unlawful payments by JSG to Mr. Gentile.

2. JSG's Contention that the Checks Payable to "A. Gentile" Were Issued to Adjust L&P's "Clips" is Not Credible.

JSG contends that the checks payable to "A. Gentile" relate to an arrangement

with L&P regarding "clips." Ms. Levine testified that the checks payable to "A. Gentile" were used by JSG as part of a system to adjust L&P's files because of L&P's "clipping" of JSG invoices. A "clip" would result in L&P paying less than JSG's invoice price. Ms. Levine testified as follows:

> [BY MR. MANDELL:]
>
> Q. Would you tell us what clips are in your understanding.
>
> [BY MS. LEVINE:]
>
> A. Okay.
>
> Q. With regard to L&P.
>
> A. Yes. As I understand it what was happening was he would -- they would make let's say or how can I explain it. They would take some money off -- they would underpay us on one invoice and then Mr. Goodman would add that onto a different file and we were keeping track like that. This is how we had set up the system. What we were doing we were taking a check and now this was one. This was a check that we were making up a clip.
>
> So we cut the check but we re-deposited it. We kept the money. We just kept track. We had a journal that we kept track. We had a list that we were keeping track of clips of how much L&P owed us. Usually they owed us and that is why we were doing it like this.
>
> Q. Miss Levine, why were you doing this with checks?
>
> A. Well, because Mr. Goodman wanted to keep a record. This way if we ever had any problem we could always say well these are the checks that we had. On this particular file we made up $320. This way we always had a check and we kept them and they came to us in our bank statement and we always were able to find them. We said we had this check, this check, this check, this check and this is how much they totaled up.

Tr. 1705-06.

Ms. Levine stated that when a customer of JSG had a problem with a load and "clips" an invoice, and JSG did not object to the "clip," JSG would rebill the

customer at a lower price (Tr. 249-50, 2063-64).

However, Ms. Levine's attempt to explain how the alleged "clip" system was maintained is not credible. She claimed that she maintained a journal to record L&P's clips balance, that a first journal had been thrown away, and that a second journal became wet when JSG's basement was flooded early in 1995 (Tr. 1706, 179[3]-95). She testified that she tried to reconstruct the second journal by copying its figures into another journal because Mr. Mandell, JSG's attorney, said the information was needed, but she was unable to [reconstruct the second journal] (Tr. 1772). However, Ms. Levine did not show the alleged second journal to Ms. Colson in February 1993, before it was allegedly damaged by the flood, even though she was served with a demand letter to provide relevant records (Tr. 1798). Further, Ms. Levine did not retain the remains of the journal allegedly damaged by the flood even though the Complaint in this matter had been filed, and she had been told by JSG's attorney that such a journal would be important evidence (Tr. 1772, 180[3]-08). Ms. Levine testified that, in attempting to reconstruct the damaged second journal, she began with the most recent clip balance allegedly still owed by L&P, $10,092.65, and worked backward in time (RX 20 at 27; Tr. [1808-]09). Ms. Levine stated that the most recent clip balance was provided to her on a piece of paper by Mr. Goodman; however, that piece of paper was never provided at the hearing (Tr. 1809[-13]). Without any tangible written evidence that JSG maintained such a balance, either in a journal or other written record, the "clips" explanation simply is not believable.

The credibility of this alleged arrangement is further weakened by the inability of either Mr. Goodman or Ms. Levine to explain its operation with any clarity. Mr. Goodman testified:

> [BY MR. STANTON:]
>
> Q. Well, this file, [CX] 13[B at 1], indicates a $3200 circular check to
> A. Gentile under the expenses portion of the file[,] correct?
>
> [BY MR. GOODMAN:]
>
> A. Okay.
>
> Q. It looks like from the file jacket, that this $3200 which you say is equal to the amount of the make-up, correct; is that basically your understanding of how this worked?

A. Pretty close to it, yes.

Q. That this $3200 is being taken away from your commissions?

A. Yes.

Q. Well, if that's the case, then how does this --

A. Wait a minute, excuse me. Marsha Levine needs to explain to you the pluses and adds to my commissions. I'm not going to testify to that because I get confused myself sometimes and she was up here and she explained it to you and she can do a much more accurate job of explaining it than I can.

Tr. 2804.

Ms. Levine also was unable to explain how the system worked. When asked how an "A. Gentile" check that was redeposited into JSG's account could have affected the balance owed between JSG and L&P, she was unable to give an adequate explanation. Finally, Mr. Mandell objected on the ground that the questions seemed to "confuse the witness":

[BY MR. STANTON:]

Q. Let's see. How about GS4300. Was that just a make up?

[BY MS. LEVINE:]

A. Yes. That is just a make up.

Q. That is a make up for what 3120?

A. Yes, that is correct.

Q. Now and it is noted in your table [(RX 20)] at page 22 where you have minus 3120?

A. That is correct.

Q. That means that the amount of money that L&P owed JSG at that point was reduced by 3120?

A. That is correct.

Q. So JSG in this particular transaction gained an extra 3120 from L&P in some fashion?

A. Yes.

Q. Now --

A. It is not that we gained. We got back money that they had ---

Q. That had lost on other ---

A. Right.

Q. Now if you look at this file jacket [(CX 14)], it indicates at the bottom an A. Gentile circular check for 3120 [(CX 14B at 1)].

A. Yes.

Q. And that is under expenses for that particular file.

A. That is correct.

Q. So it looks like it increased the expenses of JSG on that file.

A. Yes.

Q. Now this is what the problem is for me. If this is supposed to be a make up which results in more money coming to JSG from L&P on this particular file, why does it look like on this file that less money the 31[2]0 less money is coming to JSG on this file?

A. Well what I would do is that check somewhere got redeposited probably on another file somewhere on that file we made more money than we were supposed to.

Q. On the other file?

A. Wherever file I wrote, there is no way for me to tell what file I deposited that check on.

Q. The circular check?

A. Yes. I had to redeposit it somewhere.

Q. Okay. So that would balance out the circular check.

A. That would increase -- yes.

Q. The circular check didn't really mean anything anyway because it resulted in no gain or loss.

A. That is right.

Q. So by balancing out the circular check, you might decrease the amount of expenses to JSG overall by 3120 by adding the amount of the circular check somewhere on another file jacket; right?

A. When I deposited it, it increased our sales I guess you would say.

Q. The revenues or sales right.

A. Yes.

Q. By 3120 so that would balance out this 3120 negative amount on this file [(CX 14)].

A. That is correct.

Q. But that still wouldn't result in any kind of overall increase to JSG making up for previous loans by L&P would it?

A. We were just getting back the money we were supposed to get.

Q. But if this is a make up, you are supposed to be getting extra money to decrease the loan balance of L&P; isn't that right?

MR. MANDELL: I am going to object because the question seems to

confuse the witness.

Tr. 3129-3[2].

[The] credibility of this [arrangement] is also seriously compromised by [Mr. Goodman's] admitted alteration of documents in anticipation of the hearing. When the hearing reconvened on March 19, 1996, JSG introduced into evidence copies of hundreds of JSG file jackets to assist Ms. Levine in explaining how L&P's alleged clip balance was maintained (RX 53). Included among these file jackets were many in which certain amounts were shown as being deducted from L&P's clip balance by means of the notation "clip." Ms. Levine testified how these file jackets reflected the ongoing nature of JSG's arrangement with L&P.

However, upon cross-examination of Ms. Levine, it became clear that the word "clip" on at least 12 of these file jackets (SG 4131, 4152, 4211, 4242, 4273, . . . 4314, . . . 4399, 471[8], 48[7]6, [5115, 5128, and 5145]), had been added after Ms. Colson's investigation. Mr. Goodman later admitted that he personally wrote the word "clip" on the file jackets during the hearing process:

BY MR. MANDELL:

Q. First of all Mr. Goodman, you were of course present during Miss Levine's testimony and you were reviewing documents with me from RX-53 and some of Complainant's exhibits which show the word clip that appear in some documents and not in others. Can you tell us anything about that?

[BY MR. GOODMAN:]

A. Yes. I wrote the word clip.

Q. When did you do it and why did you do it. I realize it is a compound question.

A. Okay. It was done I believe sometime during the hearing process when we knew we needed this compilation made up and I told Marsha to gather up all of the files or no I take that back. It goes back before the hearing and I gathered up all of the filings, I had seen all of the files and I ---

JUDGE BERNSTEIN: In preparing for the hearing?

THE WITNESS: In preparing for the hearing.

JUDGE BERNSTEIN: Okay.

THE WITNESS: And there were just -- I was shuffling these same files into so many different categories that it was just getting lost, confused and ridiculous. So I took the files that were clipped files, I wrote on the files not changing anything the word clip. So this way as I shuffled them around, I could always keep them in piles. I tried to get files that were shared loads that involved clips. So I had files that belonged in two different places. So by writing that, I could always keep track of what was what.

BY MR. MANDELL:

Q. Now Mr. Goodman, did you write anything else on the files?

A. No.

Tr. [3168-70].

Mr. Goodman thus admitted that he altered documents prior to the hearing which his counsel intended to move into evidence. Furthermore, Mr. Goodman did not admit to these alterations until the matter was raised during Ms. Levine's cross-examination. These admitted alterations not only undercut JSG's contentions with respect to the alleged "clip" arrangements with L&P, but they also detract from JSG's credibility in general.

As I have stated [in this Decision and Order, *supra*], Mr. Goodman's testimony about the "clips" also is unbelievable. His lack of specific knowledge [of how "clips" worked is] inconsistent with his meticulous style of record keeping. He testified:

I knew there was some sort of list that she was keeping, but again I knew of no journals. A few times I saw like those yellow pieces of paper. I knew she was keeping some kind of record, and I knew because one time we spoke about it, and she said what happens when I come off of this page. I said to her when the page is done throw it away, because we are not looking to keep a balance from day one that we always had our files. If we ever wanted to go back to find out a figure, we could just take all of the files from whatever, add them up and there is the total add them up and subtract the pluses and minuses.

Tr. 2181.

I also found unbelievable Mr. Goodman's testimony as to why 5¢ per box was utilized as a "clip." Mr. Goodman answered his lawyer's questions about that as follows:

[BY MR. MANDELL:]

Q. All right. I understand about the length of time but who arrived at the five cents per box out of your commission. Why not 10. Why not 20. Why not some other figure, do you remember?

[BY MR. GOODMAN:]

A. No, I don't as a matter of fact.

Q. Huh?

A. I don't remember. I don't know how that came about.

Q. Pardon.

A. Well first off I know that I wouldn't have wanted to make it too high because I wouldn't want it to have affected my bonus all that much but the difference between a nickel and a dime really doesn't matter. I just think it just came about. It was simple and easy.

Q. Didn't have anything to do with the prior situation where you were trying to make up Tony's clips did it?

A. You know it was easy to -- the one nice thing about the nickel for the clips was like I told you whenever we tried to make a half we got wacked back. So a nickel always sailed through pretty easily. Maybe that had something to do with it. It just made sense. It was just something we were [sic] used and we just kept on going with it.

Tr. 2591-92.

Mr. Goodman's explanation as to why L&P's officials had no written record of the "clips" also defies credibility. He stated:

. . . Neither Pat Prisco nor Tony Gentile on a file by file basis ever sat there and went over it file by file as far as where we added or subtracted -- well, they always knew their deductions, but they didn't keep track of how I got my money back because he knew I was keeping track and also you just couldn't do it. You had to be very cautious -- not cautious, wrong word.

Tr. 2372.

And to the same effect, Mr. Goodman answered:

[BY MR. MANDELL:]

Q. Did you have any conversations with anyone at L&P about the $3 make-up?

[BY MR. GOODMAN:]

A. Well, not specifically on a file by file basis, but Pat Prisco and I had many conversations about the clips, and the pluses and the minuses and the deductions and so forth like that. He was well aware of what we were doing.

I'm not going to say I spoke to Patty on a weekly basis because I did not. Tony Gentile had full control of L&P's tomato business. Tony and I certainly spoke about it often. We fought like cats and dogs about it and again, Pat Prisco and I had many conversations.

Patty, on occasion, although he never asked me, "Well, how much is it today, how much is it tomorrow, you know, where's my balance," but he knew how hard the deductions were, the clips were.

As a matter of fact Patty, one day we were talking and he sad [sic], "Steve, I know exactly what you're doing, nobody could get the kind of adjustments on clean files, no inspections, that you and Tony worked out without me knowing that I'm giving it back to you someplace else," we had that conversation many times.

Tr. 2269[-70].

I, therefore, conclude that all of these 35 checks payable to "A. Gentile"

constitute illegal payments to Mr. Gentile.

II. JSG's Payments to Mr. Lomoriello.

From December 1992 through February 1993, JSG issued seven checks to Mr. Lomoriello totaling $9,733.45 at a time when Mr. Lomoriello was [an agent for] American Banana, responsible for buying tomatoes from JSG. Mr. Contos, vice-president and co-owner of American Banana, was unaware that any payments to Mr. Lomoriello were being linked directly to the number of boxes of tomatoes which American Banana was purchasing from JSG (Tr. 322-23). [JSG's] payments [to Mr. Lomoriello] also constitute bribes, in violation of the PACA.

Mr. Lomoriello became employed by American Banana in December 1991 and left its employ in 1993 (Tr. 315). Mr. Contos wanted Mr. Lomoriello to expand [American Banana's] business. Mr. Lomoriello was to receive 40 per centum of the profit on the produce he purchased, and be liable for 40 per centum of any losses (Tr. [314,] 1245-46).

Mr. Lomoriello received seven checks from JSG totaling $9,733.45 from December 1992 through February 1993. JSG and Mr. Lomoriello claim that these checks were for work done by Mr. Lomoriello not involving American Banana. However, the record does not reveal what specifically Mr. Lomoriello did for Mr. Goodman or JSG to earn these sums. Mr. Goodman testified that he began to ask Mr. Lomoriello to do things for him at the Hunts Point Market (Tr. 2192). However, Mr. Goodman admitted that there was never any written agreement setting forth what Mr. Lomoriello would do and the payments that he would receive (Tr. 2193).

Ms. Colson found 22 file jackets [that relate to JSG's sales of tomatoes to American Banana] which contain notations that are similar to those on the backs of file jackets reflecting sales to L&P (CX 63-69; Tr. 550-51). . . . The notations indicate that payments per box were being made to "Al," "HPT," or "Hunts Point Produce" in an amount equivalent to the amount of the notation multiplied by the number of boxes sold to American Banana. Ms. Colson found [Hunts Point Produce Co.] invoices . . . in the file jackets for amounts corresponding to the payments [to "Al," "HPT," or "Hunts Point Produce"] listed on the file jackets. She also found seven JSG checks totaling $9,733.45, made payable to Hunts Point Produce Co. . . . (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4 . . .). [The amounts on the Hunts Point Produce Co. invoices also correspond] to the amounts of the checks [made payable to Hunts Point Produce Co. and the Hunts Point Produce Co. invoices contain JSG file numbers which correspond to the file numbers written on the checks payable to

Hunts Point Produce Co. or written on the check skirts applicable to checks payable to Hunts Point Produce Co.] (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5). Examination of these invoices reveals that only the earliest [Hunts Point Produce Co. invoice], dated December 14, 1992, states how much money per box was being paid to Mr. Lomoriello (CX 63B at 4). When Ms. Colson examined JSG's Closed File Journal, [she found] the amounts of the checks written by JSG to Hunts Point Produce Co. . . . listed in the "Open SC" column (CX 52; Tr. 604-05).

Ms. Levine testified that Mr. Goodman asked her to pay Mr. Lomoriello, although she did not know what services Mr. Lomoriello was rendering to JSG (Tr. 1962). Ms. Levine said that she asked Mr. Lomoriello for some blank invoices that she could prepare to show that Mr. Lomoriello was not an employee of JSG (Tr. 1962, 1965). After she received the invoices and was told by Mr. Goodman what amounts to pay, Ms. Levine noted the payments to Mr. Lomoriello on . . . American Banana files, and completed a [Hunts Point Produce Co.] invoice to reflect [the amounts to be paid to Mr. Lomoriello] (Tr. 1968).

Although Ms. Levine claims that her actions were not done in furtherance of recording bribes, she stated that Mr. Lomoriello was quite upset when he received the December 14, 1992, invoice [(CX 63B at 4)], since it appeared to him as if he was receiving a "kickback." She testified:

> When Al received this, he was slightly upset and he told me I should never send him an invoice like this again because it looks like I'm getting a kickback. Those were his -- actually he didn't say it as nicely as that, but I won't say what he said.

Tr. 1969.

Ms. Levine communicated Mr. Lomoriello's comments to Mr. Goodman (Tr. 2036). After being made aware that Mr. Lomoriello was upset that JSG's payments to him were documented in a way that suggested that the payments were bribes, JSG did not stop making payments to Mr. Lomoriello (Tr. 2037), but made the nature of the payments less obvious by not stating on the invoices how much per box each file was being charged (Tr. 2037).

JSG and Mr. Lomoriello have not provided any credible evidence of what services Mr. Lomoriello performed for the money that he was paid by Mr. Goodman. Ms. Colson testified that in the course of her investigation, on March 11, 1993, when she asked to see Mr. Lomoriello's records, Mr. Lomoriello stated

they were at his home and that he would provide them to her on the following day (Tr. [608-]09). However, on the following day, when Ms. Colson met with Mr. Lomoriello, the only records that he produced were two deposit tickets [(CX 70)], supposedly reflecting his deposit of the funds received from JSG (Tr. [630-]31).

However, at the hearing, Mr. Lomoriello . . . disclosed what he alleged were notes that he had written in 1992 [and 1993] in response to Mr. Goodman's requests for his assistance (RL 19-25; Tr. 11[79]-81). These [notes] appear to be on paper containing an American Banana letterhead. Mr. Lomoriello explained: "RL -- RL-20 is a piece of paper that Mimi Contos, American Banana has a pile of American Banana letterhead on the side of the copy machine that when you write notes to people it would be done on his letterhead. . . ." (Tr. 1180).

Mr. Lomoriello said that the notes were in the back of his file cabinet at his home, and he did not provide them to Ms. Colson in March 1993 because he did not find them until early 1995 (Tr. 1194-95, 1202). Upon cross-examination, Mr. Lomoriello stated that he obtained the American Banana stationery on which the notes were written [(RL 19-25)] from the desk of American Banana's bookkeeper, Carlos Valencia:

> [BY MR. STANTON:]
>
> Q. The documents -- the blank documents on which you wrote the notes, RL-19 through RL-25, you obtained them from American Banana, right?
>
> [BY MR. LOMORIELLO:]
>
> A. The blank documents, that's American Banana stuff, yeah -- yes.
>
> Q. Now, explain again where you -- actually in American Banana you obtained them from?
>
> A. Carlos keeps them on his desk. You have to ask him, he gives you the papers and you -- they're are [sic] pretty tight in that office there so you got to ask for a pencil and he keeps everything locked up that he feels is worth any kind of money whatsoever and you got to ask for a piece of paper most of the time to do things.

Tr. 1196-97.

The question arose as to why American Banana's letterhead in RL 19-25 was completely different from American Banana's letterhead [found on] . . . notes [in JSG's files] (CX 65G at 7; CX 66B at 14). Mr. Lomoriello suggested that American Banana had stationery with different letterheads and stated that Carlos Valencia would know the facts about this (Tr. [1225-]28).

However, Mr. Valencia testified that the letterhead used for the alleged notes [(RL 19-25)] was identical to the [letterhead] used for American Banana's invoices (e.g., RL 1), and that the only letterhead that American Banana used for correspondence was th[e letterhead on notes found] in JSG's files [(CX 65G at 7; CX 66B at 14)].

BY MR. LOMORIELLO:

Q. The letterhead on RL-19 and the letterhead on CX 65(g), page 7, they are a little different aren't they, Mr. Valencia?

[BY MR. VALENCIA:]

A. Yes, very much, yes.

Q. But both of these letterheads --

JUDGE BERNSTEIN: Wait, wait. Is the letterhead in RL-19 an American Banana Company letterhead that's been used by American Banana?

THE WITNESS: No.

JUDGE BERNSTEIN: Have you ever seen that letterhead in RL-19 before?

THE WITNESS: Yes.

JUDGE BERNSTEIN: Can you explain about it?

THE WITNESS: I seen this on the invoice that we sent to the customers.

. . . .

JUDGE BERNSTEIN: And, you've seen that -- let me see if I can understand your answer. That letterhead was used by American Banana, as I understand your answer?

THE WITNESS: It's been used on the statements that we send out to the customers. It is the headlines of the statements.

Tr. [1485-]86.

When Mr. Lomoriello asked Mr. Valencia whether he kept a folder with photocopy paper containing American Banana's letterheads on his desk, as Mr. Lomoriello had testified earlier, Mr. Valencia vociferously denied that any [paper with] such letterheads were ever left outside his locked filing cabinet (Tr. 1490-92).

Upon examining one of American Banana's invoices (RL 1) and Mr. Lomoriello's exhibits (RL 19-25), Mr. Valencia concluded that the purported American Banana letterhead could have been created by simply placing a piece of white paper over all but the letterhead of a typical American Banana invoice and copying the document in a copier (Tr. 1493-94). I conclude that is exactly what occurred -- that Mr. Lomoriello manufactured this evidence to support his contention that the payments that he received from JSG were not bribes.

JSG also introduced into evidence other file jackets (RX 50 at 1-3 (SG 5206), RX 50 at 4-6 (SG 5176), RX 50 at 7-9 (SG 5175), RX 50 at 10-13 (SG 5298), RX 50 at 14-16 (SG 5304), RX 50 at 17-19 (SG 5476), RX 50 at 20-22 (SG 5480) and RX 50 at 23-25 (SG 5521)) which contain handwritten notations on the flaps allegedly referring to tasks performed by Mr. Lomoriello for JSG in 1992 and 1993. However, I strongly suspect that the writings on the flaps of these file jackets were made after the transactions ended, as they appear in a different color ink than the other writings on the backs of the file jackets (Tr. 3006-34). Further, the reference to "Al" in [(RX 50 at 18)] (SG 5476) appears to be an attempt to write Mr. Lomoriello's name over an existing notation to make it appear as if Mr. Lomoriello was involved in the transaction (Tr. 3036). Considering the other evidence of falsification and alteration of documents, it is not unlikely that these file jacket flaps allegedly containing notes by Mr. Goodman involving Mr. Lomoriello were also altered in anticipation of the hearing. I, therefore, find this evidence to be unreliable.

Mr. Goodman and Mr. Lomoriello testified that the payments were for various services that Mr. Lomoriello performed for JSG in other matters. Yet there was no reliable evidence that the moneys paid to Mr. Lomoriello were charged to any other files associated with his alleged services. Given the meticulous nature of Mr.

Goodman's notations of expenses on associated files, it is also unbelievable that these fees would be randomly charged to files totally unrelated to Mr. Lomoriello's alleged services. I, therefore, conclude that these payments from JSG to Mr. Lomoriello totaling $9,733.45 were bribes, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondents' Violations Were Willful, Flagrant, and Repeated Violations of Section 2(4) of the PACA Which Warrant the Maximum Sanctions.

As in the *Goodman* and *Tipco* cases, Respondents have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondents knew, or should have known, that the payments made by JSG to Mr. Gentile and Mr. Lomoriello to influence their buying practices and to induce them to make purchases of tomatoes for L&P and American Banana, respectively, were unlawful, and Respondents should have known that they were violating the law. *In re Tipco, Inc., supra*, 50 Agric. Dec. at 887-88.

This case is, in all material respects, similar to *Goodman* and *Tipco*. JSG made payments to Mr. Gentile and to Mr. Lomoriello to induce them to buy tomatoes for L&P and American Banana, respectively. Respondents' alternative explanations for these payments are not believable. JSG's . . . payments . . . to Mr. Gentile . . . [and] Mr. Lomoriello warrant the most severe sanctions.

As in *Goodman* and *Tipco*, the extremely serious violations in this case mandate no lesser sanctions than a license revocation for JSG; findings that Gloria and Tony Enterprises, Mr. Gentile, and Mr. Lomoriello committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and the denial of Mr. Gentile's license application. . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent JSG raises eight issues in Appeal Petition of JSG Trading Corp. and Brief of JSG Trading Corp. in Support of Their [sic] Appeal Petition [hereinafter JSG's Appeal Petition].

First, JSG contends that the standard of proof by which Complainant must prove its case is "clear and convincing evidence" or "beyond a reasonable doubt," as follows:

> It is also important to note that the Department must prove their [sic] allegations against JSG, based upon the concept of "substantial" evidence

> which burden of proof is analogous to the concept of "the preponderance" of the evidence. This concept amounts to a higher standard than the "greater weight" of the evidence and is equivalent to the standard of "clear and convincing." Also, whereas the term "substantial" evidence has never been fully defined, in the Agricultural setting, the Appellant respectfully submits that, based upon the fact that the sanctions which can be imposed are so severe, that standard of proof actually should be, proof "beyond a reasonable doubt." In any event, even under the current concept of "substantial" evidence, this Judicial Officer must certainly require a very high standard of proof before authorizing the severe sanction of the Revocation of the Licensure of JSG and branding individuals as being "corrupt."

JSG's Appeal Petition at 16-17.

I disagree with JSG's contention that the standard of proof applicable in this proceeding is "clear and convincing" evidence or "beyond a reasonable doubt."

The Administrative Procedure Act provides, with respect to burden of proof, that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof*. . . .

5 U.S.C. § 556(d) (emphasis added).

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case.[11] The burden of proof does not,

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[11] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *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 of going

however, require Complainant to disprove each of Respondents' assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[12] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in which the potential sanction is revocation of a PACA license, is preponderance of the evidence.[13] Based upon a careful consideration of the record in this proceeding, I find that Complainant has proved by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Second, JSG contends that the Judicial Officer must reverse the ALJ, unless the ALJ's decision is based on substantial evidence. (JSG's Appeal Petition at 17-18.)

I agree with JSG's contention that the conclusion that JSG willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) must be

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forward'"); 3 Kenneth C. Davis, *Administrative Law Treatise* § 16:9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

[12]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

[13]*In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 10-11 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, No. 97-4053 (2d Cir. Dec. 19, 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

based on substantial evidence.

The Administrative Procedure Act provides, with respect to substantial evidence, that:

> **§ 556. Hearings; presiding employees; powers and burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence*.

5 U.S.C. § 556(d) (emphasis added).

"Substantial evidence" denotes quantity,[14] and it is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[15] I find the record contains substantial evidence of JSG's, G&T's, and Mr. Gentile's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), which substantial evidence is fully discussed in this Decision and Order, *supra*.

Third, JSG contends that "the Judicial Officer is not required to accept the Administrative Law Judge's Findings of Fact, even if those findings are based on [credibility] determinations" and "the Administrative Law Judge's findings of fact are not entitled to any special deference from the Judicial Officer, who is free to, independently, weigh the evidence and draw his own inferences and conclusions and has an obligation to do so." (JSG's Appeal Petition at 18-19.)

I agree with JSG's contention that I am not bound by an administrative law

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[14]*Steadman v. SEC*, 450 U.S. 91, 98 (1981); *Wall Street West, Inc. v. SEC*, 718 F.2d 973, 974 (10th Cir. 1983); *Baumler v. State Farm Mutual Automobile Ins. Co.*, 493 F.2d 130, 134 n.8 (9th Cir. 1974).

[15]*Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Havana Potatoes of New York Corp. v. United States*, No. 97-4053 (2d Cir. Dec. 19, 1997); *Diaz v. Shalala*, 59 F.3d 307, 314 (2d Cir. 1995); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995); *United States Dep't of Agric. v. Kelly*, 38 F.3d 999, 1002-03 (8th Cir. 1994); *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (per curiam); *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 924 (3d Cir. 1994); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 144 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1104 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991).

judge's findings of fact. The Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved;[16] (2) the record is sufficiently strong to compel a reversal as to the facts;[17] or (3) an administrative law judge's findings of fact are hopelessly incredible.[18] Moreover, the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[19]

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[16]*In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

[17]*In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

[18]*Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

[19]*See also In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 158 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading*

However, I disagree with JSG's contention that an administrative law judge's findings are not entitled to any deference. The consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[20] I find nothing on this record sufficient to support reversal of the ALJ's credibility determinations.

Further, JSG contends that the evidence does not adequately support the ALJ's findings of fact. However, an examination of the record reveals that, with the exception of Finding of Fact No. 26 in the Initial Decision and Order, substantial evidence supports the ALJ's findings of fact, which I have adopted with only minor changes.

The ALJ found in Finding of Fact No. 26, as follows:

> 26. Ms. Colson obtained a spreadsheet from Ms. Levine or from JSG's accountant, Mr. Daily, which detailed the 1992 transactions in JSG's "loans and exchanges" account (CX 55, pp. 1 and 2; Tr. 158, 1605). The spreadsheet contained 13 columns, reflecting various individuals or firms to whom JSG had loaned money (Tr. 2054-2056). All 16 of the "A.

Comm'n, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

[20] *In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 52 (Nov. 3, 1997); *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 158 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

> Gentile" checks described in the General Ledger Entry Edit report as "L/E Tony" and a $38,475.30 boat payment to Midlantic Bank, are noted in the column headed "L&P", and reflect a reduction of Mr. Gentile's loan payable to JSG (CX 55, p[p]. 1-3; Tr. 161, 215-216).

Initial Decision and Order at 11.

JSG contends that the ALJ's finding that 16 "A. Gentile" checks are noted on the spreadsheet (CX 55) is error and that only eight of the "A. Gentile" checks appear on the spreadsheet (JSG's Appeal Petition at 50-53). I agree with JSG and I have modified the ALJ's Initial Decision and Order to reflect the fact that eight of the "A. Gentile" checks appear on the spreadsheet (CX 55).

The spreadsheet (CX 55) reflects JSG's 1992 loan and exchanges account. Therefore, the only "A. Gentile" checks entered on the spreadsheet are those checks issued in 1992; the 1992 spreadsheet does not reflect the eight "A. Gentile" checks issued in 1993.

However, the ALJ's error is harmless. The record clearly establishes that the 35 checks payable to Mr. Gentile, found in JSG's file jackets (CX 8-CX 42) relating to Mr. Goodman's sales of tomatoes to L&P reflect profit split between Messrs. Goodman and Gentile. Further, 16 of the 35 checks are shown in JSG records as reducing Mr. Gentile's debt to JSG. The fact that the ALJ mistakenly found that all 16 of the checks reducing Mr. Gentile's debt to JSG were reflected on the 1992 spreadsheet (CX 55), instead of the eight checks issued in 1992, is harmless error.

Fourth, JSG contends that before there can be a finding of a violation of the PACA, there must be proof by substantial evidence of willfulness (JSG's Appeal Petition at 20).

I disagree with JSG's contention that a necessary prerequisite to finding a violation of the PACA is proof by substantial evidence that the violation is willful.

While Complainant proved by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)),[21] it is not necessary to prove that JSG's, G&T's, and

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[21]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. *See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Scamcorp, Inc.*, 57 Agric. Dec.___, slip op. at 34 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op.

Mr. Gentile's violations were willful in order to prove that they violated the PACA.

Fifth, JSG contends that the PACA was amended by adding a sentence at the end of section 2(4) "in order to make it possible for friends and individuals to do business with each other without fear of violating the law." (JSG's Appeal Petition at 7.)

I disagree with JSG's contention that PACA was amended to make it possible for friends and individuals to do business with each other without fear of violating the law.

As initial matter, the PACA has never prohibited an individual from selling perishable agricultural commodities to, or purchasing perishable agricultural commodities from, another individual or a friend. Moreover, section 9(b)(3) of the

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at 27 (Dec. 5, 1997); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 18 (Nov. 6, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, No. 97-4053 (2d Cir. Dec. 19, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.").

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, JSG's, G&T's, and Mr. Gentile's violations are willful.

Willfulness is reflected by: (1) JSG's intentional multiple payments to Mr. Gentile (directly and indirectly through G&T and Mrs. Gentile) which were designed to induce Mr. Gentile to purchase tomatoes on behalf of L&P; (2) JSG's intentional multiple payments to Mr. Lomoriello which were designed to induce Mr. Lomoriello to purchase tomatoes on behalf of American Banana; (3) Mr. Gentile's intentional acceptance (directly and indirectly through G&T and Mrs. Gentile) of multiple payments as compensation for purchases of tomatoes on behalf of L&P; and (4) Mr. Lomoriello's intentional acceptance of multiple payments as compensation for purchases of tomatoes on behalf of American Banana. The record establishes that JSG's, G&T's, Mr. Gentile's, and Mr. Lomoriello's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are not merely the result of a careless disregard of statutory requirements or merely a gross neglect of a known duty. Instead, the record reflects JSG's, G&T's, Mr. Gentile's, and Mr. Lomoriello's evil intent to engage in commercial bribery in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995], which amended section 2(4) of the PACA by adding a sentence at the end of section 2(4) of the PACA, does not allow the payment of bribes by sellers of perishable agricultural commodities to employees or agents of purchasers of perishable agricultural commodities. Instead, the PACAA-1995 and the applicable legislative history make clear that section 9(b)(3) of the PACAA-1995 relates to promotional payments or volume discounts by the seller of perishable agricultural commodities to purchasers of perishable agricultural commodities.

Section 9(b)(3) of the PACAA-1995 amends section 2(4) of the PACA by adding the following sentence at the end of section 2(4) of the PACA:

> However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

7 U.S.C. § 499b(4) (Supp. I 1995).

Section 9(a) of the PACAA-1995 amends section 1(b) of the PACA to adding a definition of the term "collateral fees and expenses" to read as follows:

> The term "collateral fees and expenses" means any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity.

7 U.S.C. § 499a(b)(13) (Supp. I 1995).

Further, the House Report accompanying the legislation, which became PACAA-1995, describes collateral fees and expenses as follows:

> *Section 9—Consideration of collateral fees and expenses*
>
> Section 9 establishes clarification of the status of collateral fees and expenses. Collateral fees refer to promotional allowances, rebates, service or material fees paid or provided, directly or indirectly, in connection with the distribution or marketing of perishable agricultural commodities. They are fees considered separate from invoice fees. Section 9 clarifies that a collateral fee is lawful in and of itself.

H.R. Rep. No. 104-207, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457.

Moreover, testimony, during the March 16, 1995, legislative hearing to review the PACA which led to the approval of PACAA-1995, indicates that the

lawfulness of volume discounts given by a seller to a purchaser of perishable agricultural commodities was one of the issues before Congress when it considered the amendment of the PACA:

> MR. POMBO. . . .
>
> MR. BLOCK, in your opening statement, you talked about extortion. I'd like you to explain that a little further to me as to exactly in what context that statement was made and exactly how that would work.
>
> MR. BLOCK. All right. Here's how it works. We have an industry, wholesalers, food service distributors, that have done a lot of their business on what they call cost plus, the cost of the product, add something to it, and sell it on to the institution or the restaurant or whatever.
>
> And historically they have had contracts with these customers. And also historically the suppliers for volume discounts and some things at the end of the year if they had enough volume, this wholesaler or food service distributor would get a volume discount paid to him by the person who supplied him the product because he had used a lot of it.
>
> Now, PACA comes in and says "Well, that's not quite right. We've got to look at these contracts. If you're going to have cost plus, you've got to add in that rebate that you received." But they never gave us the details on what they expected.
>
> . . . .
>
> But what happened is they never would tell us what the rules were. . . .
>
> In the beginning if PACA had said, "Okay. These contracts have to be written a certain way," then I would have taken this to all of my members, food service operators and wholesalers, and say "Okay. PACA is saying the contract have to be like this. So all of you guys get them straight and get them like this." But they never clarified that.
>
> MR. POMBO. Would you give me the record information, it can be in a letter form or however, as to exactly in this case or in other cases that you or your members are aware of what happened and how it worked?

> And also if you have not done so, would you enter into the record the formal request that you held up during your opening statement so that everyone has an opportunity to see that?
>
> MR. BLOCK. Yes, I certainly will.
>
> MR. POMBO. And at the same time as we work through this process, I would greatly appreciate any information that you have on how we would make this program work more efficiently.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 48-49 (1995) (statement of John Block, president, National-American Wholesale Grocers' Association).

The payments made by JSG, which are the subject of this proceeding, were not lawful promotional payments or volume discounts to L&P and American Banana, the entities that purchased perishable agricultural commodities from JSG. Instead, the payments were unlawful commercial bribes paid to agents working for L&P and American Banana to induce those agents to purchase tomatoes on behalf of L&P and American Banana from JSG.

Sixth, JSG states that in *In re Sid Goodman & Co., supra*, and *In re Tipco, Inc., supra*, it was rather obvious that there was commercial bribery, in violation of the PACA. However, JSG contends that the facts in this proceeding are distinguishable from those in *Goodman* and *Tipco*, and that the ALJ's reliance on *Goodman* and *Tipco* is misplaced. (JSG's Appeal Petition at 79-91.)

Goodman and *Tipco* provide the legal standard for bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I disagree with JSG's contention that *Goodman* and *Tipco* are inapposite to this proceeding. I agree with the ALJ that the relevant facts in *Goodman* and *Tipco* are similar to the facts in this proceeding, and I find that the ALJ did not err by relying on *Goodman* and *Tipco*. I have therefore adopted, with only minor changes, the ALJ's discussion of the applicability of *Goodman* and *Tipco* to the facts in this proceeding.

JSG raises two issues which were not directly addressed by the ALJ in his discussion of the applicability of *Goodman* and *Tipco* to this case (Initial Decision and Order at 16-18, 46-47). JSG contends that "in order for there to be 'commercial bribery' in this [c]ase, [Complainant] must prove by substantial evidence that Mr. Gentile and Mr. Lomoriello were influenced by the actions of Mr. Goodman relative to their purchases of tomatoes from JSG." (JSG's Appeal Petition at 84.)

I disagree with JSG. Neither *Goodman* nor *Tipco* require that a bribe actually

influence the recipient of the bribe. Payment to a produce purchaser's agent or employee, in an attempt to induce that agent or employee to purchase produce (from the person making the payment) on behalf of the agent's principal or employee's employer, is sufficient to constitute bribery under the PACA. The evidence in this proceeding clearly establishes that JSG's payments to Mr. Gentile (directly and indirectly through G&T and Mrs. Gentile) and Mr. Lomoriello actually induced Messrs. Gentile and Lomoriello to purchase tomatoes from JSG on behalf of L&P and American Banana, respectively.

JSG also contends that bribery cannot be established in this proceeding because there is no evidence that JSG charged L&P or American Banana any more than L&P and American Banana would have been charged in the absence of payments to Messrs. Gentile and Lomoriello (JSG's Appeal Petition at 86, 88). However, even if JSG could show that it absorbed all of the payments made to Messrs. Gentile and Lomoriello, L&P and American Banana were still damaged by JSG's illicit relationship with Messrs. Gentile and Lomoriello, respectively, because JSG's payments to Messrs. Gentile and Lomoriello indicate that JSG would have been willing to sell produce to L&P and American Banana for less than the invoice price.

Further, even if I found that JSG would have sold tomatoes to L&P and American Banana for the same price, in the absence of payments to Messrs. Gentile and Lomoriello, that finding would not change the outcome of this case. A finding that a person has engaged in commercial bribery is not dependent on a finding that the principal of a bribed agent or the employer of a bribed employee is monetarily harmed. Commercial bribery is unfair conduct under the PACA because of the actual and possible effects on competition. A commission merchant, dealer, or broker that pays an agent or employee of another to influence buying interposes an obstacle to the competitive opportunity of other firms which is not related to any competitive advantage possessed by the commission merchant, dealer, or broker. Commercial bribery destroys the integrity of competition by poisoning the judgment of people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products. Competitors will find it extremely difficult to sell goods based on quality and price alone, and many competitors would resort to similar tactics to procure business. Unchecked, the practice of commercial bribery can spread through the market destroying fair competition.

Moreover, commission merchants, dealers, and brokers have an obligation to deal fairly with one another. Included within this obligation is the duty to refrain from corrupting an agent or employee of a person with whom the commission merchant, dealer, or broker is dealing. A PACA licensee is obligated to avoid

offering a payment to a customer's agent or employee to encourage the agent or employee to purchase produce from the PACA licensee on behalf of the agent's principal or the employee's employer. This obligation exists even when it can be shown that the bribed agent's principal or the bribed employee's employer is not monetarily harmed by purchasing produce from the PACA licensee.

Seventh, JSG contends that, in violation of the Jencks Act, it was denied notes taken by Ms. Colson, as follows:

> In the instant [c]ase, during the course of this proceeding, the [i]vestigating [o]fficer, Ms. Joan Colson, made certain references to her notes, and testified about them, and testifie[d] from them, and from which notes . . . Administrative Law Judge Bernstein drew very serious conclusions. Immediately upon learning that Ms. Colson was testifying from her notes, [c]ounsel for [JSG] requested that he be entitled to see her notes. Counsel for [JSG] brought this point to the attention of . . . Administrative Law Judge Bernstein immediately, and he offered a substantial basis for his request.
>
> In this regard, during the [h]earing on December 22, 1995, relative to [JSG's] request for Ms. Colson's notes, pursuant to the Jencks Act, 18 U.S.C. § 3500, the Court denied JSG's [c]ounsel the right to review the notes from which she was testifying. As [c]ounsel for . . . JSG indicated, an [i]nvestigator's notes have been held to be material, and properly required to be produced, pursuant to the Jencks Act, if the [i]nvestigator appears as a witness and testifies from their notes, as Ms. Colson did in this [c]ase. As such, as a rule of law, Ms. Colson's notes should have been produced and been made available to . . . JSG, at that time, along with the excerpted Report of Investigation, in order that both "statements" could have been compared and used to cross-examine the witness.

JSG's Appeal Petition at 93-94.

As an initial matter, the record reveals that the notes (CX 76) which Ms. Colson made during and immediately after her telephone conversation with JSG's accountant, Mr. Daily, are not Jencks Act statements. Subsection (e) of the Jencks Act defines the term "statement" for the purposes of the Jencks Act, as follows:

> **§ 3500. Demands for production of statements and reports of witnesses**
>
> . . . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

Courts have drawn a distinction between "statements" and "notes" under the Jencks Act and have held that a statement, unlike a note, seeks to transmit information from the declarant to the reader and a note generally does not exhibit sufficient completeness or intent to communicate to qualify as a Jencks Act statement.[22] Section 1.141(h)(1)(iii) of the Rules of Practice provides that the definitions and limitations prescribed in the Jencks Act apply to the production of statements in proceedings conducted in accordance with the Rules of Practice, as follows:

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence.* (1) *In general.* . . .

. . . .

(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has

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[22] *Norinsberg Corp. v. United States Dep't of Agric.*, 47 F.3d 1224, 1228-29 (D.C. Cir. 1995) (stating that cases decided under the Jencks Act have drawn a distinction between "statements" and mere "notes"); *United States v. Griffin*, 659 F.2d 932, 936-37 (9th Cir. 1981) (stating that the Jencks Act narrowly defines "statements" and that an agent's rough notes usually are considered to be too cryptic and incomplete to constitute the full statement envisioned by the Jencks Act), *cert. denied*, 456 U.S. 949 (1982); *United States v. Carrasco*, 537 F.2d 372, 375 (9th Cir. 1976) (stating that a "statement," unlike notes, seeks to transmit information from the declarant to the reader).

testified. *Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).*

7 C.F.R. § 1.141(h)(1)(iii) (emphasis added).

I have examined the notes taken by Ms. Colson (CX 76), and I find that they do not fall within the definition of the term "statement" in the Jencks Act. Therefore, Ms. Colson's notes were not required to be produced in accordance with section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)).

Moreover, even if I found Ms. Colson's notes are Jencks Act statements, I would find that Ms. Colson's notes were provided to JSG in accordance with subsection (b) of the Jencks Act (18 U.S.C. § 3500(b)) and section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)). Both subsection (b) of the Jencks Act (18 U.S.C. § 3500(b)) and section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)) provide that statements under the Jencks Act need only be provided after the witness has given testimony on direct examination, as follows:

§ 3500. Demands for production of statements and reports of witnesses

. . . .

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. § 3500(b).

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence.* (1) *In general. . . .*

. . . .

(iii) *After a witness called by the complainant has testified on direct*

examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

7 C.F.R. § 1.141(h)(1)(iii) (emphasis added).

The record clearly establishes that the notes which JSG sought (CX 76) were produced during Ms. Colson's direct examination, as follows:

[BY MR. STANTON:]

Q. Ms. [C]olson, during your February and March 1993 investigation of JSG, did you ever speak to Mr. Tom Daily?

[BY MS. COLSON:]

A. Yes.

Q. Was this a face to face conversation?

A. No, I spoke to him over the phone.

Q. What was the conversation about, Ms. Colson?

A. Basically I asked him -- I told him that I saw in the records, I had done check stubs and stuff, where it would say LE Tony and I asked him if that was a loan, if the LE Tony meant a loan and he said yes.

I asked him if Tony meant Tony Gentile and he said yes. I asked him questions about say [sic] the check stubs said LE Tony, would that mean that JSG had loaned Tony money and would that show up on the loan spread sheet and he said yes. He said that Tony's loan and L&P's loan had been grouped together because he had run out of room on the spread sheets so he just grouped them together that way.

. . . .

BY MR. STANTON:

Q. Ms. Colson, when you say spread sheet, you mean Complainant's Exhibits CX-55, 1, 2, and 3?

A. Yes.

Q. Is that the extent of your conversation with Mr. Daily at that time?

A. Yeah, and I asked him if I saw in the general ledger where say a deposit was made and it said LE Tony, would that mean that Tony had been paying down the loan that he had and he said yes.

I asked him if say L&P and Tony took a loan out on the same day, would they be grouped together on the spread sheet as one, like say they were both added in together and it would be listed together as one or it [sic] whether they would be listed separately on the spread sheet and he said Marsha would have entered them on the general ledger separately so they would probably have been listed separately.

I asked him for -- if he had like a description of what all the debits and credits to the loan would have been. He said he didn't have one but that he could probably create an audit trial [sic] for me. He would have had a disc and he could probably do that.

I told him I'd call him back if we needed that.

Q. At the time of your conversation with Mr. Daily, did you make any phone notes?

A. Yes.

Q. When was this conversation, approximately?

A. It was March 11th.

JUDGE BERNSTEIN: Of 1993?

THE WITNESS: Yes.

MR. STANTON: Excuse me, Mr. Reporter, what number is Complainant up to?

COURT REPORTER: I believe CX-75 is your next one.

JUDGE BERNSTEIN: CX-75 was the last one.

MR. STANTON: This would be CX-76?

COURT REPORTER: Yes, sir.

MR. MANDELL: Excuse me, Your Honor, before we start passing these around, are these notes of the investigation, sir?

MR. STANTON: These are phone notes prepared by Ms. Colson.

MR. MANDELL: Excuse me, are these notes of the investigation?

JUDGE BERNSTEIN: One moment, I want to hear his answer.

MR. STANTON: These are phone notes prepared by Ms. Colson in the course of her investigation.

MR. MANDELL: I'd like to see all of the notes of the investigation, sir. If you're going to waive your right to withhold them, then you waive all of them and I would like all of them now, sir, pursuant to Jencks.

MS. BAUER: Your Honor, you just can't pick and choose.

MR. MANDELL: You can't pick and choose. You either do none of them, or you do all of them.

MR. STANTON: Your Honor, this is not subject to Jencks.

MR. MANDELL: That's right, so you're waiving it.

MR. STANTON: Notes are not subject to Jencks.

MR. MANDELL: Then you're waiving it. I want all the notes, please.

JUDGE BERNSTEIN: I'm not sure that that's the law. These notes are being submitted not because they're covered by the Jencks Act, but to contradict an assertion made by Mr. Daily and to support previous testimony of the witness as I understand it.

MR. STANTON: That's correct, Your Honor.

JUDGE BERNSTEIN: And they're suitable for rebuttal and I'm not sure that the offer of notes in this case would operate as a waiver of all notes in general, in fact, I rule that that's not the case.

MR. MANDELL: Your Honor, we note the exception and we want an exception.

JUDGE BERNSTEIN: Yes.

MR. MANDELL: We would also request a ruling, I understand, between now and the time this hearing reconvenes in January, if you would be so kind, Judge, as to issue a brief written decision on this request.

We would like time to appeal this decision to the Judicial Officer and get a ruling there. I'm sorry, Your Honor, this takes us completely by surprise. We asked for this stuff under --

JUDGE BERNSTEIN: I doubt that you'll get an interlocutory ruling, that's generally not the case. However, if you want to submit a written Motion, since we will have time between now and the 29th, I will give you time to submit a Motion with authorities and I will give counsel for Complainant time to submit an opposition document with authorities and then I will decide this in writing.

When will you file your Motion?

MR. MANDELL: Christmas weekend. I will try to get it to your office and to Mr. Stanton no later than Thursday morning by FAX, Your Honor.

JUDGE BERNSTEIN: Thursday, being December 28th.

MR. MANDELL: Monday is Christmas, probably Friday. I've got a

tremendous amount of work to catch up with.

JUDGE BERNSTEIN: Friday, December 29th. Okay. All right, you will serve that Motion either by Express Mail or by FAX so that it will be received during business hours on December 29th.

MR. MANDELL: Yes, Your Honor.

JUDGE BERNSTEIN: Mr. Stanton, when will you submit a written response?

MR. STANTON: Your Honor, if I obtain the document on Friday, the 29th, I will probably be able to file a response -- well, considering that Monday is a holiday, I would probably like to have until Wednesday or Thursday of that week.

JUDGE BERNSTEIN: All right, I'll give you until Thursday, January 4th.

MR. MANDELL: And, Your Honor, I believe not [sic] to speed today's hearing along, I'm going to reserve my right to cross examine the witness at a later date on her testimony today, I'm not prepared to do it today. This catches us completely by surprise. This issue had come up and I think it's outrageous.

JUDGE BERNSTEIN: That's fine. I will allow you to reserve your right to cross examine after I've decided the Motion. You may proceed, Mr. Stanton.

BY MR. STANTON:

Q. Ms. Colson, take a look at the copy in front of you; do you recognize that?

(The document referred to was marked as Complainant's Exhibit CX-76.)

[BY MS. COLSON:]

A. Yes.

Q. What is it?

A. It's a copy of my notes that I made after talking with Mr. Daily.

Q. Looking at this page, can you identify what notes you made at the time of the phone conversation and if applicable, any notes you made after the phone conversation?

A. It looks like the first six bulleted items, I took down while I was talking to him and then after I hung up, it looks like I wrote like additional information on there like the little arrows would be stuff that I wrote after I hung up, and then the questions that are written down below, would have been written afterwards also.

Q. When you say afterwards, how long afterwards, Ms. Colson?

A. Just shortly after.

Q. Weeks afterwards?

A. No, it would have been the same day, like after I hung up the phone, I would have sat down and wrote down the questions.

Q. Where would you have been situated when you wrote down the questions?

A. Well, I remember talking to him from the office I was using at JSG, so it would have been there.

Q. What about when you made the little arrows?

A. That would have been at the same time.

MR. STANTON: I offer CX-76 into evidence, Your Honor.

MS. BAUER: Objection, Your Honor.

MR. MANDELL: Objection.

JUDGE BERNSTEIN: I'll receive it.

(The document referred to, having been marked for identification as Complainant's Exhibit CX-76, was received in evidence.)

. . . .

MR. STANTON: No further questions, Your Honor.

JUDGE BERNSTEIN: Cross examination about these matters?

CROSS EXAMINATION

BY MR. MANDELL:

Q. Ms. Colson, these two documents here, CX-76 and CX-77, can you tell by looking at these, ma'am, other than a handwritten date on them can you tell whether they were, in fact, made on that date by looking at them as documents, ma'am?

[BY MS. COLSON:]

A. No.

Tr. 2846-54, 2858-59.

Eighth, JSG contends that the ALJ was biased and prejudiced against JSG and the other Respondents (JSG's Appeal Petition at 95). JSG cites, as an example of the ALJ's bias and prejudice, the ALJ's adoption of the Complainant's "Findings of Fact and Conclusions of Law in its entirety without even considering [JSG's] position." (JSG's Appeal Petition at 95.)

Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality.[23]

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[23] *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (stating that a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (stating that any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating that essential to a fair administrative hearing

Further, the Administrative Procedure Act requires an impartial proceeding, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (b) There shall preside at the taking of evidence—
>
> (1) the agency;
> (2) one or more members of the body which comprises the agency; or
> (3) one or more administrative law judges appointed under section 3105 of this title.
>
> . . . The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding

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is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating that bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating that due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating that trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating that a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating that a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating that a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating that quasi-judicial proceedings entail a fair trial and fairness requires an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge).

> or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b).

However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair.[24] I have reviewed the record in this proceeding, and I find no basis for JSG's allegation that the ALJ is biased or prejudiced toward or against any litigant in this proceeding. Further, the ALJ did not adopt Complainant's proposed findings of fact and conclusions of law in their entirety without considering JSG's position, as JSG alleges. Instead, the Initial Decision and Order reveals that the ALJ considered, addressed, and rejected JSG's theory of this case. Moreover, even if the ALJ had adopted Complainant's proposed findings of fact and conclusions of law exactly as set forth in Complainant's Proposed Findings of Fact, Conclusions and Order, such adoption of Complainant's proposed findings and conclusions would not by itself be sufficient to show bias or prejudice on the part of the ALJ.

G&T and Mr. Gentile raise three issues in Respondent Anthony Gentile's Petition for Appeal.

First, G&T and Mr. Gentile contend that the ALJ's findings of fact are not supported by the evidence (Respondent Anthony Gentile's Petition for Appeal at 10-17).

An examination of the record reveals that the ALJ's findings of fact are

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[24] *Akin v. Office of Thrift Supervisor*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating that in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a resonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating that in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judg e's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1 989) (stating that a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating that the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating that in order to maintain a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating that it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

supported by substantial evidence, and with minor changes noted in this Decision and Order, I have adopted the ALJ's findings of fact.

Second, G&T and Mr. Gentile state that this case is not similar to *In re Sid Goodman & Co., supra*, and *In re Tipco, Inc., supra*, and that the ALJ's reliance on *Goodman* and *Tipco* is misplaced (Respondent Anthony Gentile's Petition for Appeal at 17-19).

Goodman and *Tipco* provide the legal standard for bribery in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I disagree with G&T's and Mr. Gentile's contention that the ALJ's reliance on *Goodman* and *Tipco* is misplaced and find that the relevant facts in *Goodman* and *Tipco* are similar to the facts in this proceeding and that the ALJ did not err by relying on *Goodman* and *Tipco*. I have therefore adopted, with only minor changes, the ALJ's discussion of the applicability of *Goodman* and *Tipco* to the facts in this proceeding.

G&T and Mr. Gentile contend that the following facts distinguish this case from *Tipco* and *Goodman*: (1) Mr. Gentile and Mr. Goodman had a relationship totally apart from Mr. Gentile's relationship with L&P and L&P knew of the relationship; (2) Mr. Gentile was not L&P's employee; (3) L&P did not pay more for its produce purchases than others; (4) L&P did not have a written policy about receipt of gifts or gratuities; (5) L&P knew about some of the transactions between JSG and Mr. Gentile; (6) JSG was never the sole provider of tomatoes to L&P; and (7) L&P's purchases from JSG decreased rather than increased (Respondent Anthony Gentile's Petition for Appeal at 18-19).

The present case is in all material respects similar to *Goodman* and *Tipco*. That Mr. Gentile was an agent of, and not an "employee" of, his principal is not a material distinction. As in *Goodman* and *Tipco*, Mr. Gentile was obligated to refrain from accepting payments from JSG since such payments would encourage Mr. Gentile to purchase tomatoes on behalf of his principal, L&P. Mr. Gentile could only accept such payments with his principal's permission. Even if he received permission, Mr. Gentile should not have accepted more than *de minimis* payments from JSG. The payments made by JSG to Mr. Gentile were more than *de minimis*. Therefore, these payments constitute commercial bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Further, the legal standard for bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is established by *Goodman* and *Tipco* and not by L&P's policies. L&P's lack of a written policy concerning the acceptance of gifts and gratuities and prohibiting bribery does not negate the fact that, under the legal standards established by *Goodman* and *Tipco*, Mr. Gentile accepted bribes (directly and indirectly through G&T and Mrs. Gentile) from JSG, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Finally, injury to L&P is not a prerequisite to finding that Mr. Gentile accepted

bribes from JSG. Commercial bribery in connection with a perishable agricultural commodities transaction generally harms the principal of the agent, or employer of the employee, who accepts bribes; but, as discussed in this Decision and Order, *supra*, commercial bribery always destroys the integrity of competition by poisoning the judgment of people who make business decisions. Moreover, when commission merchants, dealers, and brokers are dealing with one another, commercial bribery always breaches the obligation that commission merchants, brokers, and dealers have under the PACA to deal with one another fairly.

Third, G&T and Mr. Gentile contend that Complainant did not meet its burden of proof and Complainant "did NOT introduce one iota of evidence to prove or demonstrate that the Gentiles and Goodman did anything illegal, or immoral, or unethical" (Respondent Anthony Gentile's Petition for Appeal at 21 (emphasis in original)).

Complainant, as proponent of an order in this proceeding, has the burden of proof (5 U.S.C. § 556(d)). Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case.[25] The burden of proof does not, however, require Complainant to disprove each of Respondents' assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[26] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in which the potential sanction is revocation of a PACA license, is preponderance of the evidence.[27] Based upon a careful consideration of the record in this proceeding, I find that Complainant has proven by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Administrative Procedure Act provides that a sanction may not be imposed or an order issued unless supported by substantial evidence (5 U.S.C. § 556(d)). I find the record contains substantial evidence of JSG's, G&T's, and Mr. Gentile's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), which substantial evidence is fully discussed in this Decision and Order, *supra*.

For the foregoing reasons, the following Order should be issued.

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[25]See note 11.

[26]See note 12.

[27]See note 13.

Order

JSG Trading Corp.'s PACA license is revoked, effective 61 days after service of this Order on JSG Trading Corp.

Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances set forth in this Decision and Order shall be published, effective 61 days after service of this Order on Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile.

Anthony Gentile's PACA license application is denied.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Order Denying Petition for Reconsideration as to JSG Trading Corp. filed June 1, 1998.

Petition to reopen hearing — Petition for reconsideration — Commercial bribery — Burden of proof — Preponderance of the evidence — Jurisdiction of Secretary of Agriculture — ALJ bias — License revocation — Willful, flagrant, and repeated violations.

The Judicial Officer denied JSG Trading Corp.'s Petition for Reconsideration. JSG's petition to reopen the hearing, which was filed after the issuance of the Decision and Order, was denied as untimely (7 C.F.R. § 1.146(a)(2)). JSG alleges in its Petition for Reconsideration that the ALJ erred; however, the Rules of Practice (7 C.F.R. § 1.146(a)(3)) provide that a party to a proceeding may only seek reconsideration of the decision of the Judicial Officer. The evidence is sufficient to support the conclusion that JSG engaged in commercial bribery in violation of 7 U.S.C. § 499b(4). Complainant, as proponent of an order, has the burden of proof, and there is nothing in the Decision and Order that indicates that the Judicial Officer shifted the burden of proof to Respondents. Since the issuance of *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992), the produce industry has been on notice that payments of anything more than a *de minimis* amount can constitute commercial bribery. JSG's act of bestowing a $3,317 Rolex watch upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P through Mr. Gentile constitutes a commercial bribe in violation of 7 U.S.C. § 499b(4). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard, and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in which the potential sanction is revocation of a PACA license, is preponderance of the evidence. Due process and the Administrative Procedure Act (5 U.S.C. § 556(b)) require an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality. However, a substantial

showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair. JSG committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by making payments to Mr. Gentile and Mr. Lomoriello to induce them to make purchases of tomatoes for L&P and American Banana, respectively. This case is, in all material respects, similar to *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). JSG's payments to Mr. Gentile and Mr. Lomoriello warrant revocation of JSG's PACA license. The cost of defending a disciplinary action and the impact on a respondent's business of the institution of a disciplinary proceeding are not relevant to the sanction to be imposed on a respondent found to have violated 7 U.S.C. § 499b(4). Collateral effects of a respondent's PACA license revocation are relevant neither to a determination whether a respondent violated 7 U.S.C. § 499b(4) nor to the sanction to be imposed for flagrantly or repeatedly violating 7 U.S.C. § 499b(4).

Andrew Y. Stanton, for Complainant.
John V. Esposito and Mel Cottone, Hilton Head Island, SC, and Mark C.H. Mandell, Annandale, NJ, for Respondent JSG Trading Corp.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The proceedings captioned PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526 are related disciplinary proceedings brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted By The Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

PACA Docket No. D-94-0508 was instituted by a Complaint filed on November 8, 1993, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], and amended on April 8, 1994. The Amended Complaint alleges that JSG Trading Corp. [hereinafter JSG], Gloria and Tony Enterprises, d/b/a G&T Enterprises [hereinafter G&T], Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Specifically, the Amended Complaint alleges that: (1) during the period from January 3, 1992, through February 24, 1993, JSG, G&T, and Mr. Gentile engaged in a scheme in which JSG made payments to G&T, under the direction, management, and control of Mr. Gentile, to induce G&T to purchase tomatoes from JSG on behalf of L&P Fruit Corp. [hereinafter L&P]; and (2) during the period from December 15, 1992, through February 24, 1993, JSG and Mr. Lomoriello engaged in a scheme whereby JSG made payments to Mr. Lomoriello to induce him to purchase tomatoes from JSG on behalf of American Banana Co., Inc. [hereinafter American Banana]. The Amended Complaint requests revocation of JSG's PACA license

and publication of the violations committed by G&T and Messrs. Gentile and Lomoriello.

PACA Docket No. D-94-0526 was instituted by a Notice to Show Cause filed on February 8, 1994, by Complainant, challenging the PACA license applications of G&T and Mr. Gentile, based on their commission of the violations of the PACA alleged in the Complaint filed in PACA Docket No. D-94-0508. The Notice to Show Cause requests that a finding be made that G&T and Mr. Gentile are unfit to be licensed under the PACA as commission merchants, dealers, or brokers because they have engaged in practices of a character prohibited by the PACA, and that G&T and Mr. Gentile should be refused a PACA license.

JSG, G&T, Mr. Gentile, and Mr. Lomoriello filed answers denying the material allegations in the Complaint and the Amended Complaint in the disciplinary proceeding captioned PACA Docket No. D-94-0508, as follows: (1) on November 18, 1993, JSG filed Answer of Respondent JSG Trading Corp; (2) on November 29, 1993, G&T filed Answer of Respondent Gloria and Tony Enterprises; (3) on December 20, 1993, Mr. Lomoriello filed Answer of Respondent Albert Lomoriello, Jr. d/b/a Hunts Point Produce Consultants and Transportation; (4) on June 6, 1994, JSG filed Answer of Respondent JSG Trading Corp. to Amended Complaint; (5) on June 6, 1994, Mr. Gentile filed Answer of Respondent Anthony Gentile to Amended Complaint; (6) on June 6, 1994, G&T filed Answer of Respondent Gloria and Tony Enterprises to Amended Complaint; and (7) on July 6, 1994, Mr. Lomoriello filed Answer of Respondent Albert Lomoriello, Jr. d/b/a Hunts Point Produce Consultants and Transportation Co. In the disciplinary proceeding captioned PACA Docket No. D-94-0526, G&T and Mr. Gentile filed a Joint Answer of Respondents Gloria and Tony Enterprises, Inc., and Anthony Gentile on February 18, 1994, denying the allegations in the Notice to Show Cause.

On February 23, 1994, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] determined that the factual issues in PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526 are similar and that consolidation would not prejudice JSG, G&T, Mr. Gentile, or Mr. Lomoriello [hereinafter Respondents] and granted Complainant's request for consolidation of the proceedings captioned PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526.[1]

On May 2, 1995, G&T filed a letter addressed to the ALJ stating that it wished

[1]Summary of Telephone Conference, filed February 25, 1994.

to withdraw its PACA license application.[2] G&T, through counsel, confirmed it was withdrawing its license application during a May 8, 1995, telephone conference with the ALJ.[3] On May 11, 1995, Complainant filed Complainant's Motion to Withdraw Notice to Show Cause With Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises, and on May 12, 1995, the ALJ issued an Order Granting Complainant's Motion to Withdraw Notice to Show Cause. Mr. Gentile did not withdraw his PACA license application, and the Order Granting Complainant's Motion to Withdraw Notice to Show Cause does not relate to or affect the Notice to Show Cause challenging the PACA license application filed by Mr. Gentile.[4]

The ALJ presided over a hearing in New York, New York, on December 5, 1995, through December 8, 1995, December 11, 1995, through December 15, 1995, December 19, 1995, through December 22, 1995, January 29, 1996, and March 19, 1996. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Mark C.H. Mandell, Esq., Annandale, New Jersey, represented JSG.[5] Sherylee F. Bauer, Esq., of Gersen, Baker & Wood LLP, New York, New York, represented G&T and Mr. Gentile. Mr. Lomoriello represented himself.

On October 31, 1996, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order; Mr. Lomoriello filed Post Hearing Brief of Respondent Albert Lomoriello, Jr.; Mr. Gentile filed Respondent Anthony Gentile's Post-Hearing Brief; and JSG filed Post Hearing Brief on Behalf of Respondent JSG Trading Corp. On November 27, 1996, Complainant filed Complainant's Reply Brief. On December 2, 1996, Mr. Gentile filed Respondent

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[2]Letter dated April 28, 1995, from Sherylee F. Bauer to Edwin S. Bernstein, filed May 2, 1995.

[3]Summary of Telephone Conference--Rescheduling of Hearing, filed May 8, 1995.

[4]The Order Granting Complainant's Motion to Withdraw Notice to Show Cause, filed May 12, 1995, specifically states:

> By letter, filed May 2, 1995, Sherylee F. Bauer, attorney for respondents, stated that Gloria & Tony Enterprises, Inc., d/b/a G&T Enterprises wish to withdraw their license application of January 7, 1994. In view of this, on May 11, 1995, Complainant filed a Motion to Withdraw Notice to Show Cause with Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises. Complainant noted that its Notice to Show Cause with respect to the license application of Anthony Gentile remains in effect.

[5]On July 11, 1997, Mr. John V. Esposito, Esq., and Mr. Mel Cottone, Esq., of the Law Offices of Cottone & Esposito, Hilton Head Island, South Carolina, entered an appearance on behalf of JSG.

Anthony Gentile's Post-Hearing Reply Brief; and JSG filed Reply to Complainant's Post Hearing Brief on Behalf of JSG Trading Corp.

On June 17, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which he: (1) found that payments made by JSG to Messrs. Gentile and Lomoriello constituted commercial bribery; (2) found that Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) revoked JSG's PACA license; (4) ordered that the finding that G&T, Mr. Gentile, and Mr. Lomoriello committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) be published; and (5) denied Mr. Gentile's application for a PACA license (Initial Decision and Order at 18, 46-47).

Mr. Lomoriello did not appeal the Initial Decision and Order, which was served on Mr. Lomoriello on June 30, 1997.[6] In accordance with the terms of the Initial Decision and Order (Initial Decision and Order at 47) and section 1.142 of the Rules of Practice (7 C.F.R. § 1.142), the Initial Decision and Order became final and effective as to Mr. Lomoriello on August 4, 1997.

On September 23, 1997, G&T, Mr. Gentile, and JSG appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[7] On November 7, 1997, Complainant filed Complainant's Response to Appeal Petitions,[8] and on November 13, 1997, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On March 2, 1998, I issued a Decision and Order as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile [hereinafter Decision and Order]: (1) concluding that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C.

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[6]Domestic Return Receipt for Article Number P 093 033 661.

[7]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

[8]On February 2, 1998, Complainant filed Notice of Changes to Transcript Citations in Complainant's Response to Appeal Petitions and Complainant's Response to Appeal Petitions. Complainant asserts that the only difference between Complainant's Response to Appeal Petitions, filed November 7, 1997, and Complainant's Response to Appeal Petitions, filed February 2, 1998, are transcript citations and that the transcript citations in Complainant's Response to Appeal Petitions, filed November 7, 1997, are incorrect, and the transcript citations in Complainant's Response to Appeal Petitions, filed February 2, 1998, are correct.

§ 499b(4)); (2) revoking JSG's PACA license; and (3) ordering the publication of the facts and circumstances regarding G&T's and Mr. Gentile's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. ___, slip op. at 95 (Mar. 2, 1998).

On April 28, 1998, JSG filed Petition to Reconsider Decision of the Judicial Officer and/or to Reopen Hearing and/or for Rehearing *On Behalf of* Respondent JSG Trading Corp. [hereinafter Petition for Reconsideration]; on May 14, 1998, Complainant filed Complainant's Reply to Petition to Reconsider Decision of the Judicial Officer and/or to Reopen Hearing and/or for Rehearing by JSG Trading Corp. [hereinafter Complainant's Reply]; and on May 19, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued March 2, 1998.

PERTINENT STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such

commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

. . . .

(d) Withholding license pending investigation

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . . . If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . ., the Secretary may refuse to issue a license to the applicant.

7 U.S.C. §§ 499b(4), 499d(d) (1994 & Supp. I 1995).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

. . . .

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the [PACA].

7 C.F.R. § 46.26.

In addition to its request that I reconsider the March 2, 1998, Decision and

Order, JSG makes two requests in its Petition for Reconsideration. First, JSG requests that the hearing be reopened to take further evidence (Pet. for Recons. at 2, 5, 7-8, 12, 15-17). Section 1.146(a)(2) of the Rules of Practice provides that a petition to reopen the hearing may be filed at any time prior to the issuance of the decision of the Judicial Officer and must include a showing that the evidence to be adduced is not cumulative and a good reason for the failure to adduce the evidence at the hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite.* . . .
>
> . . . .
>
> (2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

The Decision and Order in this proceeding was issued March 2, 1998; JSG's petition to reopen the hearing was filed April 28, 1998. Therefore, JSG's petition to reopen is untimely and is denied.[9]

Moreover, even if JSG's petition to reopen the hearing had been timely filed, the petition would be denied. The ALJ conducted a 15-day hearing during the period December 5, 1995, through December 8, 1995, December 11, 1995, through December 15, 1995, December 19, 1995, through December 22, 1995, January 29, 1996, and March 19, 1996. JSG failed to set forth a good reason in its Petition for Reconsideration for its failure to adduce evidence relevant to its defense during the 15-day hearing.

Second, JSG renews the request it made for oral argument before the Judicial Officer in its Appeal Petition of JSG Trading Corp. and Brief of JSG Trading Corp. in Support of Their [sic] Appeal Petition [hereinafter Appeal Petition] (Pet.

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[9]*See In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing).

for Recons. at 3, 43). Section 1.145(d) of the Rules of Practice provides that the Judicial Officer may grant, refuse, or limit any request for oral argument (7 C.F.R. § 1.145(d)), and I refused the request for oral argument which JSG made in its Appeal Petition because the parties had thoroughly briefed the issues and the issues are controlled by established precedents. *In re JSG Trading Corp., supra*, slip op. at 8. Again, I find that the parties have thoroughly briefed the issues, and the issues are controlled by established precedents. Thus, oral argument would appear to serve no useful purpose, and JSG's renewed request for oral argument is denied.

Prior to addressing the specific issues raised by JSG in its Petition for Reconsideration, there is one general aspect of JSG's Petition for Reconsideration that must be addressed. JSG alleges in its Petition for Reconsideration that the ALJ erred. However, at this stage of the proceeding, error by the ALJ is irrelevant. Section 1.142(c)(4) of the Rules of Practice provides, as follows:

> **§ 1.142 Post-hearing procedure.**
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> . . . .
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> (c) *Judge's decision.* . . .
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> . . . .
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> (4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

On September 23, 1997, JSG filed a timely appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145. Consequently, while the Initial Decision and Order is part of the record,[10] the Initial Decision and Order never became effective as to JSG and no purpose relevant to this proceeding would be served by reconsidering

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[10]See 5 U.S.C. § 557(c).

the Initial Decision and Order as it relates to JSG.

Further, section 1.146(a)(3) of the Rules of Practice provides that a party to a proceeding may seek reconsideration of the decision of the Judicial Officer, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite.* . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Thus, petitions for reconsideration filed pursuant to section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) after the Judicial Officer's decision has been issued relate to reconsideration of the Judicial Officer's decision only.[11]

Therefore, based on the Rules of Practice and JSG's Petition for Reconsideration, I am treating JSG's allegations of error by the ALJ in its Petition for Reconsideration as allegations of error by the Judicial Officer in the March 2, 1998, Decision and Order.

JSG raises seven issues in its Petition for Reconsideration.

First, JSG contends that the evidence is not sufficient to support the conclusion that JSG engaged in commercial bribery in violation of section 2(4) of the PACA

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[11]*See generally In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 11 (May 13, 1998) (Order Denying Pet. for Recons.) (stating that petitions for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) relate to reconsideration of the Judicial Officer's decision only); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (stating that "[p]etitions for reconsideration under the Rules of Practice relate to reconsideration of the Judicial Officer's decision"); *In re Lincoln Meat Co.*, 48 Agric. Dec. 937, 938 (1989) (stating that "[t]he Rules of Practice do not provide for a Motion for Reconsideration to the Administrative Law Judge").

(7 U.S.C. § 499b(4)) by: (1) loaning a boat to Mr. Gentile for approximately 2 years and selling the boat to Mr. Gentile for approximately $35,000 less than the purchase price; (2) making substantial payments to Mrs. Gentile; (3) paying approximately $38,000 to provide Mr. Gentile with a Mercedes; (4) issuing 35 checks payable to "A. Gentile"; (5) giving a Rolex watch, the purchase price of which was $3,317, to Mr. Gentile; (6) paying $9,733.45 to Mr. Albert Lomoriello; and (7) paying $5,600 to G&T (Pet. for Recons. at 2-38).

I disagree with JSG. The evidence supports the conclusion that JSG engaged in commercial bribery in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the evidence supporting this conclusion is fully discussed in the March 2, 1998, Decision and Order. *In re JSG Trading Corp., supra*, slip op. at 11-95.

Second, JSG contends that the ALJ erred[12] by shifting the burden of proof regarding the value of Dirtbag Trucking Corporation from Complainant to Respondents (Pet. for Recons. at 8).

I disagree with JSG's contention that the ALJ[13] erroneously shifted the burden of proof regarding the value of Dirtbag Trucking Corporation from Complainant to Respondents. The Administrative Procedure Act provides, with respect to burden of proof, that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
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> . . . .
>
> (d) Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof*. . . .

5 U.S.C. § 556(d) (emphasis added).

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with

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[12]See discussion of the relevancy of alleged ALJ error and my determination to treat JSG's allegations of error by the ALJ as allegations of error by the Judicial Officer, *supra*.

[13]See note 12.

evidence sufficient for a prima facie case.[14] As discussed in *In re JSG Trading Corp., supra*, slip op. at 35-39, Complainant introduced evidence showing JSG's substantial payments to Mrs. Gentile. Respondents attempted to show that the payments were not commercial bribes in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), but rather were payments totalling $80,000 for 75 shares of stock in Dirtbag Trucking Corporation, which Mrs. Gentile transferred to Mr. Goodman.

I stated with respect to the evidence of the value of Dirtbag Trucking Corporation, as follows:

> However, Respondents presented no evidence that Dirtbag was worth $80,000 during the period from 1991 through 1994. To the contrary, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984[-85], 2049, [2148-]49, [2495-]96). Even if the JSG checks to Mrs. Gentile, calculated by deducting 5¢ for each box of tomatoes sold to L&P, did amount to $80,000, the payment was still unlawful. Mr. Gentile had only loaned Dirtbag $40,000 and had invested [approximately] $7,000 in a new truck (Tr. [2782-]83). JSG's payments, therefore, would have included a profit of approximately $33,000, which would have been unjustified, given Dirtbag's unprofitable status.

In re JSG Trading Corp., supra, slip op. at 38.

These statements regarding the evidence relating to the value of Dirtbag Trucking Corporation do not shift the burden of proof regarding the value of Dirtbag Trucking Corporation to Respondents, as JSG contends, but rather indicate the state of the evidence regarding Dirtbag Trucking Corporation's value.

Third, JSG contends that the Secretary of Agriculture has no jurisdiction to consider whether Mr. Gentile had any business reasons for the use of the Mercedes

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[14] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *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 of going forward'"); 3 Kenneth C. Davis, *Administrative Law Treatise* § 16:9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

(Pet. for Recons. at 18). However, JSG offers no support for its contention. Further, the question regarding the possible business reasons for Mr. Gentile's use of the car relates directly to the issue of whether payments of approximately $38,000 made by JSG to provide Mr. Gentile with the Mercedes constitute violations of the PACA, a matter over which the Secretary of Agriculture has jurisdiction.

Fourth, JSG contends that given the uncontested personal relationship between Mr. Gentile and Mr. Goodman, the gift of a $3,317 Rolex watch cannot be held to be a bribe (Pet. for Recons. at 23-24).

I disagree with JSG. The act of bestowing such an expensive gift upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P through Mr. Gentile constitutes a commercial bribe in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Since the issuance of *In re Tipco, Inc.*, in 1991, the produce industry has been on notice that payments of anything more than a *de minimis* amount can constitute commercial bribery, as follows:

> The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another--a duty to only deal with one another at arm's length. Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (e.g., more than a pen, calendar or lighter).

In re Tipco, Inc., 50 Agric. Dec. 871, 882-83 (1991) (footnotes and citations omitted), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). Mr. Goodman's alleged personal relationship with Mr. Gentile does not obviate the requirement that JSG refrain from making gifts of substantial value to Mr. Gentile who was working for one of JSG's customers. JSG could only make gifts to Mr. Gentile with L&P's permission. Even if JSG received permission from L&P, JSG should not have made gifts of more than *de minimis* value to Mr. Gentile. The gift of a $3,371 Rolex watch to Mr. Gentile was more than *de minimis*. Therefore, this gift constitutes commercial bribery in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Fifth, JSG contends that the standard of proof, which should be applied in this proceeding, is "clear and convincing" rather than a "preponderance of the evidence" (Pet. for Recons. at 26-28). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[15] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in which the potential sanction is revocation of a PACA license, is preponderance of the evidence.[16] Further, I find no basis for a heightened standard of proof merely because a respondent is alleged to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by engaging in commercial bribery.

Sixth, JSG contends that the ALJ was not impartial (Pet. for Recons. at 8, 25-26, 37). Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality.[17] Further, the Administrative Procedure Act requires an impartial

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[15]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

[16]*In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *appeal docketed*, No. 98- 60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

[17]*Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (stating that a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp.*

proceeding, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

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v. Continental Casualty Co., 393 U.S. 145, 150 (1968) (stating that any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating that essential to a fair administrative hearing is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating that bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating that due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating that trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating that a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating that a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating that a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating that quasi-judicial proceedings entail a fair trial and fairness requires an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating that it is the essence of a valid judgment that the body that pronounces judgment in a judicial or quasi-judicial proceeding be unbiased); *Inland Steel Co. v. NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (stating that trial by a biased judge is not in conformity with due process, and the recognition of this principle is as essential in proceedings before administrative agencies as it is before the courts).

> . . . The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b).

However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair.[18]

JSG contends that the ALJ's alleged shift of the burden of proving the value of Dirtbag Trucking Corporation from Complainant to Respondents, the ALJ's alleged erroneous finding regarding the identity of the lessee of the Mercedes, and the ALJ's alleged conclusion that employment agreements must be in writing, evidence the ALJ's bias (Pet. for Recons. at 8, 17-18, 25-26, 37). However, I do not find that the ALJ shifted the burden of proving the value of Dirtbag Trucking Corporation from Complainant to Respondents, concluded that employment contracts must be in writing, or erred with respect to the identity of the lessee of the Mercedes. Moreover, even if I found that the ALJ erred as alleged by JSG,

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[18] *Akin v. Office of Thrift Supervisor*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating that in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a reasonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating that in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judge's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1989) (stating that a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating that the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating that in order to maintain a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating that it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

such a finding would not be sufficient to conclude that the ALJ is biased.[19]

I have reviewed the record in this proceeding, and I find no basis for JSG's allegation that the ALJ is biased or prejudiced toward or against any litigant in this proceeding.

Seventh, JSG contends that revocation of JSG's PACA license is not an appropriate sanction based on the facts in the record (Pet. for Recons. at 39-43).

I disagree with JSG. JSG has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). JSG knew, or should have known, that the payments it made to Mr. Gentile and Mr. Lomoriello to influence their buying practices and to induce them to make purchases of tomatoes for L&P and American Banana, respectively, were unlawful, and JSG should have known that it was violating the law.

This case is, in all material respects, similar to *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). JSG's payments to Mr. Gentile and Mr. Lomoriello warrant the most severe sanctions. As in *Goodman* and *Tipco*, the extremely serious violations in this case mandate no lesser sanction than a revocation of JSG's PACA license.

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[19]*See Migliorini v. Director, Office of Workers' Compensation Programs*, 898 F.2d 1292, 1294 n.9 (7th Cir.) (stating that for petitioner to succeed on the issue of administrative law judge prejudice, he would have to point to something outside the record indicating prejudgment or to have demonstrated the administrative law judge's factual findings were undermined by his animus toward the petitioner), *cert. denied*, 498 U.S. 958 (1990); *Pearce v. Sullivan*, 871 F.2d 61, 63 (7th Cir. 1989) (stating that prejudgment such as will disqualify a judicial officer (whether judge or hearing examiner) refers to prejudgment based on information obtained outside the courtroom, rather than to rulings, even if hasty or errant, formed on the basis of the record evidence and other admissible materials and considerations); *McLaughlin v. Union Oil Co.*, 869 F.2d 1039, 1047 (7th Cir. 1989) (stating that bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires a showing that the officer had it "in" for the party for reasons unrelated to the officer's view of the law, erroneous as that view might be); *NLRB v. Honaker Mills*, 789 F.2d 262, 266 (4th Cir. 1986) (stating that petitioner may not establish bias merely by questioning the correctness of the administrative law judge's evidentiary rulings; petitioner must make a showing of bias stemming from sources outside the decisional process); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 728 (6th Cir. 1986) (stating that adverse rulings in administrative proceedings are not by themselves sufficient to show bias); *Herbert v. Secretary of HHS*, 758 F.2d 804, 806 (1st Cir. 1985) (per curiam) (stating that making an error of law does not constitute bias on the part of an administrative law judge); *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981) (stating that even if the administrative law judge's rulings had been erroneous, a judicial ruling made in the ordinary course is not to be translated into bias by disappointed counsel); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating that something more than unfavorable or even unsupported findings must be shown in order to sustain a charge of bias by the body that pronounces judgment in a judicial or quasi-judicial proceeding); *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167, 177 (3d Cir.) (stating that erroneous conclusions by the NLRB do not establish bias by the NLRB), *cert. denied*, 308 U.S. 605 (1939).

Administrative Law Judge James W. Hunt affirmed the agency's decision to deny the applicant's application for a license on the basis that it engaged in the business of a produce dealer without a PACA license, it was affiliated with a person whose bar to employment by or affiliation with a PACA licensee had not been lifted by the Secretary, and it made false or misleading statements on the license application. Judge Hunt rejected the applicant's defenses, reciting the Departmental policy that personal or business misfortunes are never considered excuses for the failure of a dealer to pay for his purchases of produce.

Kimberly D. Hart and Andre Allen Vitale, for Complainant.
John H. McConnell, New York, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding is brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)("PACA"), the regulations issued thereunder (7 C.F.R. Part 46)("Regulations"), and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*)("Rules of Practice").

The proceeding was instituted on July 2, 1997, by a Notice to Show Cause filed by Complainant, the Acting Deputy Director, Fruit & Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Notice states that the application for a PACA license by Applicant, Pete's Tropical Corp., should be denied because it is unfit to receive a license. The Notice directed Applicant to show cause why its license application should not be denied.

A hearing was held on July 11, 1997, in New York, New York. Complainant was represented by Kimberly D. Hart, Esq. and Andre Allen Vitale, Esq. Applicant was represented by John H. McConnell, Esq.

Statement of the Case

Applicant, Pete's Tropical Corp., (referred to as "Pete's Tropical"), a New York corporation, filed its application for a PACA license on June 2, 1997. It was signed by a Roger Almeida who identified himself on the application as the president of Pete's Tropical and its 100 percent stockholder. Almeida responded with a "no" to specific questions on the application form asking whether any officer, director, or owner of more than ten percent of the stock of Pete's Tropical had ever had a license suspended or revoked, or been found to have committed flagrant or repeated violations of the PACA, or against whom there were unpaid reparation awards. However, in the "explanations" section of the application, Almeida referred to a company called "Plaintains, Inc."

> The reason I failed in Plantains Inc. in 1990-1992. We lost in the Bronx Terminal Market 1.5 million Dollars and all my suppliers took away my credit and everyone wanted me to pay them right away. Which for me was impossible. I paid most of my suppliers but the losses were so big, I could

not satisfy everyone of them. So I was sued by a few creditors who also complained to PACA. Without further information PACA took away Plantains' license. They never knew the losses I suffered in this matter.

At this time my brother Plinio Almeida came into the business and formed PETE'S TROPICAL CORPORATION. Took it upon themselves to revoke PETE'S TROPICAL CORPORATION'S license also. Months later after all the investigation with no further hope of regaining the license Plinio Almeida abandoned the Company and I have continued it ever since.

Roger Almeida had been the sole officer, director, and shareholder of Plantains, Inc. Its license was revoked in 1994 after it was found to have committed repeated and flagrant violations of the PACA by failing to make full payment promptly for $347,271 in produce purchases. Almeida was then found to have been responsibly connected with Plantains and on April 22, 1994, he was formally notified that:

You are ineligible to be licensed under the PACA until April 29, 1996. You also may not be employed by or affiliated with another licensee, in any capacity, until April 29, 1995. After these dates you may, respectively, be licensed or employed by a PACA licensee, *with the approval of the Secretary of Agriculture and the posting of a suitable surety bond.* (Italics added.)

If you continue to conduct business subject to the PACA while ineligible to be licensed, an action could be filed against you in the U.S. District Court seeking an injunction, plus an initial penalty of $500 and $25 for each subsequent day of subject operation.

As for Almeida's reference on his application to the connection of his brother, Plinio, with Pete's Tropical, Plinio was its owner when it filed for a license in June 1995. The application was denied because it was found that Pete's Tropical had a close business relationship with Plantains, which, as noted, had been found to have violated the PACA and which was owned by Roger Almeida. The close relationship was found to constitute an unlawful affiliation between Pete's Tropical and Roger Almeida who was under an employment restriction. Because of this affiliation Pete's Tropical was found to be unfit to receive a license.

Plinio then left Pete's Tropical and Roger Almeida became its sole owner, director, and shareholder in March 1996. However, he had not received approval,

and the record does not show that he ever requested approval, from the Secretary to be licensed or be affiliated with a licensed produce business even though the time limit barring him from the produce industry was due to expire in another month. Despite still being under an employment restriction and despite lacking a license, Almeida began operating as a produce dealer. Between January 1996 and April 1997, he purchased 82 lots of perishable agricultural commodities in commerce which brought him within PACA's regulatory ambit. He made the purchases variously in the name of Pete's Tropical and Plantains and in the name of a business called Diana Produce. One of the suppliers, Pacific Fruit, stated in a July 1997 letter that:

> When Pacific Fruit started selling to Mr. Almeida, his company was Plantains, Inc. It is our understanding that Mr. Almeida's company's name subsequently changed to Pete's Tropical and then to Diana Produce. Within the last month, Diana Produce's name was changed back to Pete's Tropical. During the period that the company was named Diana Produce, payments on behalf of Diana Produce were made on Pete's Tropical checks.

After Pete's Tropical filed its application for a license on June 2, 1997, Complainant responded with an order directing Pete's Tropical to show cause why its application should not be denied because its operation as a produce dealer without a PACA license and its affiliation with a person, Roger Almeida, who was barred from such affiliation and who also provided false and misleading statements on the license application by denying past violations of the PACA, constituted practices of a character prohibited by the PACA.

Law

Section 4(d) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499d(d)) provides:

> The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State

or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

Section 3(a) (7 U.S.C. § 499c(a)):

> After the expiration of six months after the approval of this Act, no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. Any person who violates any provision of this subsection shall be liable to a penalty of not more than $1,000 for each such offense and not more than $250 for each day it continues, which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

Any person violating this provision may, upon a showing satisfactory to the Secretary of Agriculture, or his authorized representative, that such violation was not willful but was due to inadvertence, be permitted by the Secretary, or such representative, to settle his liability in the matter by the payment of the fees due for the period covered by such violation and an additional sum, not in excess of $250, to be fixed by the Secretary of Agriculture or his authorized representative. Such payment shall be deposited in the Treasury of the United States in the same manner as regular license fees.

Section 8(b) (7 U.S.C. § 499h(b)):

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person-

(1) whose license has been revoked or is currently suspended by order of the Secretary ;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right to appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

Section 1(9) (7 U.S.C. § 499a(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 chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Section 1(10) (7 U.S.C. § 499a(b)(10)):

The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

Section 2 (7 U.S.C. § 499b(4)):

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

Discussion

The conduct of Pete's Tropical of engaging in the business of a produce dealer without a PACA license, its affiliation with a person, Roger Almeida, whose bar to employment by or affiliation with a PACA licensee had not been lifted by the Secretary, and Almeida's false and misleading statements on the license application are all unlawful activities under the PACA. They therefore constitute practices of a character prohibited by the PACA.

Roger Almeida's defense is that he had been in the produce business for over thirty years and the troubles he encountered with Plantains were the result of his debtors failing to pay him the money they owed which in turn meant that he was unable to pay his creditors. However, it is the Secretary's unyielding policy that personal or business misfortunes are never considered excuses for the failure of a dealer to pay for his purchases of produce. *Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225 (1996).

As the practices of Pete's Tropical Corp. were of a character prohibited by the PACA, it is unfit to be licensed. Accordingly, Complainant's determination not to grant Pete's Tropical Corp. a license is affirmed.

Findings of Fact

1. Applicant, Pete's Tropical Corp., does business in the State of New York.
2. Applicant's PACA license terminated on March 9, 1995.
3. On or about March 9, 1996, Roger Almeida became the sole officer, director, and shareholder of Applicant.
4. Roger Almeida was responsibly connected with Plantains, Inc., a produce dealer whose license was revoked because it engaged in repeated and flagrant violations of the PACA.
5. Roger Almeida was barred from obtaining a PACA license and from being employed by a PACA licensee until his employment by or affiliation with a PACA licensee was approved by the Secretary.
6. The Secretary has not given its approval for Roger Almeida's licensing or employment by or affiliation with a PACA licensee at any time relevant to this proceeding.
7. From January 1996 through April 1997, Applicant engaged in the business of being a produce dealer subject to the PACA without having a PACA license.
8. On June 2, 1997, Applicant filed an application for a PACA license.
9. Applicant's license application was prepared by Roger Almeida. Roger Almeida provided false and misleading statements on the license application.
10. Complainant denied Applicant's license on the ground that it was unfit to

receive a license.

Conclusion of Law

Applicant has engaged in practices of a character prohibited by the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*).

Order

Applicant's application for a PACA license is denied.

This Order shall take effect fourteen (14) days after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision became final May 18, 1998.-Editor]

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

LINDEMANN PRODUCE, INC. v. ABC FRESH MARKETING, INC.
PACA Docket No. R-95-0089.

ABC FRESH MARKETING, INC. v. FRESH QUEST PRODUCE.
PACA Docket No. R-95-0047.

FRESH QUEST PRODUCE v. ABC FRESH MARKETING, INC.
PACA Docket No. R-95-0049.
Decision and Order filed January 14, 1998.

Accord and Satisfaction - Tender of full payment for undisputed invoices along with partial payment for disputed invoices in one "full satisfaction" check may not be a good faith tender under UCC 3-311.

Debtor tendered payment in one check for six produce transactions. Four of the transactions were undisputed, and the check covered these transactions in their full amount. The remaining two transactions were disputed, and as to these the check tendered only partial payment. The creditor negotiated the check, and then sought to recover the balance alleged due on the disputed transactions. The debtor pled accord and satisfaction. It was held that the good faith tender requirement of UCC 3-311 would not be met by such a check, especially in view of the "full payment promptly" requirement of the Act and Regulations. The situation was distinguished from that in which the parties maintain a running account.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). Timely complaints were filed in each case in connection with transactions in interstate commerce involving perishable produce.

Copies of the reports of investigation prepared by the Department were served upon the parties. Copies of the formal complaints were served upon respondents which filed answers thereto denying liability to complainants.

The amount claimed in each of the formal complaints exceeds $15,000, however the parties waived oral hearing, and therefore the shortened method of

procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in each case as are the Department's reports of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, and an opportunity to file briefs.

In Docket R-95-0089 complainant filed an opening statement and statement in reply. Respondent filed an answering statement. In Docket R-95-0047 complainant filed an opening statement and respondent filed an answering statement. In Docket R-95-0049 respondent filed an answering statement. Briefs were not filed in any of the proceedings.

In Docket R-95-0049 respondent ABC Fresh Marketing, Inc., was ordered, on May 17, 1995, to pay an undisputed amount of $14,062.33, which represented the difference between the amount it admitted owing in that proceeding, $31,647.55, and the amount it seeks in R-95-0047, $17,585.22. The $14,062.33 was duly paid.

These proceedings have been consolidated for purposes of decision.

Findings of Fact

1. Lindemann Produce, Inc., hereinafter referred to as Lindemann, is a corporation whose address is 300 E. 2nd St., Reno, Nevada.

2. ABC Fresh Marketing, Inc., hereinafter referred to as ABC, is a corporation whose address is P. O. Box 10456, Pittsburgh, Pennsylvania. At the time of the transactions involved herein ABC was licensed under the Act.

3. Fresh Quest Produce, hereinafter referred to as Fresh Quest, is a partnership composed of Northern Produce, Inc., Western Produce, Inc., Latin Produce, Inc., and Eastern Produce, Inc., and has an address of 2008 N. Fine Ave., #102, Fresno, California.

4. On or about April 15, 1994, Lindemann sold to ABC two truckloads of cantaloupes. Each load consisted of 1,064 cartons of size 15 melons at $9.00, plus cooling and palletizing charges of $1,436.40, plus $23.50 for a temperature recorder, or a total of $11,035.90, f.o.b. The melons were loaded in Miami, Florida, and the agreed destination for both loads was Columbia, South Carolina.

5. On or about April 15, 1995, ABC sold the same cantaloupes to Fresh Quest at $10.60 per carton, plus $23.50 for temperature recorders, or $11,301.90 for each load, f.o.b.

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

6. On April 15, 1994, the two loads were picked up at Lindemann's warehouse in Miami, Florida, by the same truck, sent by Fresh Quest. One load (Lindemann's invoice number 15826; ABC's invoice number 500347A) was picked up at 7:45 p.m., and the other (Lindemann's invoice number 15830; ABC's invoice number 500342A) at 9:15 p.m. The loads were transported to the Fresh Quest warehouse in Pompano Beach, Florida, and unloaded on the evening of April 15, 1994. On April 18, 1994, the two loads were shipped to H. E. B. Grocery Co., in San Antonio, Texas, where they arrived and were unloaded on April 20, 1994.

7. Two federal inspections were conducted of cantaloupes at the H.E.B. warehouse in San Antonio, Texas, on April 20, 1994. Inspection certificates were issued revealing, in relevant part, as follows:

4/20/94 8:00 A.M.

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	43 to 45 °F	Cantaloupes	"Cynthia" 15's	HD	X	336 Ctns	N
B	43 to 45 °F	Cantaloupes	"Sam Blas" 15's	CR	X	304 Ctns	N
C	43 to 44 °F	Cantaloupes	"Lindy's Delight" 15's	CR	10102 10103	168 Ctns	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S.DAM	OFFSIZE/DEFECT	OTHER
A	07	% 02	%	% Bruising (0 to 13%)	Ripe & firm; ground color generally turning yellow
to					
					yellow.
	30	% 19	%	% Discolored areas (7 to 60%)	
	00	% 00	%	% Decay	
	37	% 21	%	% Checksum	
B	03	% 00	%	% Bruising	Ripe & firm; ground color light green to yellow
	18	% 09	%	% Discolored areas (0 to 47%)	
	00	% 00	%	% DECAY	
	21	% 10	%	% CHECKSUM	

C	73	% 50	%	%	Discolored areas (53 to 87%)	Ripe & firm; ground color turning yellow to yellow	
	00	% 00	%	%	DECAY		
	73	% 50	%	%	CHECKSUM		

4/20/94 4:05 P.M. LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	43 to 44 °F	Cantaloup	"Sam Blas" 15's	CR	X	894 ctns	Y
B	39 to 42 °F	Cantaloup	"Cynthia" 15's	HD	X	168 ctns	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	03	% 00	%	% Sunken areas	Stock is ripe, firm. ground color light green to yellow
	13	% 08	%	% Discolored areas (0 to 27%)	
	03	% 01	%	% Bruising	
	00	% 00	%	% Decay	
	19	% 09	%	% Checksum	
B	08	% 02	%	% Bruising	Stock is ripe, firm. ground color generally yellow, few turning. Decay generally early stages
	08	% 00	%	% Sunken areas (0 to 13%)	
	52	% 35	%	% Discolored areas (35 to 67%)	
	02	% 02	%	% Decay	
	64	% 39	%	% Checksum	

8. On May 25, 1994, ABC issued a check to Lindemann in the amount of $20,908.22. The check stated on its face, after the printed word "MEMO," as follows: "Endorsement constitutes payment in full on the following invoices: 21058, 15826, 15830, 16182, 16052, 15737." In addition, a stub was attached to the check which stated as follows:

ABC#	YOUR#	DESCRIPTION	AMOUNT
118332	21058	CANTALOUPES	2,669.60
500347	15826	"	2,428.16
500342	15830	"	1,957.76
500357	16182	"	1,159.20
500353	16052	"	1,125.90
500340	15737	"	11,567.90

The payments tendered on invoices 21058, 16182, 16052, and 15737 were payments for the full amount on invoices as to which there was no dispute. Only the payments tendered for invoice numbers 15826, and 15830 were for disputed transactions, and for less than the amounts claimed due.

9. On November 9, 1994, Fresh Quest issued a check to ABC for the loads covered by invoices 15826, and 15830, in the total amount of $5,018.58. Fresh Quest released this check as an undisputed amount.

10. Between December 14, 1993, and April 18, 1994, Fresh Quest sold to ABC, for delivery to Toronto, Canada, seven trucklots of melons as follows:

Shipping Date	Invoice Number	Total
12/14/93	1805	$10,801.20
01/06/94	2585	8,993.50
03/31/94	5119	6,817.50
04/04/94	5149	5,821.80
04/08/94	5182	5,300.25
04/14/94	5809	6,960.50
04/18/94	5841	6,747.50
	Total	$51,442.25

11. ABC paid Fresh Quest $18,680.30 against the invoices listed in finding of fact 10, leaving a balance of $32,761.95.

12. Informal complaints were filed in each proceeding within nine months after the causes of action alleged therein accrued.

Conclusions

In Docket R-95-0089 Lindemann contends that it is due a balance of $17,685.88 for the two loads of cantaloupes sold to ABC. ABC accepted the

melons when they were diverted by ABC's customer Fresh Quest from the contract destination agreed to between ABC and Lindemann.[2] ABC asserts two defenses to Lindemann's claim for the balance of the purchase price.

First, Lindemann's negotiation of the partial payment check tendered by ABC, as set forth in finding of fact 8, is claimed to have resulted in an accord and satisfaction as to the balance claimed due on the two loads of melons. Lindemann's response to this assertion was threefold.

Lindemann first states that it put ABC on notice that the check was being accepted only as a partial payment by a letter sent to ABC nine days after the check was received, and eight days after it was negotiated. Lindemann's representative maintained that, in view of this letter, no accord took place because "[i]n some court rulings, the interpretation of 'Accord and Satisfaction' allows for a creditor to reserve his or her rights to proceed against the debtor for the remaining amount due and owing." The reference is to an interpretation offered by a few courts of UCC section 1-207.[3] This interpretation has been espoused by only a small minority of states, and has been explicitly rejected by the vast majority of states that have considered the question. Moreover, proposed revisions to the UCC adopted by the National Conference of Commissioners on Uniform State Laws have laid the question to rest by expressly stating in a new subsection (2) of the revised section 1-207 that "[s]ubsection (1) does not apply to an accord and satisfaction." In any event, Lindemann's letter to ABC, sent eight days after negotiation of the check, would not have amounted to a reservation of its rights even under the old minority interpretation of section 1-207.

Lindemann's representative also asserts that the full payment language on the check was "merely a pre-imprinted computer generated statement that is most likely on every generated check, and, in no way, . . . should be the basis for determining a finalization to this disputed proceeding." Lindemann apparently alludes to UCC section 3-311. Subsection (a) of that section provides:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

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[2]*Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345 (1996).

[3]See *A. Sam & Sons Produce Company, Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044 (1991), for a through discussion of the section, and a rejection of the interpretation by this forum.

The official comments state, in relevant part:

> 4. Subsection (a) states three requirements for application of Section 3-311. "Good faith" in subsection (a)(i) is defined in Section 3-103(a)(4) as not only honesty in fact, but the observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. . . . [An] example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(i).

It is evident to us from an examination of the check in question that the pertinent language is not pre-printed. However, even if it were pre-printed, the references to specific invoices serve to particularize the full satisfaction language so as to remove the uncertainty referred to in the Official Comment's example. The attached stub further highlights the intended purpose of the tender, eradicating any possibility of a misunderstanding on the point.

Lindemann next makes the barest allusion to what we consider to be the most formidable reason for not finding an accord and satisfaction as a result of the negotiation of the May 25, 1994, check. Complainant's sales representative, Don Johnston, said in Lindemann's opening statement:

> I would like to state for the record that upon receipt of respondent's check located in the report of investigation as exhibit no. 3, page 1, ABC Fresh Marketing, Inc. is paying on six individual trucklot shipments of melons.

As made clear in the findings of fact, the tendered payment was made in one check which paid on six invoices. Only two of these invoices were in dispute. The largest payment tendered on any of the six invoices was payment in the full amount due, or $11,567.90, on invoice 15737. This amount was more than all of the other payments put together, and was of an invoice that was older than the two in dispute. The two disputed invoices were dated April 15, 1994, and noted at the bottom: "NET DUE IN 10 DAYS." The partial payment on these invoices was not tendered until May 25, 1994. While the dispute relative to these two invoices may

have removed the payment of such invoices from the late payment category[4], the same cannot be said for invoice 15737. The "full payment promptly" provisions of the Act and Regulations are extremely important, and will not be met by a tendered payment that is contingent on acceptance of a partial payment as to a disputed amount. Moreover, there is a cross contamination here as to the contingent tender. The lumping of full payments on undisputed invoices with partial payments on disputed invoices together in one check requires a creditor to accept the partial payments in order to receive the undisputed full payments in a timely manner.[5] Such a tender cannot be said to be in good faith, and the negotiation of a check thus tendered will not accomplish an accord and satisfaction.[6] We hasten to add that in the case of a running account, where the total due on such an account is in question due to the complexities consequent upon multiple payments on account, the allocation of payments, and the like, our conclusions here would not apply[7]. Although technically the parties here may have had a running account, the total due was in question only because of disputes as to two clearly distinguished transactions.

Since no accord was reached between Lindemann and ABC as to the disputed transactions we must examine ABC's remaining defense. ABC asserts that since this was an f.o.b. sale the suitable shipping condition rule applies, and that the degree of deterioration on arrival in San Antonio was so great the melons "could not have been in suitable shipping condition a maximum of 110 hours prior to USDA inspection." ABC admits that the melons did not go to the contract destination of Columbia, South Carolina, but apparently is contending that the degree of deterioration in San Antonio was so great that a breach of the suitable shipping condition warranty is proven anyway. However, the f.o.b. suitable

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[4]See the last sentence of 7 C.F.R. § 46.2(aa).

[5]Although one could construct a hypothetical situation where this would not be the case, as where the check is issued with extreme promptness, the conclusion will undoubtedly hold true in almost all situations. If a check is tendered as full satisfaction, combining undisputed and disputed invoices, and payment is not yet due on the undisputed transactions, the creditor should ask for the issuance of a separate check covering the transactions. Otherwise, the negotiation of such a check might be deemed to accomplish an accord and satisfaction.

[6]The subjective intent of a debtor in issuing such a check is not under scrutiny. Objective standards are rather in question, namely "reasonable commercial standards of fair dealing."

[7]Such an account might combine disputed and undisputed transactions, but the amounts due on the undisputed transactions (as well as the disputed transactions) might be in doubt due the way in which past payments have been made and applied.

shipping condition rule is applicable by its express terms only "at the contract destination agreed upon between the parties."[8] These melons were unloaded in Pompano Beach shortly after shipment on the 15th, and stored under unknown conditions over the weekend. It was not until the 18th that they were shipped to San Antonio, where they were inspected, after unloading, on the 20th. Furthermore, Fresh Quest discarded the temperature tapes on arrival of the loads in Pompano Beach. This failure to supply the temperature tapes must be imputed to ABC vis à vis Lindemann, and we have held that "...the failure of a receiver who should have access to temperature tapes to offer the tapes in evidence is a factor to be considered in determining whether such receiver has met its burden of proving, after acceptance, that transportation services and conditions were normal."[9] We conclude that ABC has failed to prove a breach of contract, and, since it accepted the two loads of melons, is liable to Lindemann for the full purchase price thereof, or $22,071.80, less the $4,385.92 already paid, or $17,685.88. ABC's failure to pay this amount to Lindemann is a violation of section 2 of the Act.

In Docket R-95-0047 ABC alleges that Fresh Quest has failed to pay to ABC the combined invoice prices of the same two loads of melons, or $22,603.80. In this case the issue as to contract destination is somewhat different, with Fresh Quest maintaining that no contract destination was ever discussed. However, our precedents are clear in holding that the warranty of suitable shipping condition is void when a final destination is not agreed upon in the contract.[10] For reasons similar to those related above we find that Fresh Quest is liable to ABC for the full contract price of $22,603.80, less the $5,018.58 already paid, or $17,585.22.

In Docket R-95-0049 Fresh Quest alleges that ABC has failed to pay a balance of $32,761.95 for seven trucklots of mixed melons having an original invoice total price of $51,442.25. As related in the preliminary statement ABC has

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[8]7 C.F.R. § 46.43(j). *See Sunny Roza Fruit & Produce Co. v. Joseph Northwest*, 20 Agric. Dec. 1193 (1961) where the contract destination was Minneapolis, Minnesota, and the goods were diverted by the buyer to Philadelphia and New York. It was held that the inspection of the goods at the distant points did not show that the goods would have been abnormally deteriorated if delivered directly to Minneapolis. See also, *Rancho Vergeles Inc.. v. Richard Shelton d/b/a Midvalley Brokerage Company*, 46 Agric. Dec. 1031 (1987).

[9]Louis Caric & sons v. Ben Gatz Co., 38 Agric. Dec. 1486 at 1500-01 (1979). See also *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Monc's Consolidated Produce Inc. v. A. J. Produce Corp.*, 43 Agric. Dec. 563 (1984).

[10]*B&L Produce v. Florence Distributing Co.*, 37 Agric. Dec. 78 (1978); *Brannan, Chapman & Edwards, Inc. v. Silverstreak Distr., Inc.*, 26 Agric. Dec. 1152 (1967).

admitted owing $31,647.55 of the $32,761.95 claimed, and has paid $14,062.33 of such amount as an undisputed amount, leaving $18,699.62 of the claimed $32,761.95 unpaid. The $17,585.22 which we have found owing from Fresh Quest to ABC in Docket R-95-0047 should be set off against this amount, leaving $1,114.40 still in dispute. The basis of the dispute is as follows.

ABC does not deny the receipt and acceptance of the seven loads of mixed melons. However, ABC claims that two of the invoices, number 1805 for $10,801.20, and 2585 for $8,993.50, were priced incorrectly, and were adjusted to $10,353.20, and $8,327.10. Invoice 1805 was paid by a check dated 1/19/94 in the amount of $22,693.20 which referenced two invoices, 1805 and 2202. The check had written across its face the words "Endorsement constitutes payment in full on the following invoices: 2202 01, 1805 01." The parties agree that this check paid invoice 1805 $448.00 short of what had been billed. There is no indication in the record as to whether the check also paid invoice 2202 short of what was billed. Invoice 2585 was paid by a check dated 2/04/94 in the amount of $8,327.10. This check had written across its face the words "Endorsement constitutes payment in full on the following invoices: 2825." Fresh Quest denies that the adjustments were ever authorized. However, it negotiated the checks, the first on 1/24/94, and the second on 2/9/94.

ABC's answer was signed by its president Stanley Bielski. The answer states, as to these two invoices, "Various items were priced incorrectly and adjustment was approved by Lou Kertesz." Fresh Quest's opening statement consisted of two sworn statements. The first was by Russ Jeans, Fresh Quest's credit manager, who made the following assertions, in relevant part:

> I received advice from Fresh Quest salesperson Lou Kertesz, on March 9, 1994, deductions to Fresh Quest invoice numbers 1805-01, and 2585, by ABC Fresh Marketing Inc., were unauthorized.
>
> On March 9, 1994, I spoke with Dave Maravich, of ABC Fresh Marketing Inc. Mr. Maravich confirmed he had spoken with Lou Kertesz. On March 16, I again spoke with Mr. Maravich. Mr. Maravich advised he would be working on short-pay balances due Fresh Quest produce. On April 12, Mr. Maravich advised short pays would be paid per his arrangement with Lou Kertesz. . . .

The second sworn statement was by Lou Kertesz, Fresh Quest's salesperson responsible for sales to ABC. Mr. Kertesz stated, in relevant part, as follows:

> On March 9, 1994, I received a written inquiry by fax from Fresh Quest's Credit Manager, Russ Jeans, concerning several short-pays. Included within Russ' fax, was reference to short pays on Fresh Quest invoice #1805-01 and #2585, by ABC Fresh Marketing Inc. Upon receipt of said fax, I spoke with Dave Maravich of ABC Fresh Marketing. He advised ABC Fresh Marketing, would remit payment for both short-pays. . . . .

It is noteworthy that ABC failed to submit any affidavit from Dave Maravich, the person who had personal knowledge of the transaction. Instead, ABC's submissions were by its president whose connection with the transactions are unknown. On this basis we conclude that Dave Maravich admitted on behalf of ABC that the amounts paid short were in fact due. Although ABC asserted that an accord and satisfaction was accomplished as to the two transactions in question, we conclude that such was not the case. A good faith dispute is necessary for an accord and satisfaction to take place, and the record is devoid of any indication that the two transactions were disputed at the time the checks were negotiated.[11] We conclude that the amount of $1,114.40 remains due from ABC to Fresh Quest. ABC's failure to pay this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[12] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[13] We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order ABC Fresh Marketing, Inc., shall pay to Lindemann Produce, Inc., as reparation, $17,685.88, with interest thereon at the rate of 10% per annum from May 1, 1994, until paid.

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[11] *Eustis Fruit Company, Inc. v. The Auster Company, Inc.*, 51 Agric. Dec. 865 (1992).

[12] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[13] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Within 30 days from the date of this order ABC Fresh Marketing, Inc., shall pay to Fresh Quest Produce, as reparation, $1,114.40, with interest thereon at the rate of 10% per annum from February 1, 1994, until paid.

Copies of this order shall be served upon the parties.

DELANO FARMS COMPANY v. SUMA FRUIT INTERNATIONAL.
PACA Docket No. R-97-0033.
Decision and Order filed January 15, 1998.

Sale by Sample – Express warranty created – Proof of characteristics of sample.

Where complainant tendered six pallets of grapes to respondent's agent for examination, and stated that they were from the lot of grapes subsequently shipped to respondent, the sale was by sample, and amounted to an express warranty that the whole lot of grapes would conform to the sample. The condition or other characteristics disclosed by a sample are subject to subsequent proof in the normal manner.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $25,346.48 in connection with a transaction in interstate commerce, involving loads of table grapes.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $30,000, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Delano Farms Company, is a corporation whose address is 10025 Reed Road, Delano, California.

2. Respondent, Suma Fruit International, is a corporation whose address is P.O. Box 577, Sanger, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about July 18, 1995, complainant sold to respondent one load containing 720 21 pound lugs of Flame seedless grapes, Duck's Head brand, for $13.25 per lug, or $9,540.00 f.o.b. The load was assigned Delano Farms order number 00001607, and the customer's purchase order number was 86540. The load was shipped on July 20, 1995, in a Lee truck, license number TN 0445578, to respondent in Jacksonville, Florida. Complainant invoiced respondent on July 21, 1995, under its invoice number 803388. Respondent has not paid complainant any part of the purchase price of this shipment.

4. On or about October 19, 1995, complainant sold to respondent, and shipped to respondent in Jakarta, Indonesia, one container load of Calmeria grapes, Duck's Head brand, in 23 pound lugs, at $11.25 per lug, plus $100.00 for two temperature recorders, $63.48 for U.S.D.A. inspection, $20.50 for phytosanitary certificate, and $30.00 for three air bags, or a total of $15,806.48 f.o.b. An U.S.D.A. Export Form Certificate was issued covering the grapes on October 19, 1995, showing that they graded U.S. No. 1 Table, and met the requirements of the Export Grape and Plum Act except for export to destinations in Europe, Greenland, or Japan.

5. The grapes were shipped from Delano, California, on October 19, 1995, by truck, and from Long Beach, California, on October 22, 1995, after being loaded on to four ocean containers (SEAU310102, 346 cartons; SEAU310103, 346 cartons; SEAU310105, 348 cartons; and SEAU310104, 346 cartons) which were placed aboard the vessel Axel Maersk, voyage 9519 to Singapore. At Singapore the grapes were loaded into one container (MAEU 5391950) and transshipped aboard the vessel Kedah, voyage 915, to Jakarta where they arrived at Tanjung Priok port on November 10,1995. After discharging from the vessel the container was stacked and plugged in at an open storage site, and on November 13, 1995, was transported to the place of business of the consignee P.T. Mekàr Citra Abadi, Jakarta, Indonesia, where the grapes were unloaded into the consignee's cold storage on the same day.

6. On November 16, 1995, at the request of P.T. Mekàr Citra Abadi, of Jakarta, a survey was performed of grapes in their cold storage by P.T. Aureole,

marine surveyors licensed by the Indonesian Government. A "CERTIFICATE of CONDITION SURVEY" was issued on November 20, 1995, which stated in relevant part as follows:

. . . .

At the time of our attendance the goods were stored in the cold storage with temperature: 0° C.

Findings:

Goods	:	Fresh Grapes
Quantity	:	1,386 lugs
Marks on packing	:	Duck's Head.
Type of packing	:	Lugs.
Condition		
-Packing	:	In general sound condition
-Contents	:	20 lugs were taken at random and found as follows: -Size 15 mm - 20 mm = 90% -Size 25 mm - 30 mm = 10%
Pulp temperature	:	+9°C.
Cause of depreciation of value	:	Quality is less than the requirements
Reading form (sic) Cox Recorder Chart	:	+ 34°F

VI. SURVEYOR'S NOTES.

-Condition of goods : has a sour taste, colour too green.

-Based on the verbal statement of consignee : The size of the fruits is not according to the requirements which size was 33 mm.

. . . .

7. Respondent has not paid complainant any part of the purchase price of the grapes shipped to Jakarta.

8. The informal complaint was filed on January 19, 1996, which was within

nine months after the causes of action herein accrued.

Conclusions

The complaint concerns two separate and unrelated transactions, the first of which was shipped to Jacksonville, Florida, and the second which was shipped to Jakarta, Indonesia. Respondent claims that the grapes which were shipped to Jacksonville were not purchased from complainant, but from Cal State Marketing, a firm which in turn purchased them from complainant. Respondent submitted a copy of an invoice (number 23815) from Cal State Marketing to respondent covering a shipment of 720 Flame seedless grapes, lot number DEL005, shipped on July 20, 1995. The invoice states that Cal State's order number was 8300, and that the grapes were shipped to respondent in Jacksonville, Florida, in response to purchase order 86540-S08300. It further states that the price was $11.50 f.o.b., or a total of $8,280. Respondent has shown that this invoice was paid by respondent to Cal State on August 16, 1995.

During the informal stages of this proceeding, in response to inquiries from officials of this Department, Cal State submitted a copy of an invoice from complainant to Cal State. This invoice was numbered 803391, referenced "OUR ORDER NO. 00001629," and "CUST. P.O. NO. 8290" [this number was struck through, and "8300" was penciled in], and covered 720 21# Flame Seedless Charlie's Pride grapes at $11.25, plus $23.50 for a temperature recorder, or $8,123.50. The invoice stated that the grapes were to be shipped to Cal State in Greenville, SC, and were to be shipped by Carpet Transport, license No. OK 1FH858. Cal State has shown that it has paid this invoice to complainant on August 25, 1995.

Cal State also submitted a "REVISED" confirmation of sale showing a load of "720 Flame 21LB Duck Head" at $11.50, shipped 7/20 to "SUMA - Winn Dixie 5276, DESTINATION Jacksonville, PURCHASE ORDER # 86540, TRUCK Carpet Train, LICENSE # OK 1FH858."

It appears to us that Cal State confused two similar grape shipments from complainant. One was a sale from complainant to Cal State, and in turn from Cal State to respondent. The other was a sale (probably through Cal State acting as broker, although the record does not explicitly reveal this) from complainant to respondent. Complainant has submitted two distinct invoices. The first, numbered 803388, shows 720 Duck's Head brand Flame Seedless grapes sold to respondent at $13.25 per lug f.o.b. against customer purchase order number 86540, shipped on 7/20/95 to respondent in Jacksonville, Florida, on a Lee truck, license No. TN0445578. The second, numbered 803391, shows 720 Charlie's Pride brand Flame Seedless grapes sold to Cal State at $11.25 per lug f.o.b.

against customer purchase order number 8290, and shipped on 7/20/95 to Cal State in Greenville, South Carolina, on a Carpet Transport truck license No. OK1FH858. More importantly, the record also contains shipping manifests for each load signed by the separate truckers. These shipping manifests are consistent with complainant's invoices.

Respondent has successfully shown that it paid Cal State for the second shipment, and that Cal State paid complainant. But respondent has not shown that it has paid anyone for the first shipment. In view of the signed shipping manifest, the fact that the sale was f.o.b. to respondent, and the absence of any evidence of objection to complainant's invoice, we find that respondent is liable to complainant for the full purchase price of the first load, or $9,540.00.

Respondent asserts that the second load of grapes was sold as U.S. Fancy grade. However, the invoice does not state a grade, and there is no indication in the record that respondent made any timely objection to the invoice. There is also no other indication in any of the shipping documents that the grapes were sold as any particular grade. We conclude that the grapes were sold without reference as to grade. The second load of grapes was accepted by unloading into the cold storage in Jakarta. Accordingly, respondent became liable to complainant for the full purchase price of the grapes less any damages proven to have resulted from any breach of contract by Complainant.

Respondent asserts that complainant breached the contract by failing to ship the correct size of grapes. In this connection respondent submitted the sworn statement of Michael Missakian, which is quoted below in part:

> On October 18, 1995, I went to Delano Farms to perform routine inspections. During this visit I inspected Calmeria grapes for export sales, I asked to see some pallets from various lots. They said they had one lot and it was packed in Duck Head label. The cold storage unit at Delano Farms is quite large, so who knows what they have in back. When I was called to the inspection room I was told there were 6 pallets only to look at and the pallets were located in the hall area of the loading dock. The individual who works at Delano Farms in the cold storage area said these 6 pallets were the same lot they had in the back. There was no way of knowing because I wasn't allowed back there. I looked at random boxes from these 6 pallets and found that the pack was very nice. The bunches were very large & the stems were nice and green and very firm. The berries were a deep green in color and no signs of bleaching whatsoever. The berries were 12/16" - 13/16" in diameter and 1" - 1-1/4" in length. There was no signs of small berries. There was 0-2% scarring, no major

> defects whatsoever. In my opinion, based on the 6 pallets I inspected, I saw no reason that the fruit would not meet export requirements. It would last for 21-25 days with no problem overseas.

The inspection of the grapes by respondent's agent at Delano Farms prior to sale and shipment has let complainant to assert that respondent purchased the subject grapes after inspection. However, a "purchase after inspection" is a trade term defined in the Regulations, and must be employed by the parties to be applicable.[2] Respondent asserts that the inspection recounted above amounted to a sale by sample. The Uniform Commercial Code, section 2 - 313(1)(c) provides that:

> Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Complainant has not denied the inspection by respondent's agent, and we conclude that the described tender of samples for inspection, and their inspection and subsequent purchase by respondent, did create a sale by sample which amounted to an express warranty.[3] Where a sale is by sample there is obviously the potential for a problem of proof as to the condition of the sample tendered. It would be to the advantage of both seller and buyer to bear this fact in mind, and agree in writing, at the time of the examination of the sample, as to the condition, or other pertinent characteristics, of the sample. However, in this case complainant did not deny the description of the berries given in Missakian's affidavit. But the description must be interpreted in the light of the record as a shoe. Mr. Missakian states that the berries were 12/16" - 13/16" in diameter. However, the same survey used by respondent to show that the berries were smaller than this description also shows that they were larger than this description. Of necessity then, the statement must not be viewed as setting forth the absolute limits of the diameter of the grapes, but rather the general size range. However, Mr. Missakian does offer the further limitation that "[t]here was no signs [sic] of small berries." The question then must be answered whether the load contained any significant number of small berries.

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[2] *Primary Export International v. Blue Anchor, Inc.*, R-95-037 decided February 11, 1997, 56 Agric. Dec. ____ (1997).

[3] See *Everette Rudolph v. Spuds, Inc.*, 28 Agric. Dec. 254 (1969), and *E. L. Kempf & Son v. Certified Grocers*, 27 Agric. Dec. 799 (1968).

The survey at destination stated that 90 percent of the grapes were 15 mm to 20 mm. Converted into inches the size was 9.45/16 inch to 12.6/16 inch.[4] The remaining 10 percent of the grapes were larger, namely 25 mm to 30 mm, or 1 inch to 1 3/16 inch. Can the grapes that were 9.45/16 inch be said to have been "small?" We think not. The subject grapes were graded U.S. No. 1 Table grade prior to shipment. While we have not found that this grade was a part of the contract terms, the grade standards for U.S. No. 1 Table Grapes can be taken as an indication of what is considered normal as to size. Such standards provide for a minimum diameter for the subject type grapes of 10/16 inch.[5] However, a tolerance of 10 percent is allowed for berries which fail to meet the minimum diameter requirement. The minimum diameter described by the surveyor in Jakarta, 15 mm (or 9.45/16 inch), is not likely to have constituted more than 10 percent of the grapes. We find that respondent has failed to prove by a preponderance of the evidence that complainant breached the contract as to size.

We also note that even had respondent proven a breach as to the size of the grapes, it would have completely failed to prove damages resulting from such breach. This is because the resale of the grapes in Indonesia was delayed until the last of December, or the first part of January, and, in addition, respondent failed to submit any accounting of the resale. In the absence of an accounting it would have been impossible, under the circumstances of this case, to calculate, or even estimate, damages.

Since respondent accepted the two loads of grapes, and has not proven any breach of contract on the part of complainant, it became liable to complainant for the full purchase price of the two loads, or $25,346.48. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in

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[4]The violation of mathematical protocol involved in the expression of the numerator of a fraction in decimal form is necessitated by the fact that the Grade Standards, and Mr. Missakian's affidavit, express size requirements for grapes in sixteenths of an inch, and by the consequent need to convert the metrical size description of the survey to fractional form.

[5]The United States Standards for Grades of Table Grapes (European or Vinifera Type), § 51.884, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at http://www.ams.usda.gov/standards/stanfrfv.htm.

consequence of such violations." Such damages include interest.[6] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[7] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $25,346.48, with interest thereon at the rate of 10% per annum from October 1, 1995, until paid, plus the amount of $300.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

CHARLES JOHNSON COMPANY v. TIMOTHY HOVERSEN d/b/a HOVERSEN & SONS.
PACA Docket No. R-95-0080.
Decision and Order filed January 28, 1998.

Full protection agreement.

Statements from the broker, engaged by respondent, were the deciding factor in determining whether protection or full protection were the terms agreed to following complainant's breach due to short weight. Under the terms of "full protection", the party under a protection agreement is not entitled to a profit, commission, or brokerage costs.

Patrice Harps, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[6]*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[7]See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Packle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed with the Department, in which complainant seeks a reparation award against respondent in the amount of $3,795.50 in connection with one truckload of iceberg type lettuce shipped in the course of interstate commerce.

A copy of the formal complaint was served upon the respondent, which filed an answer thereto, denying complainant's allegations.

Because the amount claimed as damages was less than $15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and briefs. Complainant provided an opening statement and statement in reply. Respondent provided an answering statement and brief.

Findings of Fact

1. Complainant, Charles Johnson Company, hereinafter referred to as Johnson, is a corporation whose post office address is 4130 N. 70th, #223, Scottsdale, Arizona 85251.

2. Respondent, Timothy Hoversen, d/b/a Hoversen & Sons, hereinafter referred to as Hoversen, is a individual whose post office address is 21 South Water Market, Chicago, Illinois 60608. At the time of the transaction involved herein, Hoversen was licensed under the Act.

3. The parties negotiated the transaction through a broker, Alan Bull Produce Co., Fresno, California, who negotiated the transaction on behalf of Hoversen.

4. On May 9, 1994, complainant, through respondent's broker, sold and shipped to respondent 820 cartons of iceberg type lettuce at $5.10 per carton, for a total f.o.b. price of $4,205.50.

5. On May 10, 1994, complainant granted respondent a $.50 adjustment for market decline, from $5.10 per carton to $4.60 per carton for a adjusted f.o.b. price of $3,795.00.

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[1]Effective November 15, 1995, the threshold for oral hearings was raised to $30,000 by Public Law 104-48.

6. On May 12, 1994, the lettuce was federally inspected revealing "net weight ranges 41.00 pounds net weight averages 47.90 pounds". The remainder of the lot was found to have no defects.

7. An informal complaint was filed on June 6, 1994, which is within nine months from when the cause of action accrued.

Discussion

On May 9, 1994, complainant and respondent entered into a contract, through respondent's broker, for the sale of 820 cartons of iceberg lettuce with f.o.b. terms. The contract also called for the lettuce to be segregated into two lots with different weight requirements, one lot requiring a weight of 54 pounds and the other 58 pounds per carton, gross. The lettuce was shipped; and received in good transit time. On arrival the lettuce was federally inspected. The inspection revealed that the net weight of the lettuce ranged from 41.00 to 53.50 pounds, average 47.90 pounds, with the tare weight, or carton weight of 2.5 pounds, for an average gross weight of 50.4 pounds. The lot was also found to have defects. The parties agreed that the lettuce was received short of the contracted weights in breach of the contract.

Complainant alleges that, through the broker, it authorized respondent to sell the lettuce with "protection" against short weight. Complainant further states that based on USDA Market News quotations and and the results of the USDA inspection, respondent should not have incurred damages.

Respondent raises an affirmative defense, alleging that complainant's salesman authorized respondent to sell the lettuce with "full protection". Respondent claims it made the sales promptly and properly, remitting to complainant the full proceeds resulting from the breach. As the party asserting an affirmative defense, respondent must establish its allegation by a preponderance of the evidence. *Newmiller Farms v. Nicolls.* 36 Agric. Dec. 1230(1979); *Walker & Hagan Packing House v. Amato Bros. Tomato Distributors, Inc.*, 27 Agric. Dec. 1543 (1968). With the parties disputing whether the lettuce was to be sold with "protection" or "full protection", we will first discuss the difference between these terms and decide which term was agreed to by the parties.

"Protection" means that the party being protected will be saved harmless from any loss. Such party "would be responsible only for the net proceeds obtained from . . . resale, exclusive of any commission." *Vener Co. v. McCaffrey Bros. Co.*, 15 Agric. Dec. 405 (1956); *David Pepper Co. v. Harris Packing Company,* 14 Agric. Dec. 185 (1955).

"Full protection" means that the one suffering will save the other party

> harmless from any loss which may result from the defective condition of the merchandise. The contract . . . as modified . . . is not the same as a consignment transaction. The most the buyer would be obliges to pay would be the f.o.b. contract price. However, if the net returns derived from the resale of the goods were less than the contract price, the protection agreement would take effect and the buyer would be responsible only for the net proceeds obtained from such resale, exclusive of any commission."

See also *Anonymous*, 11 Agric. Dec. 754 (1952); *Northwest Arkansas Produce Company, Inc. v. The Creasy Company,* 27 Agric. Dec. 760 (1968). In certain transactions, "protection" may be intended to apply only to a certain defect. In this case, complainant, is stating it granted "protection", states that it exclusively protected respondent against any loss resulting from light weight. With "full protection", no exclusivity to one type of defect would be distinguished from another when determining losses.

Both parties submit sworn but conflicting affidavits on whether "protection" or "full protection" was agreed to. In order to determine which one of the terms was agreed to, we turn to a letter to the Department from the broker, Alan Bull (ROI Exhibit 3). Mr. Bull states:

> Arrival USDA 5/12 showed lettuce to weight 50.4#gross. Full protection for Hoversen was granted by Jamie 5/12 due to light weight. Tim Hoversen also noted additional quality problems not noted on the inspection report, namely heads were misshapen, pack had poor opening, butts were dark red, and it looked like old lettuce . . . . I explained all these quality problems to Jamie. Jamie did not disagree with anything I said about the lettuce. Jamie gave Hoversen full protection.
>
> After I faxed Johnson the returns (account sales) from Hoversen 5/25/94 Charles Johnson called me on 5/28. He complained about the returns and stated . . . . Charles Johnson again confirmed that they gave Hoversen full protection on 5/12 due to light weight.

The broker also submits copies of its memorandum of sale and corrected memorandum in support of its statement (ROI Exhibit 3A), noting that "full protection" was given by complainant to respondent. The broker's statement would be entitled to great weight if it were to be found to be neutral in the transaction. *Homestead Tomato Packing Co. v. Mim's Produce, Inc.*, 43 Agric. Dec. 173 (1984). In this case, and in most, the broker is not a totally neutral party

but is engaged by the buyer, In § 46.28 of the Regulations under the Act, it states:

> After all the parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due. The confirmation or memorandum of sale shall also identify the party who engaged the broker to act in the negotiations. If the confirmation or memorandum of sale does not contain such information, the broker shall be presumed to have been engaged by the buyer. Brokers do not normally act as general agents of either party, and will not be presumed to have so acted. Unless otherwise agreed and confirmed, the broker will be entitled to payment of brokerage fees from the party by whom it was engaged to act as a broker.

The broker's statement must therefore be weighed carefully in the determination of the merits of each party's position. In this instance, even though the broker was engaged by respondent, we find his statement to be credible, and that statement serves to give us the deciding evidence as to the agreed terms for the sale of the lettuce, following the discovery of the breach.

Respondent sold the lettuce and prepared an accounting for complainant as evidence of its loss (Complainant's Exhibit 4). The accounting shows the lot sold for gross proceeds of $3,715.00. From that amount, respondent deducted $100.00, inspection fee, $164.00 for brokerage, $1,640.00 freight, and 15% commission or $557.25, for net proceeds of $1,253.75. Complainant alleges that the proceeds should reflect the full market value since the gross weight of the lettuce was only 1.6 pounds under the contracted weight, and above the weight USDA Market News Service uses to base its quotations. (USDA Market News Service bases its terminal market quotations on a standard pack weighting 40 to 55 pounds, with under 40 pounds considered to be light weight). We agree with complainant that respondent failed to sell the lettuce for the market price, which ranged from $8.00 to $8.50 per carton. However, market price would only apply if the terms agreed to were "protection" from losses associated with light weight lettuce. We have decided the evidence shows that the parties agreed to terms of "full protection", and the broker's records show that complainant agreed that respondent had several other condition problems with the lettuce, which would affect its resale. Therefore, we find that respondent's accounting is an accurate reflection of respondent's loss.

In a protection against loss situation the protected party is not getting the goods

on consignment (in which case they would remain the property of the shipper). Rather the protected party is buying and taking title to the goods, and the original contract price remains the base-line price. See *Oshita Marketing v. Tampa Bay Produce,* 50 Agric. Dec. 968 (1991). Following a breach, the party still has the potential to make a profit on the goods. The protected party's protection extends only to protection against loss. The potential for profit is not a right, but only a potential, and still depends upon the protected party reselling for more than the original contract price. Thus the protected party under a protection agreement is not entitled to a profit, or a commission (which is a substitute for profit in a consignment transaction), or a handling fee. In addition, respondent is not entitled to brokerage costs (Since it was respondent who engaged the broker, which cost, was not a result of the breach). See *Vener v. McCaffrey*, 15 Agric. Dec. 1230 (1950).

However, the fundamental object of the protection agreement, which is to protect the buyer against any loss, requires that no monetary loss occur. This means that a buyer who has paid freight must be credited with the freight paid. See *Arthur J. Manzo v. Jarson & Zerrilli Co.,* 9 Agric. Dec. 1230 (1950). In addition, respondent would also be entitled to its incidental expense of the USDA inspection which was used to provide evidence of the breach. (See Uniform Commercial Code § 2 - 714(3)).

Therefore, respondent's proceeds would then amount to $1,975 ($3,715 [Gross proceeds] - $100 [USDA Inspection Fee] - $1,640 [Freight] = $1,975). Respondent has paid complainant $1,253.75, therefore we find respondent liable to complainant $721.25.

Respondent's failure to pay complainant $721.25 is a violation of section 2 of the Act for which reparation should be awarded to complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.,* 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.,* 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v.* Mark Bernstein Co., Inc., 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.,* 29 Agric. Dec. 335 (1979); and *W.D. Crockett v. Producers Marketing Association, Inc.,* 22 Agric. Dec. 66 (1963)

Order

Within 30 days from date of order, respondent shall pay complainant as reparation, $721.25 with interest thereon, at the rate of 10% per annum from June 1, 1994, until paid.

Copies of this order shall be served upon the parties.

SHARYLAND, LP, d/b/a PLANTATION PRODUCE v. LLOYD A. MILLER, d/b/a L & M PRODUCE CO.
PACA Docket No. R-97-0021.
Decision and Order filed February 24, 1998.

Suitable Shipping Condition - Exception to normal transportation Requirement. - Transportation - Failure to Supply Temperature Tape.

A partial truck load of sweet peppers was sold f.o.b., and, after shipment, was filled out with citrus which had not been precooled. A shipping point inspection showed U.S. Grade No. 2, with 80 percent U.S. No. 1. The bill of lading specified that transit temperatures were to be held at 36 to 38 degrees, and noted that a temperature recorder had been placed on board. The peppers were shipped from South Texas, and arrived in Portland, Oregon within normal transit time. A timely federal inspection noted temperatures of 45 to 46 degrees (which was stated to be normal for sweet peppers), and 63 percent average decay. The receiver failed to secure the temperature tape from the recorder, or explain such failure. It was held that, in view of the failure to supply the temperature tape, the buyer had failed to prove that transportation temperatures were normal. Although the decay was stated to be grossly excessive, it was found that it was possible that the decay was caused by abnormal temperatures, and consequently the exception to the rule requiring normal transit conditions in order for the suitable shipping condition warranty to apply could not be invoked.

George S. Whitten, Presiding Officer.
Byron E. White, Arlington, TX, for Complainant.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $4,615.50 in connection with a transaction in interstate commerce involving green peppers.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $30,000, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Complainant filed a brief.

Findings of Fact

1. Complainant, Sharyland LP, is a partnership composed of Aghoc, Inc., and Agri Management Group, Inc., doing business as Plantation Produce Co., whose address is P. O. Box 1043, Mission, Texas.

2. Respondent, Lloyd A. Miller, is an individual doing business as L & M Produce, whose address is Route 7, Box 206H, Edinburg, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about November 3, 1995, complainant sold to respondent one lot of green peppers consisting of 448 cartons, no grade, at $9.50 per carton, plus $.75 for precooling and pallatization, and $23.50 for a temperature recorder, or a total of $4,615.50, f.o.b.

4. A Federal-State Inspection Certificate was issued on November 6, 1995, covering the lot of 448 cartons of peppers. The certificate disclosed that the inspection was started 11/02/95 at 9:30 a.m., and competed 11/04/95 at 5:00 p.m. The inspection was noted to have taken place at Mission, Texas, and a box labeled "SUBLOT" was checked. The applicant was stated to be Plantation Produce, and the certificate further revealed, in relevant part, as follows:

PRODUCT/VARIETY	:	Select Pepper
NUMBER AND SIZE OF CONTAINER	:	448 - 1 1/9 BU. CTN.
DESCRIPTION OF PRODUCT	:	Valley Kist (Green)
GRADE	:	U.S. No. 2 Approx. 80% U.S. No.1 Quality
REMARKS	:	Applicant states loaded on Tra. 20R 012 TX.

5. On November 4, 1995, a bill of lading was issued showing that the peppers were loaded on a trailer with license number 20R-012 TX at 12:10 p.m. on November 4, 1995, with instructions to ship to L & M Produce Co., Portland, OR. The bill of lading also showed that "STIRES RECORDER. #674968" was loaded

on the truck. The bill of lading contained the instructions: "MAINTAIN TEMPERATURES AT 36/38. DEGREES," and "DELIVER MON. 11/06/95 A.M. PER BUYERS REPORTING INSTRUCTIONS."

6. The truck proceeded first to a citrus packing shed in the Texas Rio Grande Valley where the load was competed with citrus which had not been precooled. The temperatures on November 4, 1995, in Brownsville, Texas ranged between 50 and 56 degrees.

7. The truck arrived at Albertsons in Portland, Oregon on November 8, 1995, at 3:00 p.m. Albertsons rejected the peppers on the following day, and respondent moved the peppers to the United Salad Warehouse where they were federally inspected at the request of Botsford & Goodfellow, Inc. of Milwaukie, Oregon, at 1:35 p.m. on November 9, 1995, with the following results in relevant part:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 46 °F	Sweet Peppers	"VALLEY KIST"	TX	11/9 Bu	448 Cartons	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	63	%	63	%		%	Decay (53 to 76%)	Remainder Fresh, (illegible) & Crisp
	63	%	63	%		%	Checksum	Decay is in Mostly Early, Many Moderate, and some advanced stages. Decay Includes 10% affecting stems, remainder affecting walls and calyxes(?) only.

8. Respondent has not paid complainant any part of the purchase price of the peppers.

9. An informal complaint was filed on January 8, 1996, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the purchase price of 448 cartons of green pepper sold to respondent on an f.o.b. basis. Complainant asserts that the peppers were unloaded at Albertsons, in Portland, and thus accepted, but were later rejected by Albertsons. Respondent asserts that the peppers were not unloaded at Albertsons. This dispute is, of course, irrelevant to the issues between complainant and respondent because the peppers were never rejected by respondent to complainant, but were accepted when they were unloaded at the

place of inspection, the Fruit Salad warehouse.

The Regulations,[1] in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,[2] in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations,[3] which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery,"[4] are based upon case law predating the adoption of the Regulations.[5] Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless

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[1] 7 C.F.R. § 46.43(i).

[2] 7 C.F.R. § 46.43(j).

[3] 7 C.F.R. § 46.43(j).

[4] 7 C.F.R. § 46.44.

[5] See Williston, *Sales* § 245 (rev. ed. 1948).

make good delivery.[6] This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.[7]

Complainant does not dispute the results of the inspection at destination, which shows a grossly excessive amount of decay, but asserts that since transportation services and conditions were abnormal the warranty of suitable shipping condition does not apply. Complainant first states that transportation was abnormal in that the bill of lading specified that delivery was to be accomplished by the morning of Monday, November 6, 1995. However, respondent correctly points out that this would require a less than two day transit period which would be, if not impossible, at least illegal. The peppers arrived at Albertsons on November 8, 1995, which was normal for a trip of some 2,400 miles.

Complainant also points out that the bill of lading specified that temperatures were to be maintained at between 36 and 38 degrees, but that in keeping with respondent's directions the truck proceeded to another pickup point in South Texas and loaded citrus which had not been precooled. Complainant asserts that the temperatures of 45 to 46 degrees shown by the federal inspection at destination show that the citrus caused the temperature to be elevated, and show that transportation was abnormal. However, there is nothing abnormal about temperatures in the 45 to 46 degree range for sweet peppers.[8] Instead, it was complainant's specification of 36 to 38 degrees that was abnormal, since peppers

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[6]See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S. v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

[7]See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[8]All recommendations for transportation of Sweet Peppers specify 45 to 55 degrees F. See *Protecting Perishable Foods During Transport by Truck*, Agricultural Handbook Number 669, Office of Transportation, United States Department of Agriculture, p.54 (1987); *Protection of Rail Shipments of Fruits and Vegetables*, Agriculture Handbook No. 195, Agricultural Research Service, United States Department of Agriculture, p.41 (Revised ed. 1969); and *Tropical Products Transport Handbook*, Agricultural Handbook Number 668, Office of Transportation, United States Department of Agriculture, p.117 (revised ed. Sept., 1989).

are subject to chilling injury at such temperatures.[9]

Complainant next asserts that it stamped the bill of lading with the words "THIS LOAD CONTAINS A TEMPERATURE RECORDER. NO CLAIMS HONORED UNLESS RECORDER SECURED AND NOTED ON TRUCKS RECEIPTS." Complainant maintains that this constituted a part of the contract with respondent. This, of course, is not true. A bill of lading is a contract with the trucker, not a contract between the seller and buyer. However, even if the bill of lading had contained no such notation, the failure of respondent to secure the temperature recorder was a serious breach of its duty to complainant, and carries serious consequences. We have stated that:

> . . . the failure of a receiver who should have access to temperature tapes to offer the tapes in evidence is a factor to be considered in determining whether such receiver has met its burden of proving, after acceptance, that transportation services and conditions were normal.[10]

There are commonly only two parties with the opportunity, or motive, to wrongly "lose" a temperature recorder or tape, namely the receiver and the trucker. In both cases the only motive would be that the tape disclosed improper transportation. Therefore if a shipper proves by submitting a bill of lading signed by the trucker (as the shipper in this case did) that a temperature recorder was placed on the truck, it is hard to imagine an adequate excuse for a receiver's failure to produce the tape. In this case respondent has offered no excuse. A receiver may, indeed, be entirely innocent, in that the recorder may have been thrown away by the trucker before arrival of the truck. However, since a trucker would thus dispose of a recorder only if transportation was bad, one is inevitably led to the presumption that transportation temperatures were abnormal.

The conclusion that transportation was abnormal does not lead inevitably to the conclusion that the warranty of suitable shipping condition is inapplicable. A judicial exception to the requirement that transportation be normal in order for the warranty to apply has been long recognized. This exception allows a buyer to

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[9]There is, however, no indication in the literature that 36 to 38 degrees for only a few days would have had any serious ill effects on the peppers. See *McColloch, Lacy P., Chilling Injury and Alternaria Rot of Bell Peppers*, Marketing Research Report No. 536, Market Quality Research Division, Agricultural Marketing Service, United States Department of Agriculture (August, 1962).

[10]*Louis Caric & sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 at 1500-01 (1979). See also *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Monc's Consolidated Produce Inc. v. A. J. Produce Corp.*, 43 Agric. Dec. 563 (1984).

prove a breach of the seller's warranty of suitable shipping condition, in spite of the presence of abnormal transportation, if the nature of the damage found at destination is such as could not have been caused or aggravated by the faulty transportation service. The exception has been explained as follows:

> It is a well established rule that evidence of abnormal deterioration of the commodity upon its arrival at destination is evidence of breach of the warranty of suitable shipping condition only in cases in which the transportation was normal . . . .
>
> The reason for the rule is obvious. Whether the commodity, at time of billing, was in good enough condition to travel to destination without abnormal deterioration can be determined only from the condition in which it did arrive at destination, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at time of billing. The rule does not necessarily assume that abnormal transportation service caused the damage. It merely acknowledges such possibility, and even though the possibility of unsuitable condition at time of billing remains, it bars a recovery for want of proof that the damage resulted therefrom.
>
> Since this is the rationale of the rule, it has been held, as an exception to the rule, that a buyer may prove breach of the seller's warranty of suitable shipping condition in spite of proof of abnormal transportation service if the nature of the damage found at destination is such as could not have been caused by or aggravated by the faulty transportation service.

The exception has also been applied where, even though the faulty transportation service would have most certainly aggravated the damage found at destination, the damage is nevertheless deemed to be so excessive that the commodity would clearly have been abnormally deteriorated even if transit service had been normal.[11]

The federal inspection at destination did not reveal the type of decay in the peppers. However, one of the most prevalent types of decay is Bacterial Soft Rot. A Department publication states that:

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[11]See *Sharyland Corp. v. Milrose Food Brokers*, 50 Agric. Dec. 994 (1991); *Tony Mista & Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1981); and *Sanbon Packing Co. v. Spada Distributing Co., Inc.*, 28 Agric. Dec. 230 (1969).

> Bacterial soft rot on peppers is characterized by water soaking and rapid softening of the tissues. Infection initiated at the stem end progresses rapidly through stem and calyx lobe tissues . . . into the pod. Under humid conditions and optimum temperatures (75° to 85° F.) The entire pod can be reduced to a soupy mass within 3 to 6 days after infection. . . .[12]

Although the temperatures of the peppers at the time the destination inspection was performed were normal, we do not know to what temperatures the peppers may have been exposed during the days of transit prior to arrival in Portland. In view of the fact that we must assume, as a result of respondent's failure to supply the temperature tape from the Stires recorder, that transportation temperatures were abnormal, we cannot be certain that the 63% average decay present in the peppers at destination was not caused by abnormal temperatures.[13] Accordingly, we find that the warranty of suitable shipping condition was voided by abnormal transportation, and that respondent has not proven a breach of contract on the part of complainant. Since respondent accepted the peppers, he became liable to complainant for the full purchase price thereof, or $4,615.50.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[14] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[15] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300 handling fee to file the formal

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[12] *Market Diseases of Tomatoes, Peppers, and Eggplants*, Agriculture Handbook No. 28, Agricultural Research Service, United States Department of Agriculture, p. 53 (1968).

[13] *See Admiral Packing Company v. Sam Viviano & Sons*, 40 Agric. Dec. 1993 (1981). The fact that the pathogen that was at the root of the decay was likely in the peppers prior to shipment is inconsequential. See *Lookout Mountain Tomato & Banana Co., Inc. v. Consumer Produce Co., Inc. of Pittsburgh*, 50 Agric. Dec. 960 (1991).

[14] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[15] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc., 29 Agric. Dec. 978 (1970); John W. Scherer v. Manhattan Pickle Co., 29 Agric. Dec. 335 (1970); and W. D. Crockett v. Producers Marketing Association, Inc., 22 Agric. Dec. 66 (1963).*

complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $4,615.50, with interest thereon at the rate of 10% per annum from December 1, 1995, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

DeBACKER POTATO FARMS, INC. v. PELLERITO FOODS, INC.
PACA Docket No. R-96-0038.
Decision and Order filed March 3, 1998.

Interstate and Foreign Commerce.

Where potatoes were shipped intrastate to a processing plant located near the Canadian border that fact alone was insufficient to show that the resulting processed potatoes were then exported to Canada, or that it was contemplated by the parties that they would be so exported. It was concluded that the transactions were not in interstate or foreign commerce within the meaning of the Act, and the complaint was dismissed.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Mark D. Evans, Bloomfield, MI, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $140,176.19 in connection with transactions involving potatoes.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim arising out of the same transactions. This counterclaim was later withdrawn by respondent.

Although the amount claimed in the formal complaint exceeds $15,000, the parties waived oral hearing. Therefore the shortened method of procedure

provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Complainant did not file a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, DeBacker Potato Farms, Inc., is a corporation whose address is Route 1, Box 163, Cornell, Michigan.

2. Respondent, Pellerito Foods, Inc., is a corporation whose address is 2000 Mack Avenue, Detroit, Michigan. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about January 26, 1995, complainant and respondent entered into a contract in writing calling for the sale and shipment by complainant to respondent of 55 loads of bulk potatoes, each load to contain 60,000 pounds. The potatoes were to be shipped between November 21, 1994, and June 30, 1995. The price was to be $6 per hundredweight delivered to respondent, and on February 15, 1995, the price was to be raised to $6.50 per hundredweight. The contract specified the type, quality, and size of potatoes to be shipped. The potatoes were to be produced by complainant, and shipped from complainant's place of business in Cornell, Michigan, to respondent in Detroit, Michigan. The potatoes were to be processed by respondent in the state of Michigan.

4. Pursuant to the contract, between January 12 and February 14, 1996, complainant shipped eight loads of potatoes to respondent.

5. An informal complaint was filed on March 23, 1995, which was within nine months after the causes of action alleged herein accrued.

Conclusions

The record in this proceeding shows that complainant contracted to sell to respondent bulk potatoes of its own production from its farm in Cornell, Michigan, and ship them to respondent in Detroit, Michigan, where they would be processed. The record does not disclose the nature of the processing, except that the potatoes

[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

would be fried. There is no indication in the record as to where the potatoes would be distributed following processing.

Jurisdictional issues are raised by this forum *sua sponte*.[2] Accordingly we will explore the issue of whether interstate or foreign commerce is present in this case. The issue depends upon the meaning of the terminology used in the Act, and such terminology is narrower in scope than the constitutional scope of commerce.[3] The Department's report of investigation states that the "complaint involves eight loads of potatoes allegedly sold by complainant to respondent in the course of intrastate commerce . . . ." This conclusion of the report of investigation that the subject potatoes were sold in the course of intrastate commerce is apparently correct. There is no indication whatever in the record that the potatoes either moved, or were contemplated to move in the course of interstate, or foreign commerce. The one precedent decision which might be thought to indicate the presence of interstate or foreign commerce in this case is *Troyer v. Blue Star Potato*.[4] In *Troyer* a load of chipping potatoes was purchased from a Pennsylvania complainant by a respondent who was located in Pennsylvania. A substantial portion of respondent's chips were distributed by Valley Distributing Company, also located in Pennsylvania, but situated near the borders of 3 states. The Judicial Officer found that:

> . . . on the basis of evidence of record showing that the Valley Distributing Company shipped respondent's potato chips into the state of Ohio, and the evasive statements by respondent's President upon being questioned about where the products of respondent were sold, including his admission that it is possible respondent's potato chips are shipped into other States, we conclude that this was a transaction contemplating shipment in interstate commerce, and that the Secretary has jurisdiction in the matter.

In this case there is no evidence in the record that the processed potatoes moved into another state or country. While the proximity of Detroit to Canada might be thought to be analogous to the situation in *Troyer*, in fact it is not. The normal barriers to foreign commerce, while they certainly do not exclude the possibility that some of the processed potatoes moved into Canada, make it less than probable

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[2] *Provincial Fruit Company Limited v. Brewster Heights Packing, Inc.* 39 Agric. Dec. 1514 (1980).

[3] See *Tulelake Potato Distributors, Inc. v. John M. Giustino, d/b/a Grand Slam Produce, 52 Agric. Dec. 752, at 756-57 (1993).*

[4] *Troyer v. Blue Star Potato*, 27 Agric. Dec. 301 (1968).

that they did so. Moreover, the decision in *Troyer* is not based alone on the proximity of the processing plant to the borders of three other states, but also upon the positive evidence in the record that some of the processed potatoes did in fact move into Ohio. We conclude, therefore, that there is insufficient evidence in this record to show that the potatoes sold by complainant to respondent moved, or were contemplated to move, in interstate or foreign commerce.[5]

During the informal stages of this proceeding, in a letter written to complainant by the Regional Director of the PACA Branch of the Fruit and Vegetable Division of AMS, it was stated that:

> . . . the Act requires interstate commerce of a perishable agricultural commodity in order to have jurisdiction over a transaction. The exception to this is potatoes for processing and cherries in brine. Therefore, since these potatoes were processed, you should include a statement to that affect in your formal document.

This statement is incorrect. Although no portion of the Act is cited, the only paragraph of the Act that speaks of both potatoes for processing and cherries in brine is section 1(6) which defines the term dealer. There it is stated:

The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of $230,000; and (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph (4) of this section.

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[5]See *Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991); *Chester Ruter v. C. H. Robinson Company and Sol Sieff Produce Company*, 44 Agric. Dec. 2135 (1985); *Mendelson-Zeller Co. v. Pyramid Produce*, 36 Agric. Dec. 941 (1977); *Wide World of Foods v. Trinity Valley Foods Co.*, 34 Agric. Dec. 423 (1975); *P. C. Kellam v. Virginia Tomato Corporation*, 29 Agric. Dec. 835 (1970); *S. Water Mkt. Credit v. Treasure Island Foods and/or Ben Klein*, 28 Agric. Dec. 1168 (1969); *Miller Farms & Orchards v. C.B. Overby*, 26 Agric. Dec. 299 (1967); *Conway, Inc. v. Ben F. Line*, 16 Agric. Dec. 387 (1957); *E. S. Harper Co. v. B. Osborne*, 8 Agric. Dec. 1027 (1949).

Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 499c of this title, and in such case and while the license is in effect such person shall be considered as a "dealer." [6]

Of course this section only deals with the definition of the term dealer. The section excludes respondent from the exception for processors because respondent was buying potatoes, and this exclusion from the exception is operative whether or not the processed product is shipped in interstate or foreign commerce. So it may be taken as settled that respondent was a dealer. Indeed, if there were any doubt as to this question it is enough that respondent paid the fees and elected to be licensed. However, the Act grants jurisdiction over transactions in which a dealer engages only if such transactions are in interstate or foreign commerce. We have before found that the subject transactions were not in either interstate or foreign commerce. Accordingly, the complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

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[6] 7 U.S.C. § 499a(6).

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Order Denying Petition for Reconsideration filed January 5, 1998.

Willful, flagrant, and repeated violations - Effect of dismissal of reparations actions on disciplinary proceeding - Collateral effects - Mitigating circumstances - Publication of facts and circumstances.

The Judicial Officer denied Respondents' Petition for Reconsideration. Respondents committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondents' excuse that they violated the payment provisions of the PACA because they had a "bad fall farming season due to weather and markets" is not a defense. Respondents' purported 30-year history of compliance with the PACA is not a relevant circumstance under the Department's sanction policy regarding flagrant or repeated failures to make full payment under the PACA. The adverse impact on Respondents' produce sellers of publication that Respondents have committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and the requests by Respondents' produce sellers that Respondents be allowed to stay in business is irrelevant to this proceeding.

Jane McCavitt, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 29, 1996.

The Complaint alleges, *inter alia*, that: (1) Tolar Farms, during the period July 1995 through September 1995, failed to make full payment promptly to three sellers of the agreed purchase prices in the total amount of $66,696.06 for 19 lots of perishable agricultural commodities which Tolar Farms purchased, received, and accepted in interstate commerce (Compl. ¶ III); (2) Tolar Sales, Inc., during the period July 1995 through September 1995, failed to make full payment promptly to four sellers of the agreed purchase prices in the total amount of

$125,392.97 for 27 lots of perishable agricultural commodities which Tolar Sales, Inc., purchased, received, and accepted in interstate commerce (Compl. ¶ V); and (3) by reason of the facts alleged in paragraphs III and V of the Complaint, Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ VI). Complainant requests: (1) a finding that Respondents willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) an order revoking Tolar Farms' PACA license; and (3) the publication of the facts and circumstances regarding Tolar Sales, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ VI(2)-(3)).

Respondents filed an Answer on September 17, 1996, denying that they violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) as alleged in paragraphs III and V of the Complaint (Answer ¶¶ 3, 5). Respondents state in their Answer, as an affirmative defense, that "TOLAR FARMS alleges accord and satisfaction as it has come to agreements in principle with all creditors listed on the Complaint to make full payment promptly. Respondent will deliver copies of the settlement agreements when available." (Answer ¶ 8.)

On July 10, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Decision Without Hearing by Reason of Admissions [hereinafter Complainant's Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Complainant's Proposed Default Decision]. Complainant asserts that "respondents never sent the Department any settlement agreements" and states that "[p]urported partial payment agreements with unpaid sellers does [sic] not excuse the respondent's [sic] failure to make full payment promptly to its [sic] sellers." (Complainant's Motion for Default Decision at 2.) Moreover, Complainant attached to Complainant's Motion for Default Decision copies of promissory notes which Complainant asserts "constitute evidence that of the amount alleged in the complaint as owing, $192,089.03, at least $142,052.37 remains unpaid" (Complainant's Motion for Default Decision at 4 and Exhibit B).

Respondents did not file objections to Complainant's Motion for Default Decision within the time provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), and on September 4, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter ALJ] issued a Decision Without Hearing By Reason of Admissions [hereinafter Default Decision], in which the ALJ: (1) found that Respondents' Answer, in conjunction with the promissory notes attached to Complainant's Motion for Default Decision, constitutes an admission of all the material allegations of fact contained in the Complaint (Default Decision at 2); (2) found that during the period July 1995 through September 1995, Respondents

failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of $192,089.03 for 46 lots of perishable agricultural commodities which Respondents purchased, received, and accepted in interstate commerce and that, as of May 20, 1997, at least $142,052.37 of the amount alleged in the Complaint remained past due and unpaid (Default Decision at 3); (3) concluded that Respondents committed willful, flagrant, and repeated violations of section 2 of the PACA (7 U.S.C. § 499b) (Default Decision at 3); and (4) ordered the facts and circumstances set forth in the Default Decision be published (Default Decision at 3).

On October 1, 1997, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On November 3, 1997, Complainant filed Objection to Respondents' Appeal Petition [hereinafter Complainant's Response], and the case was referred to the Judicial Officer for decision.

On November 6, 1997, I issued a Decision and Order in which I: (1) found that Tolar Farms and Tolar Sales, Inc., during the period July 1995 through September 1995, failed to make full payment promptly to seven sellers of the agreed purchase prices for 46 lots of perishable agricultural commodities in the total amount of $192,089.03; (2) found that, as of May 20, 1997, at least $142,052.37 remained past due and unpaid; and (3) concluded that Respondents' failures to make full payment promptly with respect to the 46 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 8-9 (Nov. 6, 1997). Based on these findings and conclusion, I ordered that the facts and circumstances set forth in the Decision and Order be published. *In re Tolar Farms, supra*, slip op. at 21.

On November 25, 1997, Respondents filed a letter [hereinafter Petition for Reconsideration] requesting reconsideration of the November 6, 1997, Decision and Order issued in this proceeding; on December 18, 1997, Complainant filed Objection to Respondent's [sic] Petition for Reconsideration; and on December 19, 1997, the case was referred to the Judicial Officer for reconsideration.

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

PERTINENT STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.]

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a

> copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

Respondents raise four issues in their Petition for Reconsideration. First, Respondents contend that the November 6, 1997, Decision and Order is in error because Respondents' produce creditors have released Respondents from "all PACA action."

There is evidence in this proceeding that Respondents entered into settlement agreements with at least some of their produce creditors and that at least some reparation proceedings instituted under the PACA against Tolar Farms were dismissed.[2] However, dismissal of reparation proceedings instituted against Tolar Farms by private parties has no bearing on the instant disciplinary proceeding instituted by Complainant against Respondents. Moreover, Respondents' produce creditors lack standing to agree to the dismissal of a disciplinary action brought under the PACA by Complainant against Respondent, and the record contains no evidence that the instant disciplinary proceeding was ever dismissed.

Second, Respondents contend that the November 6, 1997, Decision and Order is in error because Respondents' violations of the PACA were not intentional, as follows:

> The violations were not done on purpose. We just had a bad fall farming season due to weather and markets.

Petition for Reconsideration.

I disagree with Respondents' contention that their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were not intentional. Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondents' violations are "repeated" because repeated means

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[2]Complainant filed documents that establish that two reparation proceedings instituted under the PACA against Tolar Farms were dismissed. *Classie Sales Corp. v. Tolar Farms*, PACA Docket No. R-96-140 (Sept. 11, 1996) (Dismissal Order Based on Election of Remedies); *Larry D. Ellerman v. Robert M. Tolar and Tony L. Tolar, d/b/a Tolar Farms*, PACA Docket No. R-96-149 (Dec. 16, 1996) (Order of Dismissal). (See Complainant's Response at 2, 3, Attach. A, B.) Moreover, Complainant filed seven documents entitled "Acknowledgment of Settlement." (See Complainant's Response at 2, 3, Attach. A, B.) Each of the documents entitled "Acknowledgment of Settlement" is a private agreement between Respondents and one of their produce sellers which states that the seller "will receive payment in full for the debt due it from the Tolars." *See In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 14-15 (Nov. 6, 1997).

more than one, and Respondents' violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.[3]

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

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[3]*See, e.g., Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Allred's Produce*, 56 Agric. Dec. ___ (Dec. 5, 1997) (concluding that respondent's failure to pay 19 sellers $336,153.40 for 86 lots of perishable agricultural commodities during the period of May 1993 through February 1996, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Kanowitz Fruit & Produce, Co., Inc.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers $206,850.69 for 62 lots of perishable agricultural commodities during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers $238,374.08 for 174 lots of perishable agricultural commodities during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers $1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers $101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers $245,873.41 for 113 lots of perishable agricultural commodities during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

with careless disregard of statutory requirements.[4] Willfulness is reflected by Respondents' violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and amount of violative transactions involved.[5] Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of $192,089.03 for 46 lots of perishable agricultural commodities which Respondents had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period July 1995 through September 1995.

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[4]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 27 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce, Co., Inc.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondents' violations were willful.

[5]*See Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 27-28 (Dec. 5, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

Respondents knew, or should have known, that they could not make prompt payment for the large amount of perishable agricultural commodities they ordered. Nonetheless, Respondents continued over a 3-month period to make purchases knowing they could not pay for the produce as the bills came due. Respondents should have made sure that they had sufficient capitalization with which to operate. Respondents did not, and consequently could not, pay their suppliers of perishable agricultural commodities. Respondents deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondents have both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondents' violations are, therefore, willful.[6]

However, willfulness is not a prerequisite to the publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondents' violations of 7 U.S.C. § 499b(4) were willful.

Respondents' excuse that they violated the payment provisions of the PACA because they had a "bad fall farming season due to weather and markets" is not a defense. Even if a respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful. Moreover, such excuses are not relevant to the sanction to be imposed on a respondent who has flagrantly or repeatedly failed to make full payment promptly.[7]

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[6]*See In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 28-29 (Dec. 5 1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

[7]*In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1279-80 (1996) (holding that an industry-wide crisis that resulted in few purchasers paying for perishable agricultural commodities is not relevant to the sanction to be imposed for violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225 (1996) (holding that excuses are not relevant to the sanction to be imposed for violations of section 2 of the PACA), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1443 (1995) (holding that excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1424 (1995) (holding that excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time), *appeal dismissed*, No. 95-70906 (9th Cir. 1996); *In re James D. Milligan & Co.*, 49 Agric. Dec.

573, 576 (1990) (holding that failure to pay for produce results in the revocation of respondent's PACA license, notwithstanding excuses such as failure of someone else to fulfill contractual obligations with respondent), *appeal dismissed*, No. 90-1199 (D.C. Cir. Oct. 15, 1990); *In re Carlton Fruit Co.*, 49 Agric. Dec. 513, 519 (1990) (holding that failure to pay for produce, exceeding a *de minimis* amount, results in the revocation of a respondent's PACA license, notwithstanding excuses such as the failure of someone else to fulfill contractual obligations with respondent), *aff'd*, 922 F.2d 847 (11th Cir. 1990) (unpublished); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 615 (1989) (stating that although mitigating circumstances are generally considered in determining sanctions in USDA disciplinary proceedings, all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 (1989) (stating that revocation of respondent's PACA license is appropriate even though respondent failed to pay because respondent's customers ceased doing business with respondent when the city announced it was taking respondent's property by eminent domain); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (stating that excuses such as nonpayment because of bankruptcy resulting after respondent suddenly lost its largest customer are rejected in the enforcement of the PACA); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2028-30 (1985) (stating that all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program; thus, it is not relevant that respondent failed to pay because a bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985) (stating that the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, that respondent was in business for 35 years with no complaints or financial difficulties, and that nonpayment was caused by $200,000 in losses in 2-year period from theft of produce from respondent's warehouse are irrelevant in a failure to pay case under the PACA), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 129 (1984) (stating that a fire at respondent's business for which respondent was under-insured was not relevant in determining whether payment violations occurred or whether they were willful); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1513-26 (1983) (stating that respondent's bankruptcy, caused by failure of a large purchaser from respondent to comply with its contractual agreement, is not relevant in a failure to pay case under the PACA); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158-70 (1983) (stating that nonpayment because another firm failed to pay respondent $248,805.66 is not relevant in a failure to pay case under the PACA); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (stating that nonpayment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs are irrelevant in determining whether payment violations occurred or whether violations were willful); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (stating that revocation of respondent's PACA license is appropriate where nonpayment is caused by respondent's bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (stating that nonpayment because of bankruptcy is not relevant in determining whether payment violations occurred or whether violations were willful), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982), (stating that nonpayment because of bankruptcy of another firm owing respondent $776,459.23 is not relevant in determining whether payment violations occurred or whether violations were willful), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (stating that nonpayment because of financial difficulties is not relevant in determining whether payment violations occurred or whether violations were willful); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (stating that financial difficulties, including difficulty in collecting from others, is not relevant to a PACA licensee's failure to promptly pay), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (stating that respondent's sudden and unexpected loss of a major sales account is not relevant in a failure to pay case

Third, Respondents contend that the November 6, 1997, Decision and Order is in error because Respondents have a long history of compliance with the PACA, as follows:

> We have been in the produce industry for 30 years and never had any problems or complaints. If this doesn't matter than [sic] somethng [sic] is wrong. . . .
>
> We feel we have been very good for the produce industry for many years and will continue to be good for it. One mistake was made and we will repay this debt. Therefore, we feel this decision, made based on books that

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under the PACA); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 969-70 (1981) (stating that respondent's petition in bankruptcy is irrelevant to the issuance of a sanction under the PACA), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (stating that nonpayment because of financial difficulties is not relevant in a failure to pay case under the PACA), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (stating that nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery, is not relevant in determining whether payment violations occurred or whether violations were willful), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685-86 (stating that a strike and the failure of others to pay respondent are not defenses in a disciplinary action under the PACA for failure to pay for produce), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distributing Co.*, 37 Agric. Dec. 705, 709-14 (1978) (stating that nonpayment because of failure of others to pay respondent and respondent's responsible and honorable conduct are not relevant in a PACA failure to pay case); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33 (1976) (stating that nonpayment because of financial difficulties is not relevant in determining whether payment violations occurred or whether violations were willful), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re Maure Solt*, 35 Agric. Dec. 721, 723-24 (1976) (stating that bankruptcy of another firm owing respondent over $130,000 is not a defense to a violation of the payment provisions of the PACA nor does it negate willfulness); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (stating that a railroad strike causing respondent's failure to pay is not a defense under section 2 of the PACA), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (stating that financial difficulty is not an excuse for violating the PACA and does not negate willfulness); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (stating that respondent's insolvency does not negate willfulness; a licensee is obligated by the PACA to have sufficient funds to pay for perishable agricultural commodities or not buy them), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *In re Cloud & Hatton Brokerage*, 18 Agric. Dec. 547, 549 (1959) (stating that the fact that respondent has been adjudicated a bankrupt is not a defense in a PACA disciplinary proceeding for failure to pay); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (stating that financial difficulties do not condone respondent's repeated failures to pay and revocation of respondent's PACA license should be ordered); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (stating that nonpayment because of financial difficulties authorizes revocation of respondent's PACA license and had respondent's license not already terminated, it would have been revoked).

are in Washington, is not the right decision in this case.

Petition for Reconsideration.

Respondents' purported 30-year history of compliance with the PACA is a mitigating circumstance, and mitigating circumstances are not relevant circumstances under the Department's sanction policy regarding flagrant or repeated failures to make full payment under the PACA. Rather, the relevant factors are whether the violations are flagrant or repeated failures to pay more than a *de minimis* amount, whether Respondents had paid all sellers by the opening of the hearing, and whether Respondents are in compliance with the PACA and the regulations under the PACA. Even if a respondent has been a commission merchant, dealer, or broker for an extended period of time and can demonstrate that the firm has never violated the PACA during that extended period of time, such circumstances are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful. Moreover, such circumstances are not relevant to the sanction to be imposed on a respondent who has flagrantly or repeatedly failed to make full payment promptly.[8]

Fourth, Respondents contend that the November 6, 1997, Decision and Order in this proceeding is in error because it fails to take into account the effect on Respondents' produce creditors, as follows:

> . . . We will have [our produce creditors] contact you and let them help make the decision that they might never be paid on these files. This decision will also push us into bankruptcy on these growers.
>
> . . . .
>
> . . . We can get over 100 people we do business with to sign a petition

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[8]*In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 24-25 (Dec. 5, 1997) (rejecting respondent's contention that its 30-year "unblemished" record as a produce dealer is relevant to the sanction to be imposed for failure to make full payment promptly); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1279 (1996) (stating that respondents' excellent payment history relative to others in the perishable commodities industry and respondents' good faith efforts to address their payment problems are not relevant circumstances under the Department's sanction policy), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 1204, 1225 (1996) (stating that previous compliance with the PACA and good faith efforts to pay produce suppliers are not relevant to the sanction to be imposed), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985) (stating that the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, and that respondent was in business for 35 years with no complaints or financial difficulties are not relevant circumstances), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986).

saying they sant [sic] us in the produce business. You can't get 5 people we owe to agree to keep us out.

. . . We would appreciate it if you would let the people who this decision will affect the most help you make that decision.

Petition for Reconsideration.[9]

Often produce creditors support a respondent in a PACA disciplinary proceeding in hopes that the respondent will remain in business and that they (the produce creditors) will be paid some or all of the money that they are owed for perishable agricultural commodities. However, allowing a PACA licensee that has flagrantly or repeatedly failed to make full payment promptly in accordance with the PACA to remain in business in hopes that the PACA licensee will pay its current produce creditors frequently exposes other produce sellers to the risk of nonpayment. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and even consumers of perishable agricultural commodities who ultimately bear increased industry costs resulting from failures to pay.[10] These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities

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[9]Four of Respondents' produce creditors did contact me by telephone after I issued the November 6, 1997, Decision and Order in this proceeding. Each of Respondents' produce creditors urged me to dismiss the case against Respondents so that Respondents could remain in the produce business and thereby pay their produce debts. I informed each of Respondents' four produce creditors who contacted me that I could not discuss the merits of the proceeding. These telephone conversations with Respondents' produce creditors are not part of the record in this proceeding and form no part of the basis for this Order Denying Petition for Reconsideration.

[10]Although the PACA is primarily to protect perishable agricultural commodity producers, it "is also `for the protection of consumers' (H.R. Rep. No. 1196, 84th Cong., 1st Sess. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). See also *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2026 (1985); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169, *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982).

industry to financially responsible persons, which is one of the primary goals of the PACA.[11]

Moreover, collateral effects of publication that a respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) are not relevant to a determination whether a respondent made full payment promptly or to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly. Also irrelevant are adverse impacts on a respondent's produce sellers of publication that a respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and requests by a respondent's produce sellers that a respondent be allowed to stay in business.[12] This Department routinely denies

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[11] *Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216, *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 785 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). *See also Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

[12] *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 20 (Dec. 5, 1997) (stating that the absence of complaints from respondent's produce sellers is not relevant in a failure to pay case under 7 U.S.C. § 499b(4)); *In re Hogan Distributing Co.*, 55 Agric. Dec. 622, 639 (1996) (stating that the adverse impact on sellers of perishable agricultural commodities of publication that respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (stating that the adverse impact of revocation of respondent's PACA license on respondent's creditors is not relevant); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990) (stating that a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if respondent were permitted to remain in business), *appeal dismissed*, No. 90-1199 (D.C. Cir. Oct. 15, 1990); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (stating that collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating that detriment to creditors if respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (stating that the fact that a respondent's creditors will suffer if respondent's PACA license is

requests for a lenient sanction based on the effect a sanction may have on a respondent's customers, community, or employees.[13]

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 6, 1997, *In re Tolar Farms, supra*, Respondents' Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[14] Respondents' Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on November 6, 1997. Therefore, since Respondents' Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed November 6, 1997, is reinstated, with allowance for time passed.

For the foregoing reasons, the following Order should be issued.

Order

Respondents have committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances

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revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (stating that the fact that respondent's creditors will suffer if respondent's PACA license is revoked is irrelevant).

[13] *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 23 (Dec. 5, 1997) (stating that the effect of the revocation of respondent's PACA license on employment of 30 persons and on small and medium-sized businesses that rely on respondent are collateral effects and are not relevant to the sanction to be imposed); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (holding that the fact that respondent's 25 employees will suffer harm from a sanction other than a civil penalty is a collateral effect which is not relevant to the sanction to be imposed), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating that hardship to a respondent's community, customers, or employees which might result from a disciplinary order is given no weight in determining the sanction); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987) (stating that the Department routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees), *aff'd*, 831 F.2d 403 (2d Cir. 1987).

[14] *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 13 (Dec. 22, 1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

set forth in this Decision and Order shall be published, effective 65 days after service of this Order on Respondents.

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Stay Order filed March 5, 1998.

Jane McCavitt, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On November 6, 1997, I issued a Decision and Order concluding that Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, repeatedly, and flagrantly violated section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA], and ordered the publication of the facts and circumstances set forth in the Decision and Order. *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 21 (Nov. 6, 1997). On November 25, 1997, Respondents filed a petition for reconsideration which I denied. *In re Tolar Farms*, 57 Agric. Dec. ___ (Jan. 5, 1998) (Order Denying Petition for Reconsideration).

On March 4, 1998, Respondents filed a letter requesting "a stay to give the evidence to a higher court" [hereinafter Respondents' Petition for a Stay Order], and the case was referred to the Judicial Officer for a ruling on Respondents' Petition for a Stay Order. On March 4, 1998, Jane McCavitt, attorney for the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], informed me by telephone that Complainant does not oppose Respondents' Petition for a Stay Order.

Respondents' Petition for a Stay Order is granted. The Order issued in this proceeding on November 6, 1997, *In re Tolar Farms*, 56 Agric. Dec. ___ (Nov. 6, 1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: MICHAEL NORINSBERG.
PACA-APP Docket No. 96-0009.
Order Denying Petition for Reconsideration filed January 26, 1998.

Argument for first time on appeal — Litigant prohibited from taking inconsistent positions — Litigant prohibited from appealing ruling requested.

The Judicial Officer denied Petitioner's Petition for Reconsideration. Petitioner may not raise a new argument for the first time on appeal to the Judicial Officer. Further, Petitioner's argument that the pre-November 15, 1995, definition of *responsibly connected* should be applied is directly contrary to the position he consistently advanced throughout the proceeding, and the general rule is that a party is not allowed to argue a legal position on appeal that is contrary to the position argued earlier in the proceeding. Moreover, even if the definition of *responsibly connected* as amended on November 15, 1995, was erroneously applied to determine whether Petitioner was responsibly connected with The Norinsberg Corporation during the period April 1991 through February 1992, it was applied at Petitioner's invitation, and Petitioner cannot challenge the application of the definition of *responsibly connected* as amended on November 15, 1995, to determine Petitioner's status, which, until his Petition for Reconsideration, he consistently requested be applied.

Andrew Y. Stanton, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Michael Norinsberg [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition on September 14, 1993.

The Petition challenges the August 11, 1993, determination of the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was *responsibly connected* with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the PACA,[1] in that Petitioner was the secretary, treasurer, director, and a 15 percent stockholder of The Norinsberg

[1]During the period from April 1991 through February 1992, The Norinsberg Corporation purchased, received, and accepted 46 lots of perishable agricultural commodities from 10 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $424,913.75. The Norinsberg Corporation's failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and its PACA license was revoked pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)). *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995).

Corporation and involved in the daily activities of The Norinsberg Corporation.

On January 2, 1997, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] conducted an oral hearing in New York, New York. Mr. Stephen P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioner. Mr. Andrew Y. Stanton, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On February 10, 1997, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law and a Memorandum in Support of Petitioner's Proposed Findings of Fact and Conclusions of Law, and on February 11, 1997, Respondent filed Respondent's Brief. On February 19, 1997, Petitioner filed Petitioner's Reply Brief and Respondent filed Respondent's Reply Brief.

On May 6, 1997, the ALJ issued an Initial Decision and Order in which the ALJ found that: (1) "The Norinsberg Corporation was the alter ego of Robert Norinsberg"; (2) "Petitioner . . . only nominally was a secretary, a treasurer, a director and a stockholder of The Norinsberg Corporation during the period of violation of the PACA by the corporation"; and (3) "Petitioner . . . was not actively involved in the activities resulting in the violation" (Initial Decision and Order at 8-9). The ALJ concluded that "Michael Norinsberg was not responsibly connected to The Norinsberg Corporation at the time of the corporation's violations of the PACA" (Initial Decision and Order at 4) and reversed the "Order of the Chief, PACA Branch, Fruit and Vegetable Division, USDA, dated August 11, 1993, which found that Michael Norinsberg was `responsibly connected' to The Norinsberg Corporation" (Initial Decision and Order at 13).

On May 28, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in adjudication proceedings which are subject to the Rules of Practice (7 C.F.R. § 2.35).[2] On July 21, 1997, Petitioner filed Petitioner's Opposition to Respondent's Appeal Petition, and on July 23, 1997, the case was referred to the Judicial Officer for decision.

On October 21, 1997, I issued a Decision and Order: (1) concluding that Petitioner was only nominally an officer and director of The Norinsberg Corporation during the time that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding that The Norinsberg Corporation was the alter ego of Robert M.

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Norinsberg and that Petitioner held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation during the time that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluding that Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) affirming the August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. ___, slip op. at 15, 33-34 (Oct. 21, 1997).

On December 3, 1997, Petitioner filed Petition for Reconsideration. On January 9, 1998, Respondent filed Response to Petitioner's Petition for Reconsideration, and the case was referred to the Judicial Officer for reconsideration.

Petitioner raises one issue in his Petition for Reconsideration. Petitioner contends that "the amended definition of the term `responsibly connected' [in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995))], as interpreted by the Judicial Officer, imposes new and detrimental legal consequences on [P]etitioner so that it cannot be applied retroactively to his conduct which occurred before the amendment." (Petition for Reconsideration at 1 (footnote omitted).)

I concluded that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), April 1991 through February 1992. This conclusion is based on a finding that Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). This active involvement in activities resulting in The Norinsberg Corporation's violations consisted of Petitioner's signing 14 checks, totaling $59,728.60, between May 1991 and February 1992, which were drawn on The Norinsberg Corporation's accounts with Chase Manhattan Bank and the Republic National Bank of New York and which were payable to persons who were not produce creditors of The Norinsberg Corporation.[3] *In re Michael Norinsberg, supra*, slip op. at 15, 23-26.

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[3]The checks signed by Petitioner, payable to individuals who were not The Norinsberg Corporation's produce creditors, are as follows: (1) 12 checks made payable to Robert M. Norinsberg in amounts totaling $51,369.60; (2) one check made payable to Susan Norinsberg in the amount of $5,359; and (3) one check made payable to Carmela Quito in the amount of $3,000.

During the period that The Norinsberg Corporation violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the term *responsibly connected* was defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as follows:

> 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.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended by adding a rebuttable presumption standard which explicitly allows an individual who is a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation to rebut his or her status as responsibly connected with a violator.[4] Specifically, section 12(a) of the PACAA-1995 amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) by adding a sentence to the definition, which reads as follows:

> 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 [the PACA] 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.

Neither PACAA-1995 nor the legislative history applicable to PACAA-1995 indicates that Congress intended that the definition of the term *responsibly connected* was to be applied retroactively, and Petitioner's activity on which I based my finding that he was *responsibly connected* with The Norinsberg Corporation during the period that The Norinsberg Corporation violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred prior to the approval of PACAA-1995.

However, until Petitioner filed his Petition for Reconsideration, Petitioner

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[4]Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 (1995) [hereinafter PACAA-1995].

consistently took the position that the definition of *responsibly connected* in the PACA as amended by PACAA-1995 should be applied in this proceeding to determine whether he was responsibly connected with The Norinsberg Corporation during the period The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).[5]

As an initial matter, Petitioner's contention that the pre-November 15, 1995, definition of *responsibly connected* is applicable to this proceeding is an argument which Petitioner raises for the first time in Petitioner's Petition for Reconsideration. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[6] Petitioner's failure to argue that the pre-November 15, 1995, definition of *responsibly connected* should apply to this proceeding prior to his filing the Petition for Reconsideration is too late. Further, even if I were to find that Petitioner raised the issue of which definition of *responsibly connected* to apply in his filings prior to appeal and on that basis was not too late, I would not consider the argument by Petitioner that I use the definition of *responsibly connected* in the PACA that was in effect at the time of The Norinsberg Corporation's violations of 7 U.S.C. § 499b(4) because, until his

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[5]See Petitioner's Prehearing Brief at 1-2, filed December 30, 1996; Petitioner's Proposed Findings of Fact and Conclusions of Law at 11, filed February 10, 1997; Memorandum in Support of Petitioner's Proposed Findings of Fact and Conclusions of Law, at 2-5, filed February 10, 1997; Petitioner's Opposition to Respondent's Appeal Petition at 5, filed July 21, 1997.

[6]*In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 34-35 (Dec. 5, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar.27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

Petition for Reconsideration, Petitioner consistently argued that the definition of *responsibly connected* as amended on November 15, 1995, should be applied in this proceeding. The general rule is that a party is not allowed to argue a legal position on appeal that is contrary to the position argued earlier in the proceeding.[7] Moreover, even if I erroneously applied the definition of *responsibly connected* as amended on November 15, 1995, to determine whether Petitioner was responsibly connected with The Norinsberg Corporation during the period April 1991 through February 1992, I did so at Petitioner's invitation. Petitioner cannot now challenge the application of the definition of *responsibly connected* as amended on November 15, 1995, to determine Petitioner's status, which, until his Petition for Reconsideration, he consistently requested be applied.[8]

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[7]*See Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617, 624 (2d Cir. 1993) (stating that where a party to litigation repeatedly represented that it would be bound by one interpretation of its insurance contracts, the party could not on appeal attempt to change course and rely on another interpretation of the contracts), *cert. denied*, 513 U.S. 1052 (1994); *EF Operating Corp. v. American Buildings*, 993 F.2d 1046, 1050 (3d Cir.) (stating that one cannot cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so and a reviewing court may properly consider the representations made in the appellate brief to be binding and decline to address a new legal argument based on a later repudiation of those representations), *cert. denied*, 510 U.S. 868 (1993); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 116 (3d Cir. 1992) (stating that when a litigant takes an unequivocal position at trial, that litigant cannot on appeal assume a contrary position simply because the position was a tactical mistake or a regretted concession), *cert. denied sub nom., Doughboy Recreational, Inc. v. Fleck*, 507 U.S. 1005 (1993); *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1347 (10th Cir. 1986) (stating that the general rule is that a party is not allowed to argue a legal position on appeal contrary to that argued at trial); *Richardson v. Turner*, 716 F.2d 1059, 1061 n.2 (4th Cir. 1983) (stating that appellate courts generally should not decide a case on a legal theory directly contrary to that advanced by appellants at trial); *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 n.1 (8th Cir. 1981) (per curiam) (stating that an appellate court will not consider an issue on which counsel took a contrary position before the trial court); *Alexander v. Town and Country Estates, Inc.*, 535 F.2d 1081, 1082 (8th Cir. 1976) (holding that the court would not consider an issue on appeal where the litigant took a contrary position in district court).

[8]*See generally Hagan v. McNallen*, 62 F.3d 619, 625 (4th Cir. 1995) (concluding that where a defendant conceded willfulness at trial, the defendant could not raise the issue of willfulness on appeal); *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 891 (7th Cir. 1995) (stating that ordinarily a party will not be heard to complain about an erroneous ruling that he himself precipitated); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 269 (8th Cir. 1993) (stating that where appellants failed to object to trial court's instruction, they waived any argument of error when they offered a virtually identical instruction; it is fundamental that where the defendant opened the door and invited error there can be no reversible error); *Tel-Phonic Services, Inc. v. TBS International, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992) (holding that where plaintiffs agreed to a court order transferring venue, plaintiffs cannot appeal the propriety of the order to transfer venue); *Morris v. State of California*, 966 F.2d 448, 452 (9th Cir. 1991) (stating that as a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation), *cert. denied*, 506 U.S. 831 (1992); *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n.4 (11th Cir. 1985) (stating that plaintiffs' admission of inability to pursue a claim prevents it from appealing that issue, it being a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial court proceeding invited by that party); *Gundy v. United States*, 728 F.2d 484, 488 (10th Cir.

For the foregoing reasons and the reasons set forth in the Decision and Order filed October 21, 1997, *In re Michael Norinsberg, supra*, Petitioner's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[9]

1984) (per curiam) (stating that a party may not sit idly by, watching error being committed, and then raise the claimed error on appeal without having accorded the trial court the opportunity to correct its action and an appellant may not complain on appeal of errors which he himself induced or invited); *Weise v. United States*, 724 F.2d 587, 590 (7th Cir. 1984) (stating that it is well settled law that a party cannot complain of errors which it has committed, invited, or induced the court to make, or to which it consented); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 15 (1st Cir.) (stating that, in general, a party may not appeal from an error to which he contributed, either by failing to object or by affirmatively presenting to the court the wrong law), *cert. dismissed*, 463 U.S. 1247 (1983); *International Travelers Cheque Co. v. Bankamerica Corp.*, 660 F.2d 215, 224 (7th Cir. 1981) (stating that where plaintiff argued that Bank of America was an indispensable party and the district court dismissed the suit, plaintiff-appellant cannot on appeal argue that Bank of America is not an indispensable party and complain of error which it committed, invited, or induced the court to make or to which it consented); *McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979) (stating that where the appellants argued the wrong law or theory to the trial court, they may not argue another law or theory on appeal); *United States v. Gonzalez Vargas*, 585 F.2d 546, 547 (1st Cir. 1978) (per curiam) (stating that even though a non-applicable rule regarding peremptory challenges was applied to the case, appellants share the fault for the error and proposed the compromise that was adopted; therefore, there was no reversible error); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1155 (10th Cir.) (stating that appellant may not complain of errors which he himself has invited), *cert. denied*, 439 U.S. 862 (1978); *Director General of India Supply Mission v. S.S. Maru*, 459 F.2d 1370, 1377 (2d Cir. 1972) (stating that where appellant has taken a position in the trial court and induced the trial court to adopt that position, the appellant cannot complain that the trial court erred when it adopted appellant's position), *cert. denied*, 409 U.S. 1115 (1973); *Sanders v. Buchanan*, 407 F.2d 161, 163 (10th Cir. 1969) (stating that where a trial court's comment was provoked by argument of appellant, the appellant may not complain on appeal that the comment was error); *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706, 716 (4th Cir. 1966) (stating that where the parties consent to the procedure adopted by the lower court for deciding factual issues, they cannot complain of the procedure used by the lower court on appeal); *Garza v. Indiana & Michigan Electric Co.*, 338 F.2d 623, 627 (6th Cir. 1964) (stating that one may not complain of rulings he invited the court to make); *Cranston Print Works Co. v. Public Service Co. of North Carolina, Inc.*, 291 F.2d 638, 649 (4th Cir. 1961) (stating that a party who procures or is responsible for the exclusion of evidence is estopped to assign as error the fact that the record is devoid of such evidence); *Petersen v. Chicago, Great Western Ry. Co.*, 138 F.2d 304, 306-07 (8th Cir. 1943) (stating that where from the institution of an action down to the time of argument to the jury, plaintiff regarded Iowa law as controlling, plaintiff could not claim that the trial court's application of Iowa law was in error).

[9] *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 13 (Dec. 22, 1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.);

Petitioner's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on October 21, 1997. Therefore, since Petitioner's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed October 21, 1997, is reinstated, with allowance for time passed.

For the foregoing reasons, the following Order should be issued.

Order

The August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the PACA, is affirmed.

In re: MICHAEL NORINSBERG.
PACA-APP Docket No. 96-0009.
Stay Order filed April 8, 1998.

Andrew Y. Stanton, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On October 21, 1997, I issued a Decision and Order affirming the August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Michael Norinsberg [hereinafter Petitioner], was responsibly connected with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the Perishable Agricultural Commodities Act, 1930, as amended [hereinafter the PACA]. *In re Michael Norinsberg*, 56 Agric. Dec. ___, slip op. at 34 (Oct. 21, 1997). On December 3, 1997, Petitioner filed a petition for reconsideration, which I denied. *In re Michael Norinsberg*, 57 Agric. Dec. ___ (Jan. 26, 1998) (Order Denying Pet. for Recons.).

In re Havana Potatoes of New York Corp., 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

On March 19, 1998, Respondent filed Motion for Stay Order stating that Petitioner had "filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit" and requesting "that the October 21, 1997, Decision and Order be stayed until Petitioner's appeal is resolved." On March 31, 1998, Petitioner filed Consent to Issuance of Stay Order stating that Petitioner "consents to the issuance of an Order staying the Decision and Order issued on October 21, 1997[,] until his appeal is resolved." On April 7, 1998, the hearing clerk referred the case to the Judicial Officer for a ruling on Respondent's Motion for Stay Order.

Respondent's Motion for Stay Order is granted. The Order issued in this proceeding on October 21, 1997, *In re Michael Norinsberg*, 56 Agric. Dec. ___ (Oct. 21, 1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: ALLRED'S PRODUCE.
PACA Docket No. D-96-0531.
Order Denying Petition for Reconsideration filed February 2, 1998.

Failure to make full payment promptly – Willful, flagrant, and repeated violations – License revocation.

The Judicial Officer denied Respondent's Petition for Reconsideration for the reasons previously set forth in the Judicial Officer's decision.

Jane McCavitt, for Complainant.
Mark W. Romney, Fort Worth, TX, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 29, 1996.

The Complaint alleges that, during the period May 1993 through February 1996, Allred's Produce [hereinafter Respondent] violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $336,153.40 for 86 lots of perishable agricultural commodities, which Respondent received and accepted in interstate commerce (Compl. ¶ III). Respondent filed Response of Allred's Produce to the Complaint of the Secretary of Agriculture [hereinafter Answer] on September 30, 1996, in which Respondent denies violating the PACA, but asserts that $187,404.76 of the amount Respondent is alleged in the Complaint to have failed to have paid promptly in full remained unpaid on September 30, 1996 (Answer ¶ 5). Respondent filed Amended Response of Allred's Produce to the Complaint of the Secretary of Agriculture [hereinafter Amended Answer] on April 17, 1997, in which Respondent denies violating the PACA, but asserts that less than $148,984.07 of the amount Respondent is alleged in the Complaint to have failed to have paid promptly in full remained unpaid on April 16, 1997 (Amended Answer ¶ 5).

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing begun on June 18, 1997, in Dallas, Texas, and continued and completed on August 8, 1997, in Washington, D.C. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Bruce W. Akerly, Esq., Bell & Nunnally, PLLC, Dallas, Texas, represented Respondent.[1] The ALJ issued a bench decision on August 8, 1997, in which the ALJ concluded that Respondent violated section 2 of the PACA (7 U.S.C. § 499b) and revoked Respondent's PACA license (Tr. 286). On August 20, 1997, in accordance with 7 C.F.R. § 1.142(c)(2), the ALJ filed a written copy of the decision announced orally from the bench, which the ALJ excerpted from the transcript, corrected for errors of spelling, punctuation, and transcription [hereinafter Initial Decision and Order].

On September 5, 1997, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On October

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[1]On November 12, 1997, Bruce W. Akerly, Esq., filed a Motion to Withdraw as Counsel for Petitioner [sic], which was granted (Ruling on Motion to Withdraw as Counsel, filed November 14, 1997).

[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

1, 1997, Complainant filed Complainant's Response to Respondent's Appeal, and on October 23, 1997, the case was referred to the Judicial Officer for decision.

On December 5, 1997, I issued a Decision and Order in which I: (1) found that during the period May 1993 through February 1996, Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices for 86 lots of perishable agricultural commodities in the total amount of $336,153.40, which Respondent had purchased, received, and accepted in interstate commerce; (2) concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) revoked Respondent's PACA license, effective 65 days after service of the Order in the Decision and Order on Respondent. *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 10, 44 (Dec. 5, 1997).

On January 6, 1998, Respondent filed a Petition for Reconsideration[3] and on January 26, 1998, Complainant filed Complainant's Objection to Respondent's Petition for Reconsideration. On January 28, 1998, the case was referred to the Judicial Officer for reconsideration.

Respondent raises seven issues in its Petition for Reconsideration. The seven issues raised by Respondent in its Petition for Reconsideration are identical to the issues raised by Respondent in Respondent's Appeal Petition, which issues were thoroughly addressed in the Decision and Order, filed December 5, 1997. *In re Allred's Produce, supra.* Respondent has raised nothing in its Petition for Reconsideration which would cause me to modify the December 5, 1997, Decision and Order.

For the foregoing reason and the reasons set forth in the Decision and Order filed December 5, 1997, *In re Allred's Produce, supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the

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[3]While the record does not indicate that an appearance was filed on behalf of Respondent after Mr. Bruce W. Akerly, Esq.'s motion to withdraw as counsel was granted on November 14, 1997, Respondent's Petition for Reconsideration was signed by Mr. Mark W. Romney, Esq., of Boswell & Kober, Fort Worth, Texas, and Respondent's Petition for Reconsideration was accompanied by a letter to Ms. Joyce A. Dawson from Kelly E. DeBerry of Boswell & Kober, Fort Worth, Texas. Moreover, Mr. Ronald Allred, one of the partners in Allred's Produce, contacted me by telephone on January 28, 1998, to determine whether Respondent's Petition for Reconsideration had been timely filed, and at that time, Mr. Allred informed me that Respondent was again represented by counsel. While Mr. Allred did not identify counsel representing Respondent, I infer that Mr. Mark W. Romney, Esq., of Boswell & Kober, Fort Worth, Texas, currently represents Respondent in this proceeding.

determination to grant or deny a timely filed petition for reconsideration.[4] Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on December 5, 1997. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed December 5, 1997, is reinstated, with allowance for time passed.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's PACA license is revoked, effective 65 days after service of this Order on Respondent.

In re: ALLRED'S PRODUCE.
PACA Docket No. D-96-0531.
Stay Order filed April 3, 1998.

Jane McCavitt, for Complainant.
Mark W. Romney, Fort Worth, TX, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On December 5, 1997, I issued a Decision and Order concluding that Allred's Produce [hereinafter Respondent], willfully, repeatedly, and flagrantly violated section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA], and revoked Respondent's PACA license. *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 10, 44 (Dec. 5, 1997). On January 6, 1998, Respondent filed a petition for reconsideration, which I denied. *In re Allred's Produce*, 57 Agric. Dec. ___ (Feb. 2, 1998) (Order Denying Pet. for Recons.).

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[4]*In re Michael Norinsberg*, 57 Agric. Dec. ___, slip op. at 10 (Jan. 26, 1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 13 (Dec. 22, 1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

On April 2, 1998, Respondent, by telephone, requested a stay pending the outcome of proceedings for judicial review [hereinafter Respondent's Petition for a Stay Order], and the case was referred to the Judicial Officer for a ruling on Respondent's Petition for a Stay Order. On April 2, 1998, counsel for the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], informed me, by telephone, that Complainant does not oppose Respondent's Petition for a Stay Order.

Respondent's Petition for a Stay Order is granted. The Order issued in this proceeding on December 5, 1997, *In re Allred's Produce*, 56 Agric. Dec. ___ (Dec. 5, 1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: HAVANA POTATOES OF NEW YORK CORP., AND HAVPO, INC.
PACA Docket No. D-94-0560.
Clarification of Stay Order filed February 5, 1998.

Mary Hobbie, for Complainant.
Tab K. Rosenfeld, New York, NY, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On February 20, 1997, I issued a Stay Order in this proceeding which provides as follows:

> The Order previously issued in this case, which would have revoked Respondent Havana Potatoes of New York Corp.'s PACA license and Respondent Havpo, Inc.'s PACA license, is hereby stayed pending the outcome of proceedings for judicial review.
>
> This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re Havana Potatoes of New York Corp., 56 Agric. Dec. 1029 (1997).

On February 4, 1998, Havana Potatoes of New York Corp. [hereinafter Respondent] filed a motion stating that Respondent intends to file a petition for a writ of certiorari in the Supreme Court of the United States and requesting "an order continuing the stay of [the Order revoking Respondent's PACA license] until

a decision on Havana's petition for certiorari, or at least until March 19, 199[8], the date for submission of Havana's certiorari petition."

On February 4, 1998, I contacted Complainant's counsel to determine whether Complainant intended to file a response to Respondent's February 4, 1998, motion. Complainant's counsel stated that Complainant does not intend to file a response to Respondent's February 4, 1998, motion.

Respondent's motion for an order continuing the stay of the Order revoking Respondent's PACA license is denied, because such an order would be redundant.

The Stay Order issued on February 20, 1997, by its terms, remains in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction. The Stay Order issued February 20, 1997, has not been lifted by the Judicial Officer, has not been vacated by a court of competent jurisdiction, and is now in effect. No purpose would be served by issuing an order stating that the Stay Order issued February 20, 1997, remains in effect.

In re: STEVEN J. RODGERS.
PACA-APP Docket No. 96-0002.
Stay Order filed April 8, 1998.

Andrew Y. Stanton, for Respondent.
Mark L. Johansen and Steven R. Block, Dallas, TX, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On December 12, 1997, I issued a Decision and Order affirming the determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Steven J. Rodgers [hereinafter Petitioner], was responsibly connected with World Wide Consultants, Inc., during the period of time that World Wide Consultants, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended [hereinafter the PACA]. *In re Steven J. Rodgers*, 56 Agric. Dec. ___, slip op. at 51 (Dec. 12, 1997).

On March 19, 1998, Respondent filed Motion for Stay Order stating that Petitioner had "filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit" and requesting "that the December 12, 1997, Decision and Order be stayed until Petitioner's appeal is resolved." On April 6, 1998, Petitioner filed Petitioner's Response to Respondent's Motion for Stay Order stating that Petitioner "joins Respondent's Motion for Stay Order and requests that the December 12, 1997, Decision and Order be stayed until Petitioner's appeal is concluded." On April 7, 1998, the hearing clerk referred the case to the Judicial

Officer for a ruling on Respondent's Motion for Stay Order.

Respondent's Motion for Stay Order is granted. The Order issued in this proceeding on December 12, 1997, *In re Steven J. Rodgers*, 56 Agric. Dec. ___ (Dec. 12, 1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: MENDENHALL PRODUCE, INC., and PRIMA ROMA SALES, INC. and MICHAEL J. MENDENHALL.
PACA Docket No. D-97-0028 & APP 97-0008.
Decision as to Mendenhall Produce, Inc. by Reason of Default and Dismissal as to Prima Roma Sales, Inc. by Reason of Withdrawal of Application for License filed November 7, 1997.

Failure to file an answer - Failure to appear at hearing - Failure to make full payment promptly - Failure to satisfy reparation orders - Willful, flagrant and repeated violations - Publication.

Eric Paul, for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondents.
Decision & Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

This is disciplinary and show cause proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act," instituted by a notice to show cause and complaint filed against Mendenhall Produce, Inc., and Prima Roma Sales, Inc., on July 18, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United State Department of Agriculture. It is alleged in the complaint that during the period August 1995 through November 1995, respondent Mendenhall Produce, Inc. purchased, received and accepted in interstate commerce, from 16 sellers, 66 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices totaling $219,913.17. In addition, it is alleged that respondent Mendenhall Produce, Inc. failed to satisfy reparation orders issued to eight of these 16 sellers between May 20, 1996, and December 3, 1996, involving over $195,000. It is alleged in the notice to show cause that respondent Prima Roma Sales, Inc. should be refused a license because Michael J. Mendenhall, its sole officer and shareholder, has engaged in practices of a character prohibited by the PACA. In addition, it is alleged that respondent Prima Roma Sales, Inc. and Michael J. Mendenhall have made false and misleading statements in the application for license submitted on June 21, 1997.

The notice to show cause and complaint were served upon the respondents by regular mail in accordance with section 1.147 of the Rules of Practice (7 C.F.R. § 1.147) after letters sent by certified mail were returned unclaimed. Pursuant to a telephone conference at which Michael J. Mendenhall appeared on behalf of

respondent Prima Roma Sales, Inc., the notice to show cause and complaint were set for hearing in Phoenix, Arizona, on November 5, 1997. An answer was filed on behalf of respondent Prima Roma Sales, Inc. by Michael J. Mendenhall. This answer was also accepted as a petition for review of the determination of the Chief, PACA Branch, that Michael J. Mendenhall was responsibly connected to Mendenhall Produce, Inc. Pursuant to Section 1.137 of the Rules of Practice (7 C.F.R. § 1.137), the Michael J. Mendenhall petition for review was joined for consolidated hearing with the notice to show cause and complaint proceeding. On October 14, 1997, respondent Prima Roma Sales, Inc. withdrew its application for license.

The time for respondent Mendenhall Produce, Inc. to file an answer admitting, denying, or explaining each of the allegations of the complaint in accordance with Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) having run, respondent Mendenhall Produce, Inc. having failed to appear at the hearing, and upon the motion of the complainant for issuance of the Default Order, the following Decision and Order is issued in Phoenix, Arizona, at the commencement of the hearing in the remaining responsibly connected appeal proceeding.

Findings of Facts

1. Respondent Mendenhall Produce, Inc. (hereinafter "respondent Mendenhall Produce"), is a corporation organized and existing under the laws of the State of New Mexico. Its business address is 3100 Harrelson, Mesilla Park, New Mexico 88047-1438. Its mailing address is P.O. Box 1438, Mesilla Park, New Mexico 88047-1438.

2. PACA License number 940906 was issued to respondent Mendenhall Produce on March 29, 1994, and terminated on March 29, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when respondent Mendenhall Produce failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph V of the complaint, during the period August 1995 through November 1995, respondent Mendenhall Produce failed to make full payment promptly to 16 sellers for the agreed purchase prices totaling $219,913.17 for 66 lots of perishable agricultural commodities which it received and accepted in interstate commerce. In addition, respondent Mendenhall Produce failed to satisfy reparation orders issued to eight of these 16 sellers between May 20, 1996, and December 3, 1996, involving over $195,000.

Conclusions

Respondent Mendenhall Produce's failure to make full payment promptly with respect to the 66 transactions set forth in Finding of Fact No 3 above, constitutes willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

The notice to show cause should be dismissed because respondent Prima Roma Sales, Inc. has withdrawn its application for license.

Order

A finding is hereby made that respondent Mendenhall Produce, Inc. has committed repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), and such finding shall be published.

The notice to show cause is dismissed.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final. Pursuant to the Rules of Practice governing proceedings under the Act, this Decision will become final without further proceeding thirty-five (35) days after service unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service, as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies of this Order shall be served upon the parties.

[This Decision and Order became final December 18, 1997.-Editor]

In re: A & E FOODS, INC.
PACA Docket No. D-97-0023.
Decision and Order filed October 23, 1997.

Failure to file an answer - Failure to pay reparation order - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Jane McCavitt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter

referred to as the "Act", instituted by a complaint filed on May 16, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period July 1994 through January 1996, respondent purchased, received and accepted, in interstate commerce, from 35 sellers, 341 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $525,887.75.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Finding of Fact

1. Respondent, A & E Foods, Inc., was a corporation, organized and existing under the laws of Maryland. Its business mailing address was 8869-C Greenwood Place, Savage, Maryland 20763.

2. Pursuant to the licensing provisions of the Act, license number 830025 was issued to respondent on October 6, 1982. This license was suspended on July 5, 1996, for failure to pay a reparation order, and subsequently terminated on October 6, 1996, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph III of the complaint, during the period July 1994 through January 1996, respondent purchased, received and accepted in interstate commerce, from 35 sellers, 341 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $525,887.75.

Conclusions

Respondent's failure to make full payment promptly with respect to the 341 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final January 9, 1998.-Editor]

In re: QUEEN CITY FARMS, INC.
PACA Docket No. D-97-0020.
Decision and Order filed January 6, 1998.

Admission of material allegations - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Andre Vitale, for Complainant.
Peter M. Solomon, Bedford, NH, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "PACA", instituted by a Complaint filed on April 1, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period May through November 1995, Queen City Farms, Inc. (hereinafter "Respondent"), failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $713,638.10 for 578 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. The Complaint also noted that on November 20, 1995, Respondent filed a voluntary petition in the United States Bankruptcy Court for the District of New Hampshire pursuant to

Chapter 7 of the Bankruptcy Code (7 U.S.C § 7 *et seq.*), designated Case No. 95-12848. Complainant requested that a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499(4)), and that such findings be published.

Respondent has admitted in documents filed in connection with its Chapter 7 bankruptcy proceeding entitled Schedule F Creditors Holding Unsecured Nonpriority Claims that it owes 19 sellers at least $713,638.10 which the complaint alleged that respondent failed to fully and promptly pay. This admission warrants the immediate issuance of a decision without hearing by reason of admissions. Therefore, upon the motion of the complainant for the issuance of a decision without hearing by reason of admissions, the following decision is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of New Hampshire. Its business address was 610 Gold Street, Manchester, New Hampshire 03108. Its mailing address was P.O. Box 534, Manchester, New Hampshire 03108-5314.

2. Pursuant to the licensing provisions of the PACA, license number 940834 was issued to Respondent on March 21, 1994. This license terminated on March 21, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period May through November 1995, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased, received and accepted 578 lots of mixed fruits and vegetables with agreed purchase prices in the total of $713,638.10 from 19 sellers in interstate commerce.

4. On November 20, 1995, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (7 U.S.C. § 7 *et seq.*) in the United States Bankruptcy Court for the District of New Hampshire. This petition has been designated Case No. 95-12848.

5. Respondent has admitted in bankruptcy pleadings that it owes fixed amounts that total $859,886.05, an amount greater than which the complaint alleged, to 19 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of $713,638.10 in this proceeding. The Schedule F consist of a table containing columns reflecting the name and address of the creditor and the amount of the claim. A comparison between the amounts of the claims of the 19

firms as listed in the complaint and respondent's bankruptcy filing are as follows:

Seller	Complaint	Bankruptcy Pleading
Boston Tomato Co., Inc.	$55,223.00	$54,593.00
DiMare Bros., Inc.	43,037.25	44,774.50
Dominic Gandolfo, Inc.	39,526.75	36,861.25
Noyes & Bimber, Inc.	15,022.00	13,842.00
Mutual Produce, Inc.	27,512.15	14,564.00
Marco Tomato Co.	18,723.50	20,795.50
Community-Suffolk, Inc.	69,118.95	101,650.00
Hall & Cole Produce, Inc.	15,221.50	15,221.50
P. Tavilla Co., Inc.	29,778.50	28,986.00
Garden Fresh Salad Co., Inc.	41,099.95	48,115.00
Apples Plus, Inc.	10,435.00	10,708.00
S. Strock & Co,., Inc.	43,960.71	72,587.95
W.H. Lailer & Co., Inc.	34,811.93	50,519.10
M. Cutone Mushroom Co.	142,062.29	72,511.70
D'Arrigo Bros., Co	41,681.54	55,722.05
Forlizzi Bros., Inc.	21,391.00	21,258.25
Bay State Produce Co., Inc.	10,906.69	13,780.25
Fresh Start Marketing, Inc.	35,294.30	52,326.50
Lisitano Produce, Inc.	18,831.09	31,069.50
Total	**$713,638.10**	**$859,886.05**

Conclusions

Respondent has admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 19 sellers at least $713,638.10 for 578 lots of perishable agricultural commodities on November 20, 1995. Respondent's admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent's failures to pay for numerous and substantial produce purchase obligations within the time limits established by a substantive regulation duly promulgated under the PACA are willful as a matter of law. *In re Five Star Food Distributors, supra.* Accordingly, the following Order is issued.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final February 17, 1998.-Editor]

In re: QUEEN CITY FARMS, INC.
PACA Docket No. D-97-0020.
Order Denying Late Appeal filed May 13, 1998.

Late appeal—Default—Admissions in bankruptcy filing—Failure to object to motion for default.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Edwin S. Bernstein's Default Decision and Order became final. Even if Respondent's appeal had been timely filed, it would have been denied based both upon Respondent's failure to file objections to Complainant's motion for a default decision and proposed default decision, in accordance with the Rules of Practice (7 C.F.R. § 1.139), and upon Respondent's admissions in a bankruptcy filing that it failed to make full payment promptly to 19 sellers of the agreed purchase prices for perishable agricultural commodities in a total amount of at least $713,638.10. Publication of the facts and circumstances of violations of 7 U.S.C. § 499b is not dependent on finding that the violations were willful. A violation is willful if, irrespective of evil motive, a person intentionally does an act prohibited by statute or if a person carelessly disregards statutory requirements. Failures to make full payment promptly in numerous transactions over 7 months constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).

Andre Allen Vitale, for Complainant.
Victor Dahar, Manchester, NH, and Peter M. Solomon, Londonderry, NH, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s)

[hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on April 1, 1997.

The Complaint alleges that: (1) during the period May 1995 through November 1995, Queen City Farms, Inc. [hereinafter Respondent], failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities in the total amount of $713,638.10, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); (2) on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" (Compl. ¶ IV(b)); (3) Respondent admitted in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims* that it owes the 19 sellers referred to in paragraph III of the Complaint at least $859,886.05 (Compl. ¶ IV(b)); and (4) the failure of Respondent to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent filed Respondent's Answer [hereinafter Answer] on May 27, 1997: (1) admitting that on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" (Answer ¶ IV); (2) admitting that Respondent states, in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, that it owes the 19 sellers referred to in paragraph III of the Complaint at least $859,886.05, but stating that, as of the date of the filing of the Answer, the total amount Respondent owes to the 19 sellers referred to in paragraph III of the Complaint may be less than the amount set forth in *Schedule F - Creditors Holding Unsecured Nonpriority Claims* (Answer ¶ IV); and (3) denying that during the period May 1995 through November 1995 it failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities in the total amount of $713,638.10, which Respondent purchased, received, and accepted in interstate commerce and stating that the total amount of $713,638.10 cannot be verified by Respondent (Answer ¶ III).

On November 17, 1997, Complainant filed Motion for Decision Without Hearing by Reason of Admission and Supporting Memorandum [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing by Reason

of Admissions [hereinafter Proposed Default Decision]. Respondent did not file any response to Complainant's November 17, 1997, filings. On January 6, 1998, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued Decision Without Hearing by Reason of Admissions [hereinafter Default Decision] in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) in which the ALJ: (1) found that Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848"; (2) found that Respondent has admitted in its bankruptcy pleadings that, as of November 20, 1995, it owed at least $713,638.10 for 578 lots of perishable agricultural commodities to the 19 sellers that are referred to in paragraph III of the Complaint; (3) concluded that Respondent's admitted failures to make full payment promptly for perishable agricultural commodities constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances of the violation (Default Decision).

On April 13, 1998, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On April 29, 1998, Complainant filed Motion to Dismiss Appeal Petition. On May 5, 1998, Respondent filed Objection to the United States Department of Agriculture's Motion to Dismiss, and on May 7, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Applicable Statutory Provisions and Regulation

7 U.S.C.:

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE)

UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the [PACA] shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the [PACA], or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. "Full payment promptly," for purpose of determining violations of the [PACA], means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on or about April 7, 1997.[2] Respondent filed a timely Answer admitting that, on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" and that Respondent states in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims* that it owes the 19 sellers referred to in paragraph III of the Complaint at least $859,886.05.

On November 17, 1997, Complainant filed Motion for Default Decision in

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[2]Letter from Chris Marchand, Claims and Inquiries, United States Postal Service, to Joyce A. Dawson, Hearing Clerk, United States Department of Agriculture, dated June 10, 1997.

which Complainant asserts that Respondent admits in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in a bankruptcy proceeding filed in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," that Respondent owes the 19 sellers identified in paragraph III of the Complaint at least $713,638.10 for perishable agricultural commodities. Complainant compares the amounts which Respondent is alleged in paragraph III of the Complaint to have failed to pay to 19 sellers in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)) to amounts Respondent admits to owing these same 19 sellers in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," as follows:

Seller	Complaint	Bankruptcy Pleading
Boston Tomato Co., Inc.	$ 55,223.00	$ 54,593.00
DiMare Bros., Inc	43,037.25	44,774.50
Dominic Gandolfo, Inc.	39,526.75	36,861.25
Noyes & Bimber, Inc.	15,022.00	13,842.00
Mutual Produce, Inc.	27,512.15	14,564.00
Marco Tomato Co.	18,723.50	20,795.50
Community-Suffolk, Inc.	69,118.95	101,650.00
Hale & Cole Produce, Inc.	15,221.50	15,221.50
P. Tavilla Co., Inc.	29,778.50	28,986.00
Garden Fresh Salad Co., Inc.	41,099.95	48,115.00
Apples Plus, Inc.	10,435.00	10,708.00
S. Strock & Co., Inc.	43,960.71	72,587.95
W.H. Lailer & Co., Inc.	34,811.93	50,519.10
M. Cutone Mushroom Co.	142,062.29	172,511.70
D'Arrigo Bros., Co.	41,681.54	55,722.05
Forlizzi Bros., Inc.	21,391.00	21,258.25
Bay State Produce Co., Inc.	10,906.69	13,780.25
Fresh Start Marketing, Inc.	35,294.30	52,326.50
Lisitano Produce, Inc.	18,831.09	31,069.50
Total	**$713,638.10**	**$859,886.05**

Motion for Default Decision at unnumbered page.

A copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a letter dated November 18, 1997, from the

Hearing Clerk, were served on Respondent by certified mail on November 24, 1997.[3] The November 18, 1997, letter from the Hearing Clerk states, as follows:

CERTIFIED RECEIPT REQUESTED November 18, 1997

Mr. Victor Dahar
Esquire of 20 Merrimack Street
Manchester, New Hampshire 03101

Dear Mr. Dahar:

Subject: In re: Queen City Farms, Inc., Respondent -
PACA Docket No. D-97-0020

Enclosed is a copy of Complainant's Motion for Decision Without Hearing by Reason of Admissions and Supporting Memorandum, together with a copy of the Decision Without Hearing by Reason of Admissions, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,
/s/
JOYCE A. DAWSON
Hearing Clerk

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[3]See Domestic Return Receipt for Article Number P 093 033 773, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by D. Marlen, and stating that the date of delivery is November 24, 1997. (The Answer indicates that Respondent was represented by Peter M. Solomon, Esq., of Boutin & Solomon, P.A., Londonderry, New Hampshire. However, on September 30, 1997, Mr. Solomon withdrew from the case and stated that "the only person who can appropriately represent [Respondent] would be the United States Bankruptcy Court Appointed Trustee. The Trustee is Victor Dahar, Esquire of 20 Merrimack Street, Manchester, New Hampshire 03101." (Letter dated September 23, 1997, from Peter M. Solomon to Ms. Linda Hamlin, filed September 30, 1997.) However, Respondent's Appeal from Decision Without Hearing by Reason of Admissions [hereinafter Appeal Petition], filed on April 13, 1998, and Respondent's Objection to the United States Department of Agriculture's Motion to Dismiss, filed May 5, 1998, are signed by Peter M. Solomon of Solomon, P.A., Londonderry, New Hampshire, as attorney for Michael Litvin, former vice-president and director of Respondent.)

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in 7 C.F.R. § 1.139.

On January 6, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ filed the Default Decision concluding that Respondent's admitted failures to make full payment promptly to 19 sellers for 578 lots of perishable agricultural commodities in the total amount of at least $713,638.10 constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Default Decision at unnumbered page).

The Default Decision was served on Complainant on January 8, 1998, and on Respondent on January 10, 1998.[4] The Default Decision provides:

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § [sic] 1,139 [sic] and 1.145).

Default Decision at unnumbered last page.

A letter from the Office of the Hearing Clerk accompanying the Default Decision states:

CERTIFIED RECEIPT REQUESTED January 6, 1998

Mr. Victor Dahar
Esquire of 20 Merrimack Street
Manchester, New Hampshire 03101

Dear Mr. Dahar:

Subject: **In re: Queen City Farms, Inc., Respondent-**
PACA Docket No. D-97-0020

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[4]See Domestic Return Receipt for Article Number P 093 033 798, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by Victor Dahar, and stating that the date of delivery is January 10, 1998.

Enclosed is a copy of the Decision issued in this proceeding by Administrative Law Judge Edwin S. Bernstein on January 6, 1998.

Each party has thirty (30) days from the issuance of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its issuance. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,
/s/
PAMELA M. WRIGHT
Legal Technician

Section 1.145(a) of the Rules of Practice provides that:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the required time, and on February 20, 1998, the Hearing Clerk issued a Notice of Effective Date of Decision Without Hearing by Reason of Admissions, which was served on Respondent on February 26, 1998.[5]

On April 13, 1998, Respondent filed Respondent's Appeal Petition. For the

[5]See Domestic Return Receipt for Article Number P 368 420 969, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by D. Marlen, and stating the delivery date is February 26, 1998.

reasons set forth below, Respondent's Appeal Petition must be rejected as untimely.

Respondent's Appeal Petition, filed April 13, 1998, was not filed within 35 days after service of the Default Decision on Respondent. In accordance with 7 C.F.R. § 1.139, the Default Decision became final 35 days after service on Respondent, and the Judicial Officer therefore no longer has jurisdiction to consider Respondent's Appeal Petition. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.[6]

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part,

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[6]*See In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .[7]

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[7] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after an initial decision and order becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within 60 days of the entry of the order. 28 U.S.C. § 2344 (1976). This 60-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[8]

Accordingly, Respondent's Appeal Petition and request for oral argument must be denied, since they are too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal." (7 C.F.R. §

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court can neither waive nor extend).

[8] *Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

1.142(c)(4).)

Even if Respondent's Appeal Petition had been timely filed, it would have been denied based upon Respondent's failure to file timely objections to Complainant's Motion for Default Decision. The Rules of Practice and the Hearing Clerk's November 18, 1997, letter clearly provide that Respondent must file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service on Respondent (7 C.F.R. § 1.139). Respondent had ample opportunity during this 20-day period to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. In view of Respondent's admissions in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in connection with its voluntary petition in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," there is no material issue of fact that warrants holding a hearing.[9] Moreover it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.[10] The same order

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[9]*See In re Tolar Farms*, 56 Agric. Dec. 1865, 1878 (1997) (stating that in view of respondents' answer and respondents' promissory notes attached to complainant's motion for a default decision, there is no material issue of fact that warrants holding a hearing); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (stating that in view of respondent's admissions in the documents it filed in a bankruptcy proceeding, there is no material issue of fact that warrants holding a hearing); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1413 (1995) (stating that the Chief ALJ correctly held that a hearing was not required where the record, including respondent's bankruptcy documents, shows that respondent has failed to make full payment exceeding a *de minimis* amount), *appeal dismissed*, No. 95-70906 (9th Cir. Nov. 8, 1996).

[10]The Complaint alleges that Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities, in the total amount of $713,638.10, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III). Respondent admits in its bankruptcy filing that it owes these same 19 sellers $859,886.05. Respondent admits in its bankruptcy filing that it owes the same amount as alleged in paragraph III of the Complaint to one of these perishable agricultural commodity sellers: Hale & Cole Produce, Inc. Respondent asserts in its bankruptcy filing that it owes more than the amounts alleged in paragraph III of the Complaint to 12 of these perishable agricultural commodity sellers: DiMare Bros., Inc.; Marco Tomato Co.; Community-Suffolk, Inc.; Garden Fresh Salad Co., Inc.; Apples Plus, Inc.; S. Strock & Co., Inc.; W.H. Lailer & Co., Inc.; M. Cutone Mushroom Co.; D'Arrigo Bros., Co.; Bay State Produce Co., Inc.; Fresh Start Marketing, Inc.; and Lisitano Produce, Inc. Respondent asserts in its bankruptcy filing that it owes $630 less than the amount alleged in paragraph III of the Complaint ($55,223) to Boston Tomato Co., Inc.; $2,665.50 less than the amount alleged in paragraph III of the Complaint ($39,526.75) to Dominic Gandolfo, Inc.; $1,180 less than the amount alleged in paragraph III of the Complaint ($15,022) to Noyes & Bimber, Inc.; $12,948.15 less than the amount alleged in paragraph III of the Complaint ($27,512.15) to Mutual Produce, Inc.; $792.50 less than the amount alleged in paragraph III of the Complaint ($29,778.50) to P. Tavilla Co., Inc.; and $132.75 less than the amount alleged in paragraph III of the Complaint ($21,391) to Forlizzi Bros., Inc. (Complainant's Motion for Default Decision).

would be issued in this case unless the proven violations are *de minimis*.[11]

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[12] Respondent has shown no basis for setting aside the Default Decision. The record establishes that Respondent admits in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in connection with its voluntary petition in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," that it owes at least $713,638.10 to the 19 sellers to whom Complainant alleges Respondent failed to make full payment promptly, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.[13]

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[11] *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (1997); *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question); *In re Fava & Co.*, 46 Agric. Dec. 79 (1984) (Ruling on Certified Question).

[12] *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[13] *See, e.g., Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Scamcorp, Inc.*, 57 Agric. Dec. ___ (Jan. 29, 1998)

Willfulness is not a prerequisite to publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondent's violations of 7 U.S.C. § 499b(4) were 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.[14] Willfulness is reflected by

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(concluding that respondent's failure to pay 35 sellers $634,791.13 for 165 transactions involving perishable agricultural commodities, during the period of April 1993 through June 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Allred's Produce*, 56 Agric. Dec. 1884 (1997) (concluding that respondent's failure to pay 19 sellers $336,153.40 for 86 lots of perishable agricultural commodities, during the period of May 1993 through February 1996, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997) (holding that respondents' failure to pay 7 sellers $192,089.03 for 46 lots of perishable agricultural commodities, during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers $206,850.69 for 62 lots of perishable agricultural commodities, during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers $238,374.08 for 174 lots of perishable agricultural commodities, during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers $1,960,958.74 for 345 lots of perishable agricultural commodities, during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers $101,577.50 for 23 lots of perishable agricultural commodities, during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers $245,873.41 for 113 lots of perishable agricultural commodities, during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

[14]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); Cox v. United States Dep't of Agric., 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re*

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.[15] Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $713,638.10 for 578 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period May 1995 through November 1995.

Scamcorp, Inc., 57 Agric. Dec. ___, slip op. at 34 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1905-06 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

[15] *See Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 94 (2d Cir. 1997); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 34-35 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1906-07 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879-80 (1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

Respondent knew, or should have known, that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over a 7-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not have sufficient capitalization; and consequently, could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agr icultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.[16]

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

The courts have recognized that administrative agencies "should be `free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[17] If Respondent were permitted to contest some of the allegations of fact after admitting the material

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[16]*See In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 36 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1907 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1880-81 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

[17]*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

allegations in the Complaint, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's Appeal from Decision Without Hearing by Reason of Admissions, filed April 13, 1998, is denied. The Decision Without Hearing by Reason of Admissions, filed by Administrative Law Judge Edwin S. Bernstein on January 6, 1998, is the final Decision and Order in this proceeding.

In re: PETER DeVITO COMPANY, INC.
PACA Docket No. D-97-0014.
Decision and Order filed July 29, 1997.

Admission of material allegations - Official notice of bankruptcy documents - Failure to make full payment promptly - Willful, flagrant and repeated violations.

Eric Paul, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "PACA", instituted by a Complaint filed on January 14, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It was alleged in the complaint that respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 11 sellers for purchases of 181 lots of perishable agricultural commodities in the course of interstate commerce in the amount of $1,202,849.65 during the period April 1995 through August 1996. The complaint also alleged that on October 25, 1996, respondent filed a Voluntary Petition in the United States Bankruptcy Court for the Eastern District of Massachusetts pursuant to Chapter 11 of the Bankruptcy

Code(11 U.S.C. § 1100 *et seq.*), designated Case No. 96-18215-JNF, in which respondent admitted owing ten of the eleven sellers named in the complaint amounts totaling $1,243,119.85. Complainant requested that, as a result of respondent's violations of the PACA, a finding should be made that respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and further requested that respondent's license be revoked.

Respondent submitted an answer on February 19, 1997, in which it admitted that it purchased, received and accepted the lots of perishable agricultural commodities alleged in the complaint, but denied that it willfully failed to promptly pay the prices therefor. No explanation was offered in support of this denial. Respondent admitted filing the bankruptcy petition alleged, and in response to the allegation that respondent in Schedule F of its bankruptcy petition admitted owing ten of the eleven sellers named in the complaint amounts that total $1,243,119.80, respondent further stated that said Schedule F speaks for itself.

Complainant filed a request that official notice be taken of the documents filed by respondent in its bankruptcy proceeding, and a motion with supporting memorandum seeking a decision without hearing by reason of admissions made by respondent in its answer and in its bankruptcy petition and schedules. Based upon a careful consideration of the pleadings and precedent decisions cited by complainant, official notice is taken of the bankruptcy documents filed by respondent and this decision is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Pertinent Statutory Provisions

7 U.S.C. § 499b. **Unfair conduct**

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought and sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in such commodity to the person with whom such transaction is had*; or to fail, without reasonable cause, to perform any

specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter. (emphasis added).

7 U.S.C. § 499h. **Grounds for suspension and revocation of license**

(a) **Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulation

7 C.F.R. § 46.2 Definitions.

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

. . . .

Findings of Fact

1. Peter DeVito Company, Inc. (hereinafter "respondent"), is a corporation organized and existing under the laws of the State of Massachusetts. Its business and mailing address is 34 Market Street, Everett, Massachusetts 02149.

2. At all times material herein, respondent was licensed under the provisions of the PACA. License number 890002 was issued to respondent on October 3, 1988. This license has been renewed annually and is next subject to renewal on or before October 3, 1997.

3. Respondent, during the period April 1995 through August 1996, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased, received, and accepted 181 lots of vegetables with agreed purchase prices in the total amount of $1,202,849.65 from 11 sellers in interstate commerce.

4. On October 25, 1996, respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*) in the United States Bankruptcy Court for the Eastern District of Massachusetts. This petition has been designated Case No. 96-18215-JNF.

5. Respondent has admitted in bankruptcy pleadings of which the Secretary may take official notice that it owes fixed amounts that total $1,243,119.85 to 10 of the 11 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of $1,202,849.65 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 20 creditors named are 10 of the firms listed in the complaint, with the amounts of their claims. A comparison with the table set forth in paragraph III of the complaint reveals that the amounts acknowledged as owed by respondent are identical for six of the produce sellers, slightly higher for three of the produce sellers, and slightly lower for one of the produce sellers. One produce firm alleged to be unpaid for $12,873.50 in the complaint, Robert O. Davenport & Sons, is not identified as a creditor on Schedule F. The amounts alleged unpaid by complainant and admitted unpaid by respondent with respect to the other ten produce firms are as follows:

Seller	Complaint	Schedule F
TGT, Inc.	$147,405.90	$147,405.90
R.D. Clifton Produce Company	8,167.00	8,167.00
James J. Piedmont & Sons, Inc.	60,484.00	60,484.00

M & R Company	53,411.35	52,646.00
Talley Farms	19,329.50	19,329.00
C-T Sales, Inc.	28,999.00	28,999.00
Cayuga Produce, Inc.	9,614.50	9,614.00
Windsor Distributing, Inc.	289,766.95	317,000.00
Walden-Sparkman, Inc.	423,975.90	444,258.15
John Molinelli, Inc.	148,822.05	155,216.80
	$1,189,976.15	**$1,243,119.85**

6. Respondent purchased perishable agricultural commodities from TGT, Inc. and Windsor Distributing, Inc. in 51 unpaid transactions where payment was due within 21 days from the dates on which the lots were delivered and accepted as set forth in paragraph III of the complaint. Payments due between April 26, 1995 and February 16, 1996 in these 51 transactions were 8 to 18 months past due when respondent filed its Chapter 11 Petition on October 25, 1996.

7. Respondent purchased perishable agricultural commodities from the other eight sellers named above in 127 unpaid transactions where payment was due within 10 days from the dates on which the lots were delivered and accepted as set forth in paragraph III of the complaint. Payments due between July 17, 1995 and August 11, 1996 in these 127 transactions were 2 to 15 months past due when respondent filed its Chapter 11 Petition on October 25, 1996.

Conclusions of Law

Respondent has admitted in its answer that it purchased, received and accepted from 11 sellers, during the period April 1995 through August 1996, 181 lots of vegetables in interstate commerce having agreed purchase prices in the total amount of $1, 202,849.65. Respondent has further admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 10 of these 11 sellers at least $1,189,976.15 for 178 of these lots of perishable agricultural commodities on October 25, 1996.[1] Respondent's admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of section

[1]Official notice is hereby taken of these documents as authorized by *In re Five Star Food Distributors, Inc.*, PACA Docket No. D-96-0521 (January 23, 1997), 56 Agric. Dec. ___; *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), *remanded on other grounds, Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987).

2(4) of the PACA (7 U.S.C. § 499b(4)).[2] Respondent's failures to pay for numerous and substantial produce purchase obligations, which respondent has acknowledged as liquidated, undisputed and non contingent debts, within the time limits established by a substantive regulation duly promulgated under the PACA are willful as a matter of law[3], and respondent's denials in its answer that " it willfully failed to promptly pay the prices therefor" and "it willfully and flagrantly violated Sec. 2(4) of the P.A.C.A. (7 U.S.C. sec. 499b(4))" do not establish the existence of a bona fide dispute as to material facts that would require the holding of a hearing pursuant to the Rules of Practice in the proceeding.[4] The appropriate sanction for repeated or flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4) when the respondent has a valid PACA license is revocation of license.[5] Accordingly, the following Order should be issued.

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[2]See, e.g., *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F. 2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F. 183 (9th Cir. 1972)(finding 26 violations involving $19,059.08 occurring over 2 1/2 months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110,115 (2d Cir. 1967)(concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.*, 55 Agric. Dec. 1234 (1996), *appeal docketed*, No. 97-4053 (2d Cir. April 2, 1997) (Havana's failure to pay 66 sellers $1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo's failure to pay 6 sellers $101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Food Distributors*, supra, slip op. at 18 (holding that 174 violations involving 14 sellers and at least $238,374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter of law").

[3]*Id.*

[4]A respondent's evil intent need not be established for a violation to be willful, provided the record shows that the respondent acted with careless disregard of statutory requirements. The admissions in this case establish a gross neglect of the express provisions of the PACA and a substantive regulation known by respondent to require prompt payment. See, *In re Five Star Food Distributors, Inc., supra*, slip op. At 20-21, and 7 C.F.R. § 46.2(aa)(5),(11).

[5]See, *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 612, 620-627 (1989)(reviewing the goal of having only financially responsible persons operating and the special exception provided in 11 U.S.C. § 525 for enforcement of the PACA); and *In re Andershock Fruitland, Inc., and James A. Andershock, d/b/a AAA Recovery*, 55 Agric. Dec. 1204,1224-28 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996)(the license revocation requirement set forth in *Caito* is not altered by the Department's new sanction policy articulated in See *In re SS. Linn County, Inc.*, 50 Agric. Dec. 476 (1991)).

Order

Respondent Peter DeVito Company, Inc.'s PACA license is hereby revoked.

This Order shall become final and effective thirty-five (35) days after service hereof upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies thereof shall be served upon the parties.

[This Decision and Order became final February 25, 1998.-Editor]

In re: GEORGE TOWELL DISTRIBUTORS, dba FANTASTIC PRODUCE.
PACA Docket No. D-98-0004.
Decision and Order filed April 16, 1998.

Failure to file timely answer - Failure to make full payment promptly - Willful, flagrant, and repeated violations.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S. C. § 499a *et seq.)* (PACA), which was instituted on December 16, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, by the filing of a complaint alleging that Respondent failed to account and make full payment promptly of the net proceeds, in the total amount of $576,334.45, due to three growers for perishable agricultural commodities which it received, accepted, and sold on behalf of those growers in interstate commerce between January 1995 and July 1996. The complaint also alleges that Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of $692,221.72, to sixteen (16) sellers for 204 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between April 1995 through July 1996. A copy of the complaint was served on Respondent December 31, 1997, and Respondent did not file an answer. The period for filing a timely answer has elapsed.

As a result of the Respondent's failure to file an answer within the time required by section 1.136 of the Rules of Practice governing this proceeding (7

C.F.R. § 1.136), Complainant filed a motion for the issuance of a default decision. Accordingly, the following Decision Without Hearing by Reason of Default is issued without further investigation or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Finding of Fact

1. George Towell Distributors, herein referred to as Respondent, is a corporation doing business as Fantastic Produce, organized and existing under the laws of State of Florida with a business address of 1131 N.W. 9th Street, Belle Glade, Florida 33430 and a business mailing address of P.O. Box 159, Belle Glade, Florida 33430-0159.

2. PACA license number 910137 was issued to Respondent on November 1, 1990. This license was suspended on November 5, 1996, because Respondent failed to pay a reparation order that had been entered against it. Respondent's PACA license was terminated on November 1, 1997, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because it failed to pay the required annual renewal fee.

3. As set forth more fully in paragraph III of the complaint, Respondent failed to account and make full payment promptly of the net proceeds due, in the total amount of $576,334.45, to three growers for perishable agricultural commodities which it received, accepted, and sold on behalf of those growers in interstate commerce between January 1995 and July 1996.

4. As set forth more fully in paragraph IV of the complaint, Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of $692,221.72, to sixteen (16) sellers for 204 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between April 1995 and July 1996.

Conclusions

Respondent's failures to remit the net proceeds due to three growers and its failures to make full payment promptly to sixteen sellers, as set forth above in Findings of Fact 3 and 4, constitute willful, repeated, and flagrant violations of Section 2 of the PACA (7 U.S.C. § 499b), for which the order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of Section 2 of the PACA (7 U.S.C. § 4996b).

The facts and circumstances of Respondent's violations of the PACA shall be published.

As provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139,.145), this Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service.

Copies hereof shall be served upon the parties.

[This Decision and Order became final June 1, 1998.-Editor]

In re: BOBBY E. ROBERTSON, dba BOBBY ROBERTSON PRODUCE.
PACA Docket No. D-98-0009.
Decision and Order filed April 20, 1998.

Failure to file answer - Failure to make full payment promptly - Willful, repeated, and flagrant violations.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a Complaint filed on January 2, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1994 through December 1996, respondent failed to make full payment promptly to 10 sellers in the total amount of $426,170.11 for 42 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the Complaint was mailed to the respondent by certified mail on January 2, 1998, returned unclaimed on February 6, 1998, and was mailed again by regular mail on February 10, 1998. This complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Bobby Robertson, d/b/a Bobby Robertson Produce, was a corporation organized and existing under the laws of the State of Alabama. Its business address was 414 Finley Avenue, Birmingham, Alabama 35207. Its mailing address was Route One, Box 2595, Oneonta, Alabama 35121.

2. At all times material herein, respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 950699 was issued to respondent on February 9, 1995. This license terminated on February 9, 1997, when respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 1994 through December 1996, respondent purchased, received and accepted, in interstate commerce from 10 sellers, 42 shipments of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $426,170.11.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 16, 1998.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Cox Tomato Co., Inc. PACA Docket No. D-97-0006. 3/2/98.

Premier Produce Company, Inc. PACA Docket Nos. D-98-0018 & D-97-0033. 6/2/98.