AGRICULTURE DECISIONS

Volume 57

July – December 1998

UNITED STATES DEPARTMENT
OF AGRICULTURE

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket 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.

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COURT DECISION

VITO BALICE v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CV F 92-5483-AWI.
Filed July 14, 1998.

Marketing order — Almonds — Civil penalty — Eighth amendment — Due process.

The Circuit Court granted the United States Department of Agriculture's cross-motion for summary judgment, holding the Judicial Officer's (JO) assessment of a $225,000 civil penalty against plaintiff for violations of the Almond Marketing Order (7 C.F.R. pt. 981) was not arbitrary and capricious. The Court found the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which requires agency programs or policies to reduce or to waive civil penalties for violations by small entities, was not applicable because SBREFA does not appear to apply to adjudication and SBREFA was enacted after the JO assessed the civil penalty. The Court concluded that the assessment of a civil penalty, after notice and an opportunity to be heard, did not violate plaintiff's right to due process and that the amount of the civil penalty was not in violation of the Eighth Amendment to the United States Constitution, as excessive.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Docs. 19, 22]

This is an action by Vito Balice ("Balice") seeking review of the imposition of a $225,000 civil penalty imposed by the United States Department of Agriculture ("the USDA") against him. Balice was fined for violating certain regulations contained within the California Almond Marketing Order ("the Marketing Order"). 7 C.F.R. § 981 et seq. Both Balice and the USDA now move for summary judgment of Balice's action for judicial review. The court has jurisdiction to review this administrative action by the Secretary of Agriculture. 7 U.S.C. § 608c(14)(B).

PROCEDURAL HISTORY

In 1990 the administrator of the United States Department of Agriculture's Agricultural Marketing Service filed an administrative complaint alleging that

Balice, an agent of the O.R.C. Company, as well as Onofrio Calabrese and Rocco Calabrese, violated certain provisions of the Marketing Order. In response Balice filed an answer, and also an administrative petition challenging the lawfulness of the regulations. In 1991 a hearing as to the administrative complaint was held before an administrative law judge, who ruled that Balice had violated certain provisions of the Almond Marketing Order, and thereafter fined Balice $216,000.[1] Balice was fined $62,000 for violating a "reserve" requirement, $74,500 for violating record keeping provisions, $1,000 for failing to file certain reports either at all or on time, and $78,500 for violating "inedible disposition" regulations. The administrative law judge also heard Balice's petition, denied any relief to Balice based on the petition challenging the regulations, and dismissed the petition.

Balice then filed administrative appeals, both as to the imposition of the fine and as to the dismissal of Balice's petition. As to Balice's appeal relating to the imposition of the fine, the USDA filed a cross-appeal seeking to increase the fine to $582,000.

On January 31, 1992 the Judicial Officer upheld the ALJ's dismissal of Balice's petition challenging the lawfulness of the regulations. Balice then sought judicial review of that decision by filing a complaint, which is pending before another judge of this court. *Balice v. United States Dep't of Agriculture*, CV F 92-5108 OWW. After the USDA answered that complaint, the parties entered into a stipulation approved by the Magistrate Judge on May 12, 1992 staying the action due to the pendency of appeals before the Ninth Circuit that may address the same, or similar, legal issues.[2]

On June 25, 1992 the Judicial Officer issued a second order, generally affirming the ALJ's decision as to the administrative complaint, but revising the fine against Balice. The Judicial Officer affirmed the ALJ's findings and conclusions regarding the four types of violations, and added certain findings. The Judicial Officer then fined Balice $124,000 for the "reserve" regulation violation, $74,500 fine for record keeping violations, $2,000 for the failure to timely file reports, and $25,000 for the "inedible disposition" regulation violations. Thus the total fine against Balice was $225,500. Because the Calabreses did not appeal the $216,000 fine

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[1]The $216,000 fine was assessed jointly and severally against Balice, Onofrio Calabrese and Rocco Calabrese. The Calabreses, Balice's uncles who live in Italy, did not challenge the ALJ's decision, and are not a party to this action for judicial review.

[2]The stay of that action remains in effect, neither party having moved for relief from the stay to resolve that separate action, and neither party having filed a motion to consolidate or relate that action to this action.

against them, the Judicial Officer determined that $216,000 of the $225,500 fine against Balice would be jointly and severally imposed against all three individuals, while the balance of $9,500 would be imposed as against Balice only.

Balice filed this second action to challenge the findings and conclusions of the Judicial Officer. This action was originally assigned to the Hon. Garland E. Burrell, Jr. On October 30, 1992 the Magistrate Judge approved a stipulation between the parties to say this action due to certain appeals before the Ninth Circuit that reportedly might address some of the legal issues presented in Balice's complaint. Having heard nothing from the parties from that point, on December 4, 1996 Judge Burrell issued an Order directing the parties to show cause as to why this action should not be dismissed. Balice responded that the Ninth Circuit appeals had not addressed many of the issues in his complaint, and he proposed that the court set a briefing schedule for cross-motions for summary judgment.

On March 5, 1997 Judge Burrell set a schedule for the filing of cross-motions for summary judgment, thus lifting the stay of this action by implication.

On July 15, 1997 Balice filed his motion for summary judgment. The USDA filed its cross-motion for summary judgment on September 24, 1997. On October 16, 1997 the USDA filed the administrative record.

On December 15, 1997 this action was reassigned to the Hon. Anthony W. Ishii. On April 15, 1998 this court issued an order vacating the previously set hearing date for the summary judgment motions, which was to have been April 20, 1998, and directed the parties to cure certain deficiencies in the administrative record. On May 18, 1998 the USDA filed certain additions and corrections to the administrative record, thus curing the record deficiencies. On June 5, 1998 the court issued an order stating that it was taking the pending motions for summary judgment under submission.

LEGAL STANDARD

Summary judgment shall be granted when the undisputed facts entitle the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment motions are particularly appropriate where, as here, the court's review is of an administrative record. *Adams v. United States*, 318 F.2d 861, 865 (9th Cir. 1963).

A district court reviewing the action of an administrative agency shall "hold unlawful and set aside agency action, findings, and conclusions" which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "unsupported by substantial evidence." 5 U.S.C. §§ 706(2)(A), (B), (E).

In determining whether an agency decision is arbitrary, capricious, or an abuse of discretion, the standard of review is narrow, and the district court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In applying this standard of review, the court determines whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Resources Ltd. v. Robertson*, 35 F.3d 1301, 1304 (9th Cir. 1993).

"Substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Western Truck Manpower, Inc. v. United States Dep't of Labor*, 12 F.3d 151, 153 (9th Cir. 1993) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

The court must also grant "a high degree of deference to an agency's interpretation of the statutory provisions and regulations it is charged with administering." *Natural Resources Defense Council v. United States Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (citation omitted).

DISCUSSION

In this action Balice seeks judicial review of the Secretary of Agriculture's decision that Balice violated four aspects of the California Almond Marketing Order.

The California almond handling industry is regulated by the Almond Marketing Order, 7 C.F.R. § 981 (the "Order"). The Order was established in 1950 by USDA pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c (the "Act"). The purpose of the Act is to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce" as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. §§ 602(1), 602(4) (1988). The Act authorizes the Secretary of Agriculture (the "Secretary") to issue, following notice and an opportunity for hearing, marketing orders that will "tend to effectuate the declared policy of [the Act]" with respect to the particular commodity. 7 U.S.C. § 608c(4) (1988). The Order is administered by the [California Almond] Board, which has the power to "make rules and regulations to effectuate the terms and provisions" of the Order. 7 C.F.R. § 981.38 (1993). The Board has ten members, all of whom are industry representatives appointed by the Secretary. The Board engages in a variety of activities, including research and development, marketing, quality control, and volume regulation.

Cal-Almond, Inc. v. United States Dep't of Agriculture, 14 F.3d 429, 433 (9th Cir. 1993).

Under 7 U.S.C. § 608c(14)(B) the Secretary of the USDA can assess against a handler or an agent of a handler a civil penalty of up to $1,000 per day for each violation of a marketing order. Each day that a violation continues is deemed to be a separate day for which a penalty of up to $1,000 can be assessed.

The administrative order at issue imposes a fine against Balice of $225,000, and includes findings that Balice violated certain regulations within the Marketing Order. Balice contests certain aspects of each of the four violations, and also challenges the fine as a whole as being excessive.

I. The Reserve Requirement Violation

The Judicial Officer fined Balice $124,000 for violating the "reserve" requirement of the Marketing Order, fining him $1,000 per day for 124 days of violation.

The Ninth Circuit has explained the nature of the reserve requirement as follows:

> The reserve requirement is the mechanism the Board uses to regulate the volume of almonds entering the market, pursuant to the Act's goals of protecting almond prices and maintaining an orderly flow of almonds to market. 7 U.S.C. § 608c(6)(A) (1988). Every year, the Board recommends to the Secretary what percentage of the total almond crop should be "salable" and what percentage should be held in "reserve" by handlers. 7 C.F.R. § 981.49 (1993). Handlers may only sell the salable percentage of almonds they receive; they must withhold from marketing an amount equal to the reserve percentage. 7 C.F.R. § 981.50 (1993). The Secretary designates the final percentage based on the Board's recommendation and "any other available information." 7 C.F.R. § 981.47 (1993).

Cal-Almond, Inc., 14 F.3d at 443.

For the crop year 1987-88, the reserve requirement was 18%, meaning that Balice was required to withhold from both domestic and export markets 18% of the merchantable almonds he obtained from growers in that crop year. 52 Fed. Reg. 39,900 (1987). On August 1, 1988 handlers were allowed to "release" their entire reserve into edible markets after the Secretary of Agriculture determined that the market could sustain such an influx. 53 Fed. Reg. 28,630 (1988).

The Judicial Officer found that Balice, as an agent for the O.R.C. Company,

violated 7 C.F.R. §§ 981.46,[3] 981.50,[4] and 981.52[5] on March 22, 1988 and from March 31, 1988 through July 31, 1988, for a total of 124 days. The Judicial Officer further found that Balice fully understood the reserve requirement but deliberately violated the regulation.

In his motion for summary judgment Balice does not specifically contend that these findings are unsupported by substantial evidence.[6] Balice instead contends that the amount of the fine was excessive and was arbitrary and capricious, because (1) he shipped the reserve to Italy at the bequest of his uncles because the uncles believed that they needed the reserve in Italy to comply with an Italian currency rule, (2) the Secretary failed to show that the almonds not held in reserve were actually placed in the stream of commerce, and (3) the Judicial Officer did not consider other mitigating circumstances, namely that O.R.C.'s reserve requirement was small given that O.R.C. itself was a small handler of California almonds. Because Balice does not expressly challenge the sufficiency of the evidence as to the finding that he violated the reserve requirement, the court interprets Balice's arguments as being offered to lower the amount of the fine, rather than to contest the fact that he was found in violation of the reserve regulation.

Balice's first argument is that his uncles ordered him to ship some portion of the reserve to Italy, which is perhaps characterized as a duress defense, in that the uncles asserted to Balice that they needed the almonds in Italy in order to comply with an Italian currency rule. The Judicial Officer found that Balice and uncles knew well in advance of the deadlines imposed by the Italian law in question that they were subject to both sets of laws, and did nothing to prepare for the perceived conflict. Further the Judicial Officer adopted the reasoning of the ALJ that the Italian currency law and the United States' almond reserve requirements were not in conflict in the first place, and this court finds no error in such a legal conclusion.

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[3]"When a reserve percentage has been fixed for any crop year, . . . no handler shall handle almonds except on condition that he comply with the requirements in respect to withholding reserve almonds."

[4]When "reserve percentages are in effect for a crop year, each handler shall withhold from handling a quantity of almonds having a kernel weight equal to the reserve percentage of the kernel weight of all almonds such handler receives for his own account during the crop year."

[5]"Each handler shall, at all times, hold in his possession or under his control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligations."

[6]To the extent that Balice may be implicitly challenging the quantum of evidence offered to sustain the findings, the court finds that the Judicial Officer's findings are supported by substantial evidence as set forth and identified in the Judicial Officer's opinion at pp. 7-11, 33-34, 38, and 42.

Based on the above the Judicial Officer's decision not to consider this defense to be an appropriate mitigating factor calling for a lower fine was not a capricious and arbitrary decision.

As to whether the Judicial Officer did or did not find that Balice actually caused harm to his competitors by placing the almonds not held in reserve in the stream of commerce, the record is not clear. However, the findings that Balice willfully and deliberately violated the reserve requirement and that O.R.C. did not have on hand a sufficient reserve on hand for 124 days would seem to give rise to a reasonable inference that the almonds had been placed into the stream of commerce in some manner or another. If in fact no such finding was implicitly made by the Judicial Officer, the court nevertheless finds that the Judicial Officer's decision not to lower the daily fine on the basis that the USDA did not prove that Balice caused actual harm to a competitor was not an arbitrary and capricious decision.

The court also finds that, contrary to Balice's interpretation of the administrative record, the Judicial Officer did consider the asserted mitigating factor that Balice was a small handler. The Judicial Officer expressly stated that, as to the administrative complaint as a whole, he would consider any "circumstances shedding light on the degree of culpability involved." Judicial officer's Decision and Order, p. 32. After reviewing the Judicial Officer's opinion, this court cannot conclude that the Judicial Officer failed to consider any evidence of additional circumstances offered by Balice. As to the point that Balice was a small handler, applied to the reserve requirement violation, the Judicial Officer noted that, based on the reserve amount that Balice was required to hold and on the then-prevailing market rate for edible almonds, Balice stood to gain close to a quarter to a million dollars in profit by releasing the reserve before the release date. From Balice's perspective he may have been a small handler as compared to larger operators, but the profit available to him from selling the reserve almonds before the release date was not small. Also as noted by the Judicial Officer if all "small" handlers ignored the reserve requirements the integrity of the reserve program would quickly erode.

Additionally the Judicial Officer reported that imposition of the fines against Balice and his uncles were the first fines to be imposed for handlers of California almonds under the then-new section 608c(14)(B),[7] and that the first fine should set the standard. Congress passed section 608c(14)(B) to provide for a civil penalty alternative to the previously available criminal penalties for violation of the reserve requirement. The Judicial Officer believed that it was congressional intent to create

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[7] 7 U.S.C. § 608c(14)(B) became law on December 22, 1987. Public Law No. 100-203, tit. I, § 1501, 101 Stat. 1330 (1987).

the alternative civil penalties because federal prosecutors rarely invoked the available criminal statute due to workload restrictions. The Judicial Officer concluded that, to be an effective alternative to criminal prosecution, the first civil fine cases should be sufficient to deter similar conduct by Balice and all other handlers in the future.

In any action in which a violation of the Marketing Order is found, the Judicial Officer has the discretion granted by 7 U.S.C. § 608c(14)(B) to issue a daily fine in some amount below $1,000. After reviewing the record, and based on the above, this court cannot conclude that the Judicial Officer's decision to fine Balice for the statutory maximum due to the violations of the reserve requirement was arbitrary and capricious.

II. The Recordkeeping Requirement Violations

The Judicial Officer fined Balice $74,500 for violating certain recordkeeping regulations of the Marketing Order, fining him $250 per day for 289 days of violation.

7 C.F.R. § 981.70 of the Marketing Order requires handlers to keep records to "clearly show the details of his receipts of almonds, withholdings, sales, shipments, inventories, reserve disposition, advertising and promotion activities, and other pertinent information with respect to his operations pursuant to" the Marketing Order. That regulation also requires that handlers retain such records for two years after the end of the crop year to which they are applicable.

The Judicial Officer adopted the finding of the ALJ that Balice violated the recordkeeping requirement on May 18, 1988. The ALJ found that on May 18, 1988 a Board auditor, Charles Charlton, visited Balice to audit O.R.C., but Balice could not provide records of grower receipts, withholdings, sales, shipments, inspections and inventories.

The Judicial Officer further adopted the finding of the ALJ that Balice violated the recordkeeping requirements from March 13, 1989 to January 5, 1990. The ALJ found that on March 13, 1989 a compliance officer with the USDA, Stephen Pollard, requested from Balice certain records for the 1987-88 crop year, but that Balice could not produce them, and admitted that certain of the records had never been created or maintained. Further the ALJ found that Balice sent some of the records to Italy after Pollard originally informed him that O.R.C. was being audited, thus indicating that Balice had control over the records but chose not to provide them to Pollard in an attempt to frustrate the USDA's investigation. The records were not produced at any time after March 13, 1989. The ALJ found that violation continued up to the point that the USDA filed the complaint, which was

January 5, 1990.

The Judicial Officer further found that Balice fully understood the recordkeeping requirement but nevertheless violated the regulation.

Balice does not expressly contend that the above findings are unsupported by substantial evidence.[8] Balice instead contends that the amount of the fine was excessive and was arbitrary and capricious, because (1) he provided some of the records, and those he did not provide he shipped to Italy upon the advice of his tax accountant, and later could not retrieve them because he became estranged from his uncles, (2) the USDA never asked Balice's uncles in Italy to produce records that they had in Italy, even though the USDA compliance officer suggested that course of action to his superiors, (3) fining Balice up to the date that the USDA filed its complaint was unfair because, had the USDA filed the complaint earlier the fine would have been lower. Because Balice does not expressly challenge the sufficiency of the evidence as to the findings that he violated the recordkeeping requirements, the court interprets Balice's arguments as being offered to lower the amount of the fine, rather than to contest the fact that he was found in violation of the recordkeeping regulations.

Initially the court notes that the Judicial Officer rejected the USDA's position, as set forth in its cross-appeal from the ALJ's opinion, that Balice be fined $1000 per day for each of the 289 days. Instead the Judicial Officer, after considering mitigating circumstance evidence offered by Balice, imposed a fine as to the recordkeeping violations of $250 per day rather than $1000 per day as allowed by 7 U.S.C. § 608c(14)(B). The Judicial Officer, contrary to Balice's contentions, did consider and accept Balice's arguments as to certain mitigating factors, including the fact that the records were of less import to the USDA after the end of the crop year. Because the Judicial Officer did accept certain of the mitigating evidence offered by Balice, the court does not find that the Judicial Officer acted capriciously in not imposing a daily fine in some amount below $250.

Further the court notes that the fact that Balice sent certain of the forms to Italy, whether at the behest of his accountant or not, is not a proper mitigating factor at all. Nothing prohibited Balice from maintaining a copy of whatever forms were needed in Italy before Balice caused them to be sent abroad. It was unreasonable for Balice, considering that he had actual knowledge that the USDA sought the

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[8]To the extent that Balice may be implicitly challenging the quantum of evidence offered to sustain the findings, the court finds that the Judicial Officer's findings are supported by substantial evidence, specifically the testimony of Peggy Leong and Stephen Pollard before the ALJ, and by USDA's Exhibits 74, 76, and 77, and by the evidence set forth in the Judicial Officer's opinion at pp. 33-34.

records for the purposes of conducting a lawful audit before he sent them to Italy, not to have kept a copy of the records that he sent to Italy. Likewise, whether or not the USDA attempted to attain records held abroad does not diminish the fact that Balice, who had control over them as evidenced by his sending them to Italy, failed to provide them to the USDA as requested.

III. The Report Filing Violations

The Judicial Officer fined Balice $2,000 for two violations of report filing violations.

7 C.F.R. § 981.74 provides that "every handler shall furnish to the Board in such manner and at such times as it prescribes . . . such other information as will enable the Board to perform its duties and exercise its powers." 7 C.F.R. § 981.472(a) provides that "each handler shall report to the Board on ABC Form 1 the total adjusted kernel weight of almonds, by varieties, received by it for its own account within any of the . . . reporting periods. Each report shall be filed with the Board within five (5) business days after the close of the applicable [ten] reporting period[s]."

The Judicial Officer noted that, at the hearing before the ALJ, Balice conceded that he did not file one of the ten Form 1 reports at any time, and that he filed another of the Form 1 reports more than five weeks late. Thus, substantial evidence supports the finding that Balice failed to comply with the report filing requirements as to two of the required Form 1 reports during the 1987-88 crop year.

Balice contends that fining him the maximum $1000 for each of the two violations is excessive and arbitrary on the ground that Balice was cooperating with the Board and sought help from the Board in filing the reports. Balice however, did not offer evidence that he sought help from the Board in relation to the two reports in question, but rather that on various occasions he spoke with Board personnel about the report filing obligations in general.

The Judicial Officer concluded that the maximum fine was appropriate because the complete failure to file a report, and the failure to file another report on a timely basis (here more than one month late) were serious violations in that the information provided on the reports are verified against other reports and are used by the Board for such purposes as calculating assessments, projecting industry volume, recommending to the Secretary whether changes as to the reserve requirement are advisable, and recommending to the Secretary future reserve percentages. The Judicial Officer further indicated that the USDA, in its complaint, did not itself seek the maximum fine given that the failure to file the two reports

in compliance with the Marketing Order regulations were continuing violations, and thus Balice could have been fined much higher amounts.

Based on the above the court cannot conclude that the $2000 fine for the failure to file one report at all, and the filing of another report more than one mouth late, was a capricious and arbitrary act by the Judicial Officer.

IV. The Inedible Disposition Requirement Violation

The Judicial Officer assessed a $25,000 penalty against Balice for not disposing of his entire inedible disposition by the due date, fining him $1000 a day for 25 days of violation.

An "inedible kernel" are pieces of an almond "with any defect scored as serious damage, or damage due to mold, gum, shrivel or brown spot, . . . or which has embedded dirt or other foreign material not easily removed by washing." 7 C.F.R. § 981.408.

The Marketing Order provides that "each handler shall cause to be determined . . . the percent of inedible kernels received by him. . . . The quantity of inedible kernels in each variety in excess of two percent of the kernel weight received, shall constitute a weight obligation to be accumulated in the course of processing and shall be delivered to the Board, or Board accepted crushers, feed manufacturers, or feeders." 7 C.F.R. § 981.42(a). 7 C.F.R. § 981.442 sets forth the manner of determining the disposition requirement, and the manner of disposing of inedible kernels. *See* 7 C.F.R. § 981.442(a). According to 7 C.F.R. § 981.442(a)(4) "the weight of inedible kernels in excess of 0 percent of kernel weight reported to the Board of any variety received by a handler shall constitute that handler's disposition obligation." Section 981.442(a)(5) explains in more detail the mechanics as to how the disposition requirement is physically met, and states that the "disposition obligation shall be satisfied when the almond meat content of the material delivered to accepted users equals the disposition obligation, but no later than July 31, succeeding the crop year in which the obligation was incurred." The July 31 deadline was extended for the 1987-88 crop year to August 31, 1988 "to satisfy the 18 percent of their disposition obligation which corresponds to the 18 percent reserve almonds released to salable almonds." 53 Fed. Reg. 29,222, 29,223 (1988).

The Judicial Officer adopted the finding of the ALJ that Balice handled a total of 571,726 pounds during the 1987-88 crop year, that his inedible disposition obligation was 10,291 pounds, and that he properly disposed of 7,695 pounds of inedible kernels on August 24, 1988, leaving 2,596 pounds not disposed. The Judicial Officer further found that Balice had been instructed by Board representatives several months prior to the August 31 deadline of his need to

comply with the inedible disposition requirement. The court concludes that these findings are supported by substantial evidence as set forth and identified in the Judicial Officer's opinion at pp. 17, 33, 52.

Since 2,596 pounds were not disposed of as of the August 31, 1988 deadline, Balice violated the inedible disposition requirement as of September 1, 1988. The failure to so dispose was apparently never cured, or at a minimum the evidence establishes that it was not cured as of the date that the USDA filed its complaint, January 5, 1990, and hence the Judicial Officer correctly determined that Balice did not comply with the requirement for at least 491 days.

Balice raises the following additional arguments: (1) the inedible obligation is not really crucial, (2) this type of violation is not properly viewed as a "continuing" violation because after the August 31 deadline passed without compliance Balice could no longer comply with the regulation, and (3) because the obligation remaining after the deadline was very small, it was arbitrary and capricious to impose a penalty over $1000 in totality for this violation.

Balice has not clearly identified the nature of his contention that the inedible disposition requirement is not crucial. To the extent that he may be claiming that a violation of that requirement should not subject one to the maximum $1000 violation, Congress has granted the Judicial Officer that discretion by the enactment of 7 U.S.C. § 608c(14)(B). To the extent that Balice may be claiming that the regulation itself is substantively unfair, the court is not convinced that the issue was properly raised either in the administrative forum or before this court; however the regulation has a rational basis, namely that "requiring handlers to meet [the inedible disposition] requirement should ensure that each handler's outgoing shipments of almonds are relatively free of almonds with serious damage, and the number of kernels with minor damage should be minimal." 41 Fed. R. 22,075, 22,078 (1976) (USDA's explanation, in part, for need for 7 C.F.R. § 981.42). If an economic regulation furthers a legitimate public goal and is reasonably directed to meet that goal, the regulation does not deprive those so regulated of substantive due process rights. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (economic regulations are not substantively unfair unless the regulation "manifests a patently arbitrary classification, utterly lacking in rational justification").

Balice also contends that the failure to meet the entire inedible disposition requirement by August 31, 1988 cannot be a "continuing" violation in that it is physically impossible to comply with the regulation after the deadline. However Balice cites no authority and does not point to any regulation to support his contention that the Board, and by extension the USDA, lacks the authority to apply an inedible disposition occurring after the deadline to the crop year in which the disposition had been due. Lacking any reasonable construction to the contrary, the

court will defer to the Judicial Officer's interpretation of the Marketing Order -- that the Marketing Order does not contain any regulation excusing a violation of the inedible disposition requirement once the deadline passes, and does not contain a regulation that would prohibit a handler from complying with the 1987-88 crop year disposition requirement after the deadline.

Finally Balice maintains that the total amount of the fine was too high because he complied with most of his inedible disposition requirement. The Judicial Officer determined that Balice violated the requirement for at least 491 days, but decided to apply a $1,000 fine to 25 days rather than to the entire violation period. The court finds that the Judicial Officer's decision to limit the number of days to which a fine would apply was sufficient to account for Balice's partial compliance with the disposition requirement.

V. The Additional $9,500 Fine

Balice claims that the Judicial Officer "for no apparent reason" increased the fine originally set by the ALJ by an additional $9,500. This contention is unsupported by the record. The Judicial Officer provided a lengthy analysis of each of the four violations in question, and made various changes, additions, and subtractions to the fines. When the four separate fines were totaled, the total imposed by the Judicial Officer exceeded that of the ALJ by $9,500. However given that the Judicial Officer explained the bases for each of the four fines, the court does not accept Balice's depiction of the increased fine as being "for no apparent reason."

Balice also states that the increased fine was imposed because the Judicial Officer sought to penalize Balice for seeking redress from the ALJ's decision. The court also rejects this characterization. The Judicial Officer had before it both Balice's appeal seeking to vacate or lower the original $216,000 fine, and also the USDA's cross-appeal seeking to increase the fine to $582,000. The mere fact that the Judicial Officer ruled against Balice does not evidence any prejudice or bad motive.

Balice finally argues that having his fine increased by the Judicial Officer violated his right to due process in an undisclosed manner. Given that he had full notice of the USDA's cross-appeal, this contention is frivolous.

VI. Attacks On Fine As A Whole

In addition to challenging the specific fines relative to the four violations, plus the challenge to the increased fine imposed by the Judicial Officer, Balice also

maintains that the $225,000 fine in totality is excessive under a number of legal theories.

A. Small Business Regulatory Enforcement Fairness Act Claim To Fine As A Whole

On March 29, 1996 Congress enacted the Small Business Regulatory Enforcement Fairness Act of 1996 ("the SBREFA"). Section 223(a) of that Act states that administrative agencies "regulating the activities of small entities shall establish a policy or program within 1 year of enactment of this section [Mar. 29, 1996] to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities."

Balice contends that neither the ALJ nor the Judicial Officer considered his ability to pay the fine in question. He therefore asks this court to wave or substantially reduce the penalty pursuant to the SBREFA.

The court finds that the SBREFA is inapplicable to this action. The SBREFA does not contain any indication that its substantive provisions were directed at administrative agencies acting in their adjudicative capacity. Instead it appears that Congress intended that agencies comply with the SBREFA when engaging in rule-making. *See Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1417 (M.D. Fla. 1998) (the SBREFA "requires an agency in the process of rule-making to the effect of the agency's proposed regulation on small enterprises and to prescribe pertinent mitigating measures"). Further even if the SBREFA could be interpreted as requiring an administrative law judge or a judicial officer with the USDA to consider a small entity's ability to pay a fine as part of the hearing process, the statute was enacted over four years after the Judicial Officer assessed the fine in question. Balice presents no legal argument as to why the SBREFA has retroactive effect, and the court declines to so hold.

B. Eighth Amendment Claim To Fine As A Whole

Balice maintains that the $225,000 fine violates the Eighth Amendment in that

the penalty is excessive compared to the conduct.[9] Assuming without deciding that the civil penalty in question could be characterized as "punishment,"[10] the fine is not excessive in the constitutional sense given the relationship between the profit available to Balice due to his violations of the Marketing Order and the actual fine imposed. Looking solely at the reserve regulation violation the Judicial Officer explained that placing the reserve on the market before the reserve release date would have resulted in a profit to Balice of somewhere in the vicinity of $241,196 to $246,677. Judicial Officer's Decision and Order, p. 42.

C. Due Process Claims To Fine As A Whole

Balice also states that the fine, as a whole, violates his due process rights. The court concludes that imposition of the fine did not violate Balice's procedural due process rights in that he had full notice of the USDA's intent to impose a fine well over $225,000, and exercised his opportunity to be heard in opposition to the complaint before the ALJ and the Judicial Officer.

Neither can it be said that imposition of the fine violated Balice's substantive due process rights. To show that a government action, which would include imposition of a civil fine, violates substantive due process, the plaintiff would need to show that the challenged action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Congress has declared that the institution and implementation of marketing orders, in part, is necessary "in the interests of producers and consumers [for] an orderly flow of the supply of [an agricultural product] to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). Fining a handler who violates a marketing order by not maintaining the required reserve, not

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[9]The USDA asserts that Balice did not specifically argue before the Judicial Officer that the ALJ's $216,000 fine violated the Eighth Amendment, and that therefore he cannot argue before this court that the Judicial Officer's fine, even though it was higher, violated the Eighth Amendment. The court is not convincing by this logic as Balice could not know in advance of the Judicial Officer's decision what amount, if any, the Judicial Officer would impose. In any event a review of Balice's Appeal Petition to the Judicial Officer establishes that Balice expressly challenged the fines imposed by the ALJ relative to the reserve regulation violation and the inedible disposition regulation violation as constituting cruel and unusual punishment.

[10]*Austin v. United States*, 509 U.S. 602, 621 (1993) suggests that, unless a civil monetary penalty solely serves remedial purposes, it may be considered punishment and thus subject to scrutiny under the Excessive Fines Clause.

maintaining proper records to verify handling activity, not filing timely reports with the overseeing Board, and not meeting inedible disposition requirements is a government action that is rationally related to public health and general welfare interests.

D. Administrative Procedure Act Based Claims To Fine As A Whole

Balice contends that the Judicial Officer acted in a arbitrary and capricious manner within the meaning of the Administrative Procedure Act, as well as abused the discretion granted him by that Act, by failing to consider Balice's offered mitigating circumstance evidence. The court, having reviewed the record below, that the Judicial Officer did consider the evidence and argument posed by Balice, but simply did not accept it to the extent suggested by Balice.

CONCLUSION

The court, having reviewed the parties' cross-motions for summary judgment and the administrative record, finds that the Judicial Officer's decision was not arbitrary and capricious. The decision is based on substantial evidence, and the particular fines imposed as to each of the four violations found to have occurred were within the scope of the discretion granted to the Judicial Officer by 7 U.S.C. § 608c(14)(B).

The Judicial Officer's Decision and Order filed June 25, 1992 is affirmed.

ORDER

For the reasons stated in the above Memorandum Opinion, IT IS HEREBY ORDERED that

1. Balice's motion for summary judgment is DENIED;
2. the USDA's motion for summary judgment is GRANTED; and
3. the Clerk of the Court is to close the case.

KREIDER DAIRY FARMS, INC. v. DAN GLICKMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.
Civil No. 98-0518.
Filed August 10, 1998.

(Cite as 1998 WL 481926 (E.D. Pa.)).

Jurisdiction of court — Postmark — Appeal petition.

The District Court held that petitioner's Amended Complaint, in which it first appealed the Judicial Officer's Order Denying Late Appeal and Order Denying Petition for Reconsideration, was not filed within 20 days of the Judicial Officer's Orders, as required by 7 U.S.C. § 608c(15)(B). Nonetheless, the Court found that it had jurisdiction to review the Judicial Officer's Orders because the Amended Complaint relates back to the filing date of the timely Complaint, which makes explicit reference to the Judicial Officer's Orders. Moreover, the Court held that the Judicial Officer's determination, that the word "postmarked" in 7 C.F.R. § 900.69(d) does not include a Federal Express label, is not in accordance with law. The Court vacated the Judicial Officer's Order Denying Late Appeal and Order Denying Petition for Reconsideration, remanded the case to the Judicial Officer, and ordered the Judicial Officer to treat petitioner's appeal petition as timely and to rule on the merits of the appeal petition.

United States District Court
Eastern District of Pennsylvania

MEMORANDUM

Cahn, C.J.

This case is back before the court following a remand. Currently pending is the Secretary's motion to dismiss Kreider's Amended Complaint. For the reasons that follow, the court will deny the motion. The court will also vacate the Judicial Officer's ("JO") January 12, 1998, and February 20, 1998, decisions (respectively, the "January 12 decision" and the "February 20 decision") and remand this case to the Secretary for a decision on the merits of Kreider's appeal of the Administrative Law Judge's ("ALJ") August 12, 1997, decision (the "August 12 decision").

I. BACKGROUND

The background of this case prior to the remand is set forth in *Kreider Dairy Farms, Inc. v. Glickman*, No. CIV. A. 95-6648, 1996 WL 472414 (E.D. Pa. Aug.

15, 1996) ("*Kreider I*") (denying motions for summary judgment and remanding).[1] In *Kreider I*,

> Kreider challenge[d] the ruling of the [JO] who affirmed the decision of the Market Administrator ("MA") for the New York-New Jersey Milk Marketing Order ("Order 2") to regulate Kreider as a handler under Order 2 rather than designating Kreider as a producer-handler exempt from paying certain fees for sales of fluid milk.

Id. at *1 (footnote omitted). The court held that

> neither the plain language of Order 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' in this factual context. Thus, the refusal to designate Kreider as a producer-handler appears arbitrary on the record before this court.

Id. at *11. Therefore, the court remanded this case to the Secretary and directed the Secretary "to hold such further proceedings necessary to determine whether in fact Kreider is `riding the pool.'" *Id.* at *9.

On remand and following an evidentiary hearing, the ALJ issued the August 12 decision, in which he found, *inter alia*, that

> Kreider was `riding the pool' and receiving an unearned economic benefit. Accordingly, the decision of the Market Administrator to deny Kreider producer-handler status must be upheld and the petition [challenging the MA's decision] must be denied.

In re: Kreider Dairy Farms, Inc., No. 94 AMA M-1-2, at 10 (U.S.D.A. ALJ 8/12/97 Decision & Order) (Admin. R., Tab 55). The ALJ therefore dismissed Kreider's petition.

At the end of the August 12 decision, the ALJ notified the parties that the decision "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." *Id.*; *see* Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From

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[1]Unless otherwise indicated, the court uses the same abbreviated terms used in *Kreider I*.

Marketing Orders ("Rules of Practice"), 7 C.F.R. §§ 900.50-71, at 900.64(c), 900.65(a) (1998) (same). The August 12 decision was served on Kreider on August 15, 1997.

On September 12, 1997, Kreider moved by telephone for an extension of time to file its appeal of the ALJ's decision, and the JO granted an extension until September 19, 1997. *See In re: Kreider Dairy Farms, Inc.*, No. 94 AMA M-1-2 (U.S.D.A. JO 9/12/97 Informal Order) (Admin. R., Tab 56). On September 19, 1997, a Friday, Kreider gave its appeal petition (the "Appeal Petition") to Federal Express for delivery to the hearing clerk on the next business day. The Office of the Hearing Clerk stamped the Appeal Petition as received on September 25, 1997. (*See* Admin. R., Tab 57.)

Upon consideration of the Appeal Petition, the JO issued the January 12 decision, in which he noted that § 900.69(d) of the Rules of Practice provides, in relevant part:

> Any document or paper . . . 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). The JO focused on the term "postmarked," which the applicable regulations do not define. *See In re: Kreider Dairy Farms, Inc.*, No. 94 AMA M-1-2, 1998 WL 25746, at *7 (U.S.D.A. JO Jan. 12, 1998); 7 C.F.R. §§ 1.132, 900.51 (1998) (definitions). The JO noted that several dictionaries define "postmark" as a mark placed on pieces of mail by the post office, and that some courts have adopted similar definitions. *See id.* & n.7 (citing, for example, Black's Law Dictionary 1167 (6th ed. 1990) and *United States v. Maude*, 481 F.2d 1062, 1065-66 (D.C. Cir. 1973) ("It is commonly known that a postmark is the official mark which the Post Office Department places on mail.")). In addition, the JO cited one decision by the Secretary suggesting such a definition. *See id.* at *7-8 (citing *In re: Sequoia Orange Co.*, No. 90 AMA F&V 908-6, 56 Agric. Dec. 1632, 1992 WL 139549, at *1 (U.S.D.A. JO 1/3/92 Remand Order) (ruling that Pitney Bowes, Inc., meter stamp, which stamping individual can manipulate to show any desired date, is not a "postal department cancellation mark")).

In light of the foregoing definitions of "postmark," the JO ruled that because the Federal Express label (also known as an "airbill") accompanying the Appeal Petition does not contain the mark of the U.S. Postal Service, the Appeal Petition is not postmarked for purposes of § 900.69(d). *See id.* at *8. Therefore, pursuant to 7 C.F.R. § 900.69(d), the JO deemed the Appeal Petition filed on the date the hearing clerk received it, September 25, 1997, which was six days after the

September 19 deadline. *See id.* As a result, the JO found that the Appeal Petition was not timely, and that he lacked jurisdiction over the Appeal Petition. *See id.* In addition, the JO found that he lacked jurisdiction to further extend the time for filing the Appeal Petition because the August 12 decision had become final on September 20, 1997, thirty-five days after service on Kreider. *See id.* Accordingly, the JO denied the Appeal Petition without reaching the merits, and noted that the merits

> 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[2] pursuant to an appeal [of the ALJ's decision] by a party to the proceeding."

Id. at *9 (citing 7 C.F.R. § 900.64(c)).

On January 27, 1998, Kreider filed a Petition for Reconsideration, which the JO denied in the February 20 decision. *In re: Kreider Dairy Farms, Inc.*, No. 94 AMA M-1-2, 1998 WL 92814 (U.S.D.A. JO Feb. 20, 1998). The JO again found that the Appeal Petition was not timely, citing the reasons set forth in the January 12 decision. The JO acknowledged that the Appeal Petition would have been timely if, on September 19, 1997, Kreider had sent it to the hearing clerk via the U.S. Postal Service[3] instead of Federal Express, but found this fact irrelevant. In addition, the JO distinguished *Edmond v. United States Postal Service*, 727 F. Supp. 7, 11 (D.D.C. 1989) (finding service by Federal Express to be service "by mail" for purposes of serving pleadings pursuant to Fed. R. Civ. P. 5(b)), *rev'd in part on other grounds*, 949 F.2d 415 (D.C. Cir. 1991), because the Federal Rules of Civil Procedure do not govern the administrative proceedings on remand in the instant case. The JO again declined to consider the merits of the Appeal Petition.

On February 2, 1998, while Kreider's Petition for Reconsideration was pending before the JO, Kreider filed a Complaint After Remand ("Complaint") in this court, seeking judicial review of the Secretary's decision to deny Kreider producer-handler status. (*See* Compl. at ¶ 28.) Kreider requests a declaration that it is

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[2]Pursuant to 7 C.F.R. § 2.35 (1998), the Secretary delegated to a JO the authority to consider appeals of ALJ decisions and issue final agency decisions.

[3]Under this scenario, Kreider presumably would have secured a postmark dated September 19, 1997, and pursuant to § 900.69(d), the JO would deem the Appeal Petition filed on this date.

exempt from Order 2, and a refund, with interest, of all of its payments to the Order 2 MA to date. (*See id.* at 7.) On April 3, 1998, after the JO denied the Petition for Reconsideration, Kreider filed a First Amended Complaint After Remand ("Amended Complaint") which: (1) adds a count challenging the JO's January 12 and February 20 decisions as "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law," (Am. Compl. ¶ 29); and (2) specifies that Kreider seeks the court's review of the ALJ's August 12 decision to deny Kreider producer-handler status, (*see id.* ¶ 30). Kreider alleges that as of the date it filed the Amended Complaint, the total payments it has made to the Order 2 MA exceed $800,000. (*See id.* ¶ 4.)

On April 7, 1998, the Secretary filed a motion to dismiss the Complaint,[4] unaware that Kreider filed the Amended Complaint four days earlier. On April 21, 1998, the Secretary filed a motion to dismiss the Amended Complaint. On May 29, 1998, Kreider filed a response, to which the Secretary filed a reply on June 16, 1998.

II. DISCUSSION

The Secretary makes three arguments in support of the motion to dismiss the Amended Complaint. As explained below, the court rejects the first and second arguments, but finds the third argument persuasive.

A. Jurisdiction to Review the JO's January 12 and February 20 Decisions

The Secretary first argues that the court lacks jurisdiction to review the JO's January 12 and February 20 decisions because Kreider appeals the decisions for the first time in the Amended Complaint, which Kreider did not file within twenty days of the decisions as required by 7 U.S.C.A. § 608c(15)(B)(West 1980).

Section 608c of title 7 of the U.S. Code provides, in relevant part:

> **Petition by handler for modification of order or exemption; court review of ruling of Secretary**
>
> (15) . . .
>
> (B) The District Courts of the United States . . . are vested with

[4]The court will deny the motion as moot.

> jurisdiction in equity to review such ruling [of the Secretary on a petition for modification of order or exemption], provided a bill in equity for that purpose is filed *within twenty days from the date of the entry of such ruling.*

(Emphasis added.) The Secretary correctly notes that Kreider appeals the January 12 and February 20 decisions for the first time in the Amended Complaint, which Kreider filed on April 3, 1998, after the twenty-day period set forth in § 608c(15)(B) expired with respect to each decision. Given the statutory language and the above facts, the Secretary's argument appears to have merit.

Closer analysis, however, reveals that it does not. Rule 15(c) of the Federal Rules of Civil Procedure provides that

> [a]n amendment of a pleading *relates back to the date of the original pleading* when
>
> * * *
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

(Emphasis added.) The Complaint makes explicit reference to the January 12 decision, (*see* Compl. ¶ 26), and the Petition for Reconsideration which resulted in the February 20 decision, (*see* Compl. ¶ 27). Therefore, the Complaint "set forth or attempted to set forth" the occurrences that are the subject of the appeals of the January 12 and February 20 decisions raised in the Amended Complaint. Accordingly, Kreider satisfies the requirements of Rule 15(c)(2), and the Amended Complaint relates back to the filing date of the Complaint, February 2, 1998.

Treating the Amended Complaint as filed on February 2, 1998, the court finds that the appeal of the January 12 decision is timely. Although February 1, 1998, was the twentieth and final day to file a timely appeal of the January 12 decision pursuant to 7 U.S.C. § 608c(15)(B), February 1, 1998, was a Sunday. Therefore, the twenty-day period was automatically extended until February 2, 1998. Fed. R. Civ. P. 6(a). Accordingly, the court has jurisdiction to review the January 12 decision.

The court also finds that the appeal of the February 20 decision is timely. Although the February 2, 1998, filing date of the Amended Complaint precedes the February 20 decision itself, the court of appeals has held that, "[i]n the civil context, . . . where only property interests are implicated, a premature appeal becomes operative upon entry of the final order and in the absence of a showing of prejudice to the other party." *United States v. Hashagen*, 816 F.2d 899, 905 (3d

Cir. 1987) (in banc) (citing *Richerson v. Jones*, 551 F.2d 918, 922 (3d Cir. 1977)). Here, the Secretary suffers no prejudice from Kreider's premature appeal of the February 20 decision.[5] The court therefore regards the appeal of the February 20 decision as having ripened on the day the decision issued, February 20, 1998, which is well within the twenty-day period set forth in 7 U.S.C. § 608c(15)(B). Accordingly, the court has jurisdiction to review the February 20 decision.

B. The Postmark Requirement of Section 900.69(d) of the Rules of Practice[6]

The Secretary next argues that even if the court has jurisdiction to review the JO's January 12 and February 20 decisions, the decisions are correct. Although the JO made several rulings in each decision, the outcome of the instant dispute depends on one ruling in particular: the ruling that the Appeal Petition that Kreider gave to Federal Express on September 19, 1997, the last day to file a timely appeal of the ALJ's August 12 decision, is not postmarked within the meaning of the postmark requirement of section 900.69(d) of the Rules of Practice.[7]

The decision of the Secretary, and of the JO as the Secretary's delegatee, is entitled to substantial weight. As the court of appeals held in *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315 (3d Cir. 1968), *cert. denied sub nom. Lewes Dairy, Inc. v. Hardin*, 394 U.S. 929 (1969),

> [t]he power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a *de novo* fact finding process. It is limited to a determination whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence.

(Footnote omitted.)

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[5]The Secretary had notice that Kreider would appeal the February 20 decision, because Kreider suggested in the Complaint that it would appeal an adverse decision on the then-pending Petition for Reconsideration. (*See* Compl. ¶ 27.)

[6]In this memorandum, the court uses the term "postmark requirement" to refer to the provision in § 900.69(d) for deeming a document "filed when it is postmarked."

[7]The Secretary suggests that if the JO correctly ruled that the Appeal Petition was not timely, then the JO also correctly ruled that he lacked jurisdiction to consider the Appeal Petition's merits, and that this court lacks jurisdiction to review the ALJ's August 12 decision.

Although the standard of review is deferential, the JO's ruling regarding the postmark requirement cannot be upheld. The court first notes that the question of whether the Appeal Petition satisfies the postmark requirement is a legal one. Therefore, the court must determine whether the JO's ruling—pursuant to which a party that sends a document to the hearing clerk via the U.S. Postal Service satisfies the postmark requirement, whereas a party that sends a document to the hearing clerk via Federal Express does not—is in accordance with law. The court finds that the JO's ruling is not in accordance with law for two reasons.

First, the JO's ruling elevates form over substance. The purpose of the postmark requirement is to ensure that there is reliable evidence of the date a party sends a document to the hearing clerk before the document will be deemed filed on such date.[8] By ruling that the only way a party can satisfy the postmark requirement is to send a document to the hearing clerk via the U.S. Postal Service, the JO construes the postmark requirement too literally and, as a result, too narrowly. Although Federal Express (also known as "FedEx") is not affiliated with the U.S. Postal Service, it is nevertheless a well-known delivery service, and there is no reason to doubt the reliability of a Federal Express label, especially one generated and affixed by Federal Express employees, insofar as it establishes the date a party gives an item to Federal Express for delivery.[9]

Moreover, in light of the fact that the applicable regulations do not define the term "postmark," a party that sends a document to the hearing clerk via Federal Express has made at least a reasonable effort to comply with the postmark requirement, and consequently should be permitted to consider the document filed on the date it was given to Federal Express for delivery. *Cf. State of Oregon v.*

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[8]The court's explanation of the postmark requirement's purpose is consistent with the outcome in *Sequoia Orange Co.* At issue in that case was the reliability of the date shown by the Pitney Bowes, Inc., meter stamp. As the JO noted, a private individual applying the stamp could manipulate it to show any desired date. *See* 1992 WL 139549, at *1.

[9]Federal Express follows certain procedures that make it possible to reliably determine the date a party gives an item to Federal Express for delivery.

> All items [Federal Express] delivers carry an electronically generated label that includes the date on which the item was given to FedEx for delivery. . . . The information in FedEx's database can be used to show when the item was given to or picked up by a FedEx employee if (1) there is a customer-generated label or (2) there is a FedEx-generated label but the date is illegible or otherwise unavailable.

Four Private Delivery Services Okayed, 86 J. Tax'n 259 (1997) (summarizing Notice 97-26, 1997-17 I.R.B. 6).

FCC, 102 F.3d 583, 585 (D.C. Cir. 1996) (Ginsburg, J.) (holding that "the FCC acts arbitrarily and capriciously when it rejects an application as untimely based on an ambiguous cut-off provision, not clarified by FCC interpretations, if the applicant made a reasonable effort to comply") (citation, brackets, and internal quotation marks omitted). Such a result is particularly appropriate when a literal construction of the postmark requirement would prevent the party from having its claims decided by the Secretary on the merits. As the Supreme Court explained with respect to the Federal Rules of Civil Procedure, "[i]t is too late in the day . . . for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962).[10]

Second, the JO's ruling is at odds with the realities of the modern practice of law. Over the past several years, the court has observed that lawyers' use of delivery services such as Federal Express is rising steadily. Because delivery services can reliably deliver documents worldwide, and often faster than the U.S. Postal Service, it appears to the court that in at least some legal markets, delivery services have supplanted the U.S. Postal Service as the normal means of document delivery.[11] As a New York lawyer recently said in response to the court's suggestion that he send a document by "regular mail" (the U.S. Postal Service) instead of Federal Express, which costs more, "Out here, FedEx *is* regular mail."

The JO's construction of the postmark requirement bucks the current trend favoring the use of delivery services, because the JO's construction effectively compels a party that sends a document to the hearing clerk on the date the filing is due to use the U.S. Postal Service. Ironically, the use of a delivery service in such a situation, while it may effect delivery of the document sooner, will result in a document that the JO deems to be filed later and, as in this case, too late to be considered.

In the instant case, the correct approach—one that elevates substance over form and is more in tune with the practices of today's legal community as the court perceives them—is to construe the postmark requirement to cover use of the U.S.

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[10]Kreider alleges that it "served its notice of appeal of the 1995 ALJ decision by Federal Express on the date the filing was due and it [was] accepted [by the JO] without objection." (Br. Opp. Mot. at 16.) If true, the allegation suggests that the JO rejected a literal construction of the postmark requirement in the past.

[11]In fact, the Secretary sent a copy of the administrative record and the motion to dismiss the Complaint to Kreider's counsel via Federal Express.

Postal Service and Federal Express for purposes of determining a filing date.[12] The court notes that statutes and regulations regarding "postmarks" in some other contexts already take this approach. *See, e.g.*, 26 U.S.C.A. § 7502(f)(1) (West 1989 & Supp. 1998) (Internal Revenue Code) ("[A]ny reference . . . to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked . . . by any designated delivery service."[13]); 50 C.F.R. § 285.2 (1998) (Wildlife and Fisheries) (defining postmark as, *inter alia*, "independently verifiable evidence of date of mailing, such as U.S. Postal Service postmark, United Parcel Service (U.P.S.) or other private carrier postmark"); *but see* 38 U.S.C.A. § 7266(a)(3)(B) (West 1991 & Supp. 1998) (Veterans' Benefits) ("[A] notice of appeal shall be deemed to be received by the Court [of Veterans Appeals] . . . on the date of the United States Postal Service postmark.").

The Appeal Petition bears two Federal Express labels, one generated by Federal Express and the other apparently generated by Kreider. (*See* Resp't Opp'n to Pet'r Appeal Pet., Ex. A) (Admin. R., Tab 59). Each of the labels is dated September 19, 1997, indicating that Kreider gave the Appeal Petition to Federal Express on that date for delivery to the hearing clerk. On these facts, the court holds that the Appeal Petition is postmarked for purposes of section 900.69(d) of the Rules of Practice.[14] The court further holds that the Appeal Petition has a postmark date of September 19, 1997, is deemed filed on that date, and is timely.

C. Jurisdiction to Review the ALJ's August 12 Decision

The Secretary's final argument is that even if the court has jurisdiction to review the JO's January 12 and February 20 decisions, and the decisions are incorrect, the court lacks jurisdiction to review the ALJ's August 12 decision because the August 12 decision is not a ruling of the Secretary for purposes of 7 U.S.C. § 608c(15)(B)

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[12]The court expresses no opinion on whether use of delivery services other than Federal Express satisfies the postmark requirement.

[13]Pursuant to 26 U.S.C.A. § 7502(f)(2), one of the requirements of a "designated delivery service" is that it "is at least as timely and reliable on a regular basis as the United States mail." *Id.* at § 7502(f)(2)(B). Federal Express is a designated private delivery service for purposes of § 7502(f). See Notice 97-26, 1997-17 I.R.B. 6, *modified*, Notice 97-50, 1997-37 I.R.B. 21 (providing that "the list [in Notice 97-26] of private delivery services . . . will remain in effect until further notice").

[14]The court's holding does not cover situations in which customer-generated and FedEx-generated labels have conflicting dates, or in which one of the labels is missing or illegible. The court notes, however, that these scenarios are addressed in the tax context. *See* Notice 97-26, 1997-17 I.R.B. 6.

or a "final decision issued by the Secretary" for purposes of 7 C.F.R. § 900.64(c).

This argument, which Kreider does not dispute, is correct. Pursuant to 7 U.S.C. § 608c(15)(B), the court may review a ruling of the Secretary as described in § 608c(15)(A). Section 608c(15)(A), in turn, describes such a ruling as a final ruling made by the Secretary after holding a hearing in accordance with applicable regulations. *See* 7 U.S.C.A. § 608c(15)(A) (West 1980). The applicable regulations provide that "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) (1998).

Here, the JO, as the Secretary's delegatee, did not consider the Appeal Petition's merits. As a result, for the purpose of judicial review, there has not been a "final decision issued by the Secretary," 7 C.F.R. § 900.64(c), or a ruling of the Secretary, 7 U.S.C. §§ 608c(15)(A)-(B), concerning the ALJ's August 12 decision. Accordingly, the court lacks jurisdiction to review the ALJ's August 12 decision.

The court will, however, remand this case to the Secretary. As provided in 7 U.S.C.A. § 609c(15)(B) (West 1980),

> [i]f the court determines that [the Secretary's] ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

Because the court has found that the JO's ruling regarding the postmark requirement is not in accordance with law, the court will vacate the JO's January 12 and February 20 decisions and remand this case to the Secretary. The court will also direct that on remand the JO treat the Appeal Petition as timely and consider and rule on the Appeal Petition's merits.

III. CONCLUSION

Kreider has sought producer-handler status for almost five years. Because a substantial amount of money is at stake, Kreider's persistence is understandable. What is surprising to the court, however, is the number of times during the litigation that Kreider has needlessly risked dismissal of its claims on the basis of late filings. Continued procrastination can only lead to more disputes such as the instant one that consume the parties' time and resources, and, at best, will further delay the merits determination that Kreider seeks.

For all the foregoing reasons, the court will deny the Secretary's motion to

dismiss Kreider's Amended Complaint. In addition, the court will vacate the JO's January 12 and February 20 decisions and remand this case to the Secretary for further proceedings consistent with the court's decision.

An appropriate order follows.

ORDER

AND NOW, this 7 day of August, 1998, upon consideration of: Defendant's Motion to Dismiss (Dkt. 4); Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Dkt. 5); Plaintiff's response; and Defendant's reply; and for the reasons set forth in the court's memorandum of even date herewith in this case, it is hereby ORDERED as follows:

1. Defendant's Motion to Dismiss (Dkt. 4) is DENIED as MOOT.
2. Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Dkt. 5) is DENIED.
3. The Judicial Officer's ("JO") January 12, 1998, and February 20, 1998, decisions in this case are VACATED.
4. This case is REMANDED to the Secretary. On remand, the JO shall treat Kreider's Appeal Petition, (Admin. R., Tab 57), as timely filed on September 19, 1997, and shall consider and rule on the Appeal Petition's merits.
5. The Clerk shall close the docket for statistical purposes.

ANIMAL WELFARE ACT

COURT DECISIONS

C.C. BAIRD, DOING BUSINESS AS MARTIN CREEK KENNEL v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 98-3296.
Filed October 29, 1998.

United States Court of Appeals
Eighth Circuit

JUDGMENT

After consideration of the court, this appeal is dismissed as untimely taken.

SAMUEL ZIMMERMAN v. UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE.
No. 98-3100.
Filed December 21, 1998.

Animal Welfare Act — Sanction.

A dealer licensed under the Animal Welfare Act brought an action challenging a $7,500 civil penalty and a 40-day license suspension imposed by the Judicial Officer for violations of the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. The United States Court of Appeals for the Third Circuit held that an agency's choice of sanction is not to be overturned unless unwarranted in law or unjustified by the facts or an abuse of discretion. Further, the Court held that a sanction is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. The Court affirmed the Judicial Officer, holding that the sanctions imposed by the Judicial Officer were well within the range of options available to the Judicial Officer and the Judicial Officer did not abuse his discretion.

United States Court of Appeals
Third Circuit

Before: STAPLETON and NYGAARD, Circuit Judges, and GOLDBERG*, Judge

NYGAARD, Circuit Judge.

MEMORANDUM OPINION OF THE COURT

Petitioner Samuel Zimmerman is a dog kennel operator and a licensed animal dealer under the Animal Welfare Act. He was charged by the Animal and Plant Health Inspection Service in a disciplinary administrative proceeding under the Animal Welfare Act. A hearing was held before an Administrative Law Judge ("ALJ") which resulted in a Decision and Order imposing a $500 fine. The Department of Agriculture appealed the order, and the Judicial Officer, on review, issued an Opinion increasing the sanction to a $7,500 fine and a forty day suspension. Zimmerman then requested reconsideration, which was denied. He has filed a Petition for Review with this Court.

Zimmerman argues that the ALJ, who found that only two of the charges against him were "serious," correctly assessed the gravity of the situation. Zimmerman contends that the larger $7,500 fine imposed by the Judicial Officer was "arbitrary and capricious" and must be vacated. He requests that the case be remanded, or, in the alternative, that the ALJ's less severe fine be reinstated. We will affirm.

I. BACKGROUND

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, the Complainant, instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended, *see* 7 U.S.C. §§ 2131-2159; the regulations and standards issued under the Animal Welfare Act, *see* 9 C.F.R. §§ 1.1-3.142; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, *see* 7 C.F.R. §§ 1.130-.151. The Complainant alleged that on October 5, 1994, November 15, 1994, and January 31, 1995, Zimmerman did some or all of

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*The Honorable Richard W. Goldberg, Judge for the United States Court of International Trade, sitting by designation.

the following: (1) failed to maintain complete records showing the acquisition, disposition, and identification of animals; (2) 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; (3) failed to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation; (4) failed to provide structurally sound and well-maintained primary enclosures for dogs in order to protect the animals from injury; (5) failed to remove excreta from primary enclosures daily in order to prevent soiling of the animals and to reduce disease hazards, insects, pests, and odors; (6) failed to keep premises where the housing facilities were located clean and in good repair to protect the animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin; (7) failed to individually identify dogs; (8) failed to make provisions for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes in a manner that minimized contamination and disease risks; and (9) denied the Animal and Plant Health Inspection Service entry to inspect his facility, all in willful violation of various portions of the statutes, regulations and standards governing his conduct.

Zimmerman filed an Answer denying the material allegations in the Complaint. The ALJ held a hearing at which Zimmerman appeared pro se. On May 29, 1997, the ALJ's Decision and Order: (1) concluded that Zimmerman violated the Regulations and Standards; (2) ordered Zimmerman to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessed Zimmerman a civil penalty of $500. The government appealed to the Judicial Officer.

The Judicial Officer issued a Decision and Order that affirmed the ALJ's findings of fact and concluded that Zimmerman was indeed responsible for essentially all of the failures alleged in the Complaint. Based on this conclusion, the Judicial Officer increased the civil penalty against Zimmerman to $7,500, ordered him to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and suspended his Animal Welfare Act license for a period of forty days.

Zimmerman filed a Petition for Reconsideration in which he contended (as he does before us) that the $7,500 civil penalty and the forty day license suspension were excessive. The Judicial Officer denied his Petition.

II. ISSUE AND DISCUSSION

Specifically, the question before us on appeal is: "Did the Judicial Officer abuse his discretion and consider matters outside the record in increasing the penalty from a $500 fine to a $7,500 fine plus a forty-day suspension?" As previously stated, we will affirm.

The Judicial Officer found that Zimmerman had corrected some of the cited violations either during inspections or between inspections. He also found that there was no proof that Zimmerman had intentionally harmed his animals. He further determined that the refusal to allow an inspection occurred in the heat of the moment, and not in defiance of the law. Based on these factors, Zimmerman contends the penalty was excessive. We disagree.

Despite finding that Zimmerman corrected a number of the cited violations, the Judicial Officer concluded that, although corrections are encouraged and may be taken into account when determining the sanction, the correction of a condition has no bearing on the fact that a violation occurred. This is true. The law requires each dealer to be in compliance in all respects with the Regulations and Standards, and this duty exists regardless of a correction date.

Section 19 of the Animal Welfare Act provides that:

> [i]f 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.
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> . . .
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> 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 Judicial Officer also found that "[t]here is no evidence that Zimmerman deliberately harmed his animals." However, in regard to the effect and potential effect of Zimmerman's violations on the health and well-being of his animals, it found that:

> [f]our of [Zimmerman's] violations, [Zimmerman's] failures to provide adequate veterinary care, and failures to remove excreta from primary enclosures on October 5, 1994, and November 15, 1994, constitute "serious" violations in that they directly affected the health and well-being of [Zimmerman's] animals . . . . [Zimmerman's] 10 other violations, while not "serious, are "significant" in that they constitute violations of the Regulations and Standards which could have affected the health and well-being of animals under certain circumstances.

Zimmerman could have been assessed a maximum daily penalty of $2,500 for each of his fifteen violations, for a total of $37,500. Moreover, his license under the Animal Welfare Act could be revoked for a single willful violation of the Animal Welfare Act or the Regulations and Standards. Hence, the sanction was well within the range of options of the Judicial Officer.

Our review is very deferential. An agency's choice of sanction is not to be overturned unless it is unwarranted by the law or unjustified by the facts or represents an abuse of discretion. *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88, 93 S. Ct. 1455, 1459 (1973). Zimmerman's primary argument is that the fine amount of $7,500 is excessive in light of the fact that he only grosses between $15,000 and $25,000 per year. He points out that this level of fine is often imposed on kennel operators who earn much more each year. However, in Butz, the Supreme Court explicitly noted that a sanction is "not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Id.* at 187, 93 S. Ct. at 1459. This holding effectively counters Zimmerman's argument. Hence, the fine imposed, being well within the statutory limits and the Department's discretion, is valid.

III.

The Judicial Officer examined each of the pertinent factors under section 19 of the Animal Welfare Act, the recommendation of the Acting Administrator of the

Animal and Plant Health Inspection Service, and all the relevant circumstances. The sanction imposed in the November 6, 1997, Decision and Order is consistent with the Animal Welfare Act and the Department's sanction policy.

We will affirm.

BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

JERRY GOETZ d/b/a JERRY GOETZ AND SONS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED v. DAN GLICKMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, et al.

No. 96-3120.
Filed July 10, 1998.

(Cite as 149 F.3d 1131)

Beef promotion - Assessments - Commerce clause - First amendment - Freedom of speech - Freedom of association - Tax - Equal protection clause.

The Tenth Circuit Court of Appeals affirmed the decision of the United States District Court for the District of Kansas. The Tenth Circuit concluded that the enactment of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) is a valid exercise of Congress' commerce power and the $1.00 per head assessment on the sale and importation of cattle under the Beef Promotion Act is not a tax that must be apportioned uniformly among the states under the Taxing Clause because the primary purpose of the Beef Promotion Act is regulation. The Tenth Circuit held that the district court erred by concluding that advertising under the Beef Promotion Act to support promotion of beef is commercial speech and applying the test in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), to determine whether use of assessments for such advertising violates appellant's First Amendment rights to freedom of speech and association. Instead, the Tenth Circuit held that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of appellant's First Amendment challenges, that the promotion of beef under the Beef Promotion Act is government speech, and that there are no First Amendment restrictions on government speech. The Tenth Circuit rejected appellant's contention that the Beef Promotion Act violates the Equal Protection Clause because it unfairly burdens some parts of the beef industry while benefitting the entire industry. The Court held that the classification scheme under the Beef Promotion Act does not jeopardize a fundamental right or a suspect class; therefore, the Equal Protection Clause only requires that the classification rationally further a legitimate governmental interest. Relying on *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 439 U.S. 1094 (1990), the Tenth Circuit held that Congress had several rational bases for the enactment of the Beef Promotion Act and that the Act does not violate appellant's right to equal protection of the laws.

United States Court of Appeals
Tenth Circuit

Before MURPHY and LOGAN, Circuit Judges, and MILES-LaGRANGE, District

Judge.*

MILES-LaGRANGE, District Judge.

Plaintiff Jerry Goetz ("Goetz"), a Kansas cattle farmer, appeals the district court's ruling in favor of Dan Glickman, Secretary, U.S. Department of Agriculture ("Secretary"). Goetz claims the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901(a) ("Beef Promotion Act" or "Act"), is unconstitutional. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Facts and Proceedings Below

Goetz filed this class action lawsuit against the Secretary contending that his and other class members' constitutional rights are being violated because they must pay a $1.00 per head "assessment" on the sale and importation of cattle as authorized by the Beef Promotion Act. The district court's decision provides a succinct description of the Act's regulatory scheme:

> The Act directs the Secretary to promulgate a Beef Promotion and Research Order ("the Order"), that provides for financing beef promotion and research through the assessments on cattle sold in the United States and cattle, beef, and beef products imported into the United States. 7 U.S.C. § 2901(b), 2903, 2904(8)(A)-(C). The Order established by the Secretary (7 C.F.R. Part 1260, Subpart A) established the Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Beef Board") and the Beef Promotion Operating Committee ("the Operating Committee"). 7 U.S.C. § 2904(1)-(7); 7 C.F.R. 1260.141, 1260.161. The Cattlemen's Beef Board is made of cattle producers and importers appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. 1260.141. The Board's principal duties are to administer the Order, make rules and regulations to effectuate the terms and provisions of the Order, elect members of the Board to serve on the Operating Committee, to approve or disapprove the budget submitted by the Operating Committee, to receive, investigate and report to the Secretary complaints of violations of the Order, and [to] recommend to the Secretary amendments to the Order. 7 U.S.C. § 2904(2)(A)-(F).

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*The Honorable Vicki Miles-LaGrange, United States District Judge of the Western District of Oklahoma, sitting by designation.

The Operating Committee is composed of ten members of the Cattlemen's Beef Board and ten members elected by a federation of State beef councils. 7 U.S.C. § 2904(4)(A); 7 C.F.R. 1260.161. The Operating Committee develops and submits to the Secretary for approval promotion, advertising, research, consumer information and industry information plans and projects. 7 U.S.C. § 2904(4)(B); 7 C.F.R. 1260.168. The Act prohibits the use of funds for political purposes. 7 U.S.C. § 2904(10).

The Act requires cattle producers in the United States to pay a one dollar per head assessment on cattle sold in this country. 7 U.S.C. § 2904(8)(A) & (C); 7 C.F.R. 1260.172(a)(1), 1260.310. Each person making payment to a cattle producers [sic] for cattle is a "collecting person" who is required to collect the assessments and remit them to a qualified State beef council in the State in which the collecting person resides, or, if there is no qualified State beef council, to the Cattlemen's Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. 1260.311(a), 1260.312(c). Each collecting person must report to the Board certain information for each calendar month at the time the assessments are remitted and must maintain and make available for the Secretary's inspection the records necessary to verify the reports. 7 U.S.C. § 2904(11); 7 C.F.R. 1260.201, 1260.312(a)-(c), 1260.202.

The Secretary is authorized to conduct investigations and to issue subpoenas to determine if there has been a violation of the Act, the Order, or the rules and regulations thereunder. 7 U.S.C. § 2909. After an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for each violation of the Act and the Order. *Id.* § 2908(a). In addition, the Secretary may request the Attorney General to initiate a civil action to enforce, and to restrain a person from violating, any order or regulation under the Act. *Id.* § 2908(b), (c).

Within 22 months of the issuance of the Order, the Act required the Secretary to conduct a referendum among those persons who were producers and importers during that trial period. The Order would continue to operate only upon approval by a majority of those participating in the referendum. 7 U.S.C. § 2906(a). Prior to the referendum, a cattle producer who paid the assessment could demand a one-time refund. *Id.* § 2907; 7 C.F.R. 1260.173, 1260.174. On May 10, 1988, the referendum was conducted and the Order was approved.

> Plaintiff is a "producer" within the meaning of the Act. 7 U.S.C. § 2902(12). As a producer, plaintiff is subject to the one dollar per head assessment upon the sale of cattle. Plaintiff alleges that at times he makes payments to other producers for cattle purchased from such producers, and thus he is a "collecting person" under the Act. *Id.* § 2904(8)(A). As a collecting person, plaintiff is subject to the collecting provisions of the Act and accompanying regulations.

See Goetz v. Glickman, 920 F. Supp. 1173, 1176-77 (D. Kan. 1996) (footnote omitted).

On October 29, 1993, the Secretary commenced administrative proceedings against Goetz because he failed to comply with the Beef Promotion Act and pay the assessment. A hearing before an administrative law judge was set for August 8, 1994. On August 2, 1994, Goetz filed a civil action in district court and moved for a temporary restraining order to enjoin the Secretary from proceeding with the administrative hearing. The district court entered a temporary restraining order which expired on August 15, 1994. On August 19, 1994, the parties agreed, with the court's approval, to stay the administrative proceedings until October 1, 1994. As part of the agreement, Goetz agreed to let an accounting firm audit his company. Over the objection of the Secretary, the district court continued the stay throughout the litigation.

Four Kansas cattle producers and three non-profit associations representing cattle producers in Kansas and throughout the nation intervened in the lawsuit to defend the Act.[1] On Dec. 8, 1995, the district court heard oral arguments from the parties.[2] Goetz argued the Act was unconstitutional because it (1) was beyond Congress' power to regulate interstate commerce, (2) imposed an unconstitutional direct tax, (3) effected an impermissible delegation of legislative authority, (4) violated the Takings Clause of the Fifth Amendment, (5) violated the Equal Protection Clause of the Fourteenth Amendment, and (6) infringed on the first amendment rights of cattle producers. He sought a ruling in the district court that the Act is unconstitutional, an injunction against its enforcement, and a refund of

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[1]In their brief, the intervenors/appellees adopted the arguments made by the Secretary and addressed Goetz' first amendment challenge arguing the Act is not subject to first amendment scrutiny because it is government speech.

[2]The National Pork Producers Council, the American Soybean Association and the National Potato Council filed amicus briefs in the district court.

assessments he has paid.

On Feb. 28, 1996, the district court upheld the constitutionality of the Act adopting the reasoning of the Third Circuit Court of Appeals in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S. Ct. 1168, 107 L.Ed.2d 1070 (1990).[3] The district court found that promoting the beef industry is a proper object of legislation under Congress' commerce power because it is reasonably adapted to the goal of strengthening the beef industry. 920 F. Supp. at 1180. The district court also held that the assessment imposed by the Beef Promotion Act is not a tax because the Act does not raise revenue for the government and regulation is the primary purpose of the statute. *See id.* at 1181. The court further held that Congress did not unlawfully delegate its legislative authority to the members of the beef industry because the Act places the Board under the Secretary's authority, Congress sets the amount of the assessments, and the Secretary decides how the funds will be spent. *See id.* at 1182. As to Goetz' takings clause claim, the district court concluded there was no fifth amendment violation because the government is not taking money for private use or to confer a private benefit on private interests (beef groups) in the beef industry. *See id.* Since Congress has determined beef promotion is in the public interest, the district court held courts should not substitute their judgment for Congress'. *See id.*

With regards to Goetz' first amendment claim, the district court agreed with the *Frame* court and found there was no free speech or free association violation because the Act is "commercial speech" not "government speech."[4] The district court concluded that the Act passed the test outlined in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) on the free speech claim.[5] The court also concluded Goetz' first amendment free association claim should be analyzed under the higher standard of scrutiny set forth in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct.

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[3]The plaintiff in *Frame* also challenged the constitutionality of the Beef Promotion Act.

[4]The district court, like the court in *Frame*, recognized the issue was a close one. *See id.* at 1182.

[5]Restrictions on commercial speech are subject to the test outlined in *Central Hudson*: (1) the State must assert a substantial government interest; (2) the regulatory technique must be in proportion to that interest; and (3) the incursion on commercial speech be designed carefully to achieve the State's goal. 447 U.S. at 564, 100 S.Ct. 2343.

3244, 82 L.Ed.2d 462 (1984).[6] 920 F. Supp. at 1182. The district court found the Act's restrictions passed this test because there was only a slight incursion on Goetz' associational rights, the national interest was compelling, the purpose of trying to bolster the beef image was neutral, the Act did not proscribe any official view, and no political funding was authorized by the statute. *See id.* at 1183.

Finally, the district court found there was no equal protection violation. The court held that Congress had a rational basis for enactment of the statute. Specifically, the district court determined that an assessment was easier to administer, ranchers would be the most benefitted by the Act and ranchers could pass any costs incurred on to others, and since Congress gave cattle producers the maximum influence in shaping the program, it rationally decided to pass along the corresponding financial burden to them.[7] *See id.* The district court (1) granted the motion to dismiss filed by the Secretary and intervenors; (2) denied Goetz' motion for summary judgment; (3) declared Goetz' motion for class certification moot; and (4) set aside its prior orders staying the administrative proceedings. *See id.* at 1184. Goetz appeals the district court's decision and asks this court to declare the Act unconstitutional, give him injunctive relief from the administrative proceedings, and order the return of funds he and other class members paid as assessments under the Beef Promotion Act.

On July 9, 1997, we directed the parties to file supplemental briefs addressing the effect of the Supreme Court's decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ____, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) on Goetz' first amendment claim. In *Wileman Bros.*, the Supreme Court, resolving a circuit split, held the regulations imposing a generic advertising program for California peaches, nectarines, and plums paid for by mandatory assessments on fruit handlers, did not implicate or violate the First Amendment.

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[6]Under *Roberts*, the governmental interference with associational rights must be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." 468 U.S. at 623, 104 S.Ct. 3244.

[7]The district court also held that because no fundamental right was involved the Equal Protection Clause only required that the classification rationally further legitimate governmental interests. *See id.* at 1183 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 8-12, 112 S.Ct. 2326, 2331-32, 120 L.Ed.2d 1 (1992); *United States v. Phelps*, 17 F.3d 1334, 1344 (10th Cir.), *cert. denied*, 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1223 (10th Cir. 1990)).

Analysis

In this appeal, Goetz raises all of the same claims made in the district court except the unconstitutional delegation of power and taking clause claims. The ruling of the district court is reviewed de novo. *National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1243-44 (10th Cir. 1989) (legal issues are reviewed *de novo*).

Commerce Clause

Goetz first argues the Beef Promotion Act is unconstitutional because it violates the Commerce Clause. He contends (1) the Act does not have a public purpose, (2) the Act does not regulate an activity which substantially affects interstate commerce, and (3) there is no rational connection between the regulatory means selected and the asserted ends. In response, the Secretary argues beef purchases and sales substantially affect interstate commerce. Furthermore, the Secretary argues, the Act, which authorizes promotion and research to strengthen the beef industry and is funded by a regulatory assessment, represents a valid exercise of Congress' commerce power. In addition, the regulation of interstate commerce encompasses promotion as well as prohibition. The Secretary contends promotion and research are reasonably adapted to the Act's goal of strengthening the market through increased consumption because advertising affects demand.

The United States Supreme Court has clearly defined a court's function in examining Congress' exercise of its power under the Commerce Clause:

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution. The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme. Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. Moreover, this Court has made clear that the commerce power extends not only to the use of channels of interstate or foreign commerce and to

> protection of the instrumentalities of interstate commerce or persons or things in commerce, but also to activities affecting commerce. As we explained in *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975), even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. Thus, when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (internal citations and quotations omitted). *See also State of Oklahoma v. Federal Energy Regulatory Commission*, 661 F.2d 832, 837 (10th Cir.1981), *cert. denied*, *Texas v. Federal Energy Regulatory Commission*, 457 U.S. 1105, 102 S.Ct. 2902, 73 L.Ed.2d 1313 (1982); *United States v. Hampshire*, 95 F.3d 999, 1001-1002 (10th Cir. 1996), *cert. denied*, ___ U.S. ____, 117 S.Ct. 753, 136 L.Ed.2d 690 (1997).

In examining the validity of Congress' exercise of power, we begin with the language contained in the Act itself. Congress made the following findings when it passed the Beef Promotion Act:

> (1) beef and beef products are basic foods that are a valuable part of human diet;
> (2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;
> (3) beef and beef products should 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 beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation;
> (5) there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products; and
> (6) beef and beef products move in interstate and foreign commerce, and

beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products.

7 U.S.C. § 2901(a).

Congress' purpose and objectives are clearly set forth in the Act:

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 Act shall be construed to limit the right of individual producers to raise cattle.

7 U.S.C. § 2901(b).

Goetz first contends that beef production does not substantially affect interstate commerce.[8] For congressional exercise of power to be valid under the commerce clause, the legislation must involve an activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 1630, 131 L.Ed.2d 626 (1995) (Court struck down the Gun Free School Zone Act of 1990 enacted under the commerce clause because it had nothing to do with any sort of economic enterprise). As the district court noted, "It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause." 920 F. Supp. at 1179. We also conclude Congress had a rational basis for finding the beef industry substantially affects interstate commerce.

Goetz also argues Congress really intended to regulate advertising. However, the plain language of the statute reveals the purpose of the Act is to strengthen the

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[8]Goetz contends the Act is unconstitutional because it does not have a public purpose. Essentially, he argues the Act's primary purpose is to raise revenue, therefore it is a direct tax impermissibly levied upon him. *See* Brief of Appellant at 31. As set forth below, we hold the Act's primary purpose is to regulate, therefore it is not a tax.

beef industry and we conclude this is a legitimate congressional goal. We further conclude the objective of the Act is valid and the stimulation of the beef market is a proper regulatory activity.

Goetz contends Congress' commerce power is limited to restricting or prohibiting an activity.[9] We agree with the well reasoned opinion of our sister circuit in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990). The Third Circuit said, "[I]t is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce." *Id.* at 1126. The Act regulates commerce by authorizing the collection of an assessment that is used to promote and advertise beef. The Supreme Court has recognized that advertising stimulates consumer demand for the product being promoted. *See Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986). The court in *Frame* also rejected the argument that the Act is not regulatory noting that Congress chose to promote and stimulate the demand side of the beef market indirectly, by influencing consumer attitudes toward beef. 885 F.2d at 1126. The *Frame* court likewise rejected Goetz' argument that the Act is unconstitutional because no activity is being regulated. The court stated: "[W]e decline to invalidate an otherwise lawful exercise of the commerce power on the basis Congress has not specified whether it is regulating the `activity' of `consumer beef purchases,' `interstate beef sales,' or `national beef markets.' Each activity is related, and is validly regulated by Congress." *Id.* at 1127.

Goetz also contends there is no rational connection between the regulatory means selected and the asserted end. Goetz contends since the government has set up a pork promotion and research board (among others), and pork is the primary competitor of beef, it is not reasonable for the Secretary to engage in conflicting programs. In addition, Goetz argues the Act does not serve its stated purpose to regulate beef and Congress is actually trying to regulate advertising.

In considering this argument, the *Frame* court stated: "To stimulate the demand for beef, the lack of which Congress has determined is harming the beef industry, Congress has chosen from its arsenal of regulatory means promotion and advertising, research, consumer information and industry information. These endeavors are rationally related to the maintenance and expansion of the nation's beef markets." *Id.* The *Frame* court found that the Act was a valid exercise of

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[9]Goetz contends Congress does not have the power to "stimulate and promote" commerce since Congress' power is limited to a) leaving the activity alone; b) restricting the activity; or c) prohibiting the activity.

Congress' power to regulate interstate commerce. *See id.* We agree. Goetz' argument that the promotion of beef is offset by other promotion schemes such as for pork is without merit. We hold Congress has a rational basis for stimulating different areas of the agricultural economy and determining its various promotional programs are in the best interest of the public.

In sum, we conclude that under current Supreme Court precedent, Congress has validly exercised its commerce powers in enacting the Beef Promotion Act.

Direct Tax

Goetz also argues the assessment is a direct tax that must be apportioned uniformly among the states to be constitutional under the Taxing Clause because the Act's primary purpose is to raise revenue. Goetz argues the Act is a direct tax and relies on legislative history to support his contention Congress never intended it to be a regulatory program. Goetz contends the assessments flow to qualified beef councils and national private trade associations in the beef industry.

The Secretary argues the Apportionment Clause is inappropriate because Congress clearly intended to exercise its authority under the Commerce Clause. The Secretary contends assessment is not the objective of the Act but merely a funding mechanism for the promotion of the beef industry and research. The Secretary further argues the assessment is not a tax but is like a "special assessment" imposed on convicted criminals under the Victims of Crimes Act, or mandatory bar dues or union dues. Finally, the Secretary points out that Goetz has no evidence that the assessment is a direct tax.

The test for determining whether an assessment is a tax has been clearly enunciated by the Sixth Circuit Court of Appeals:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943). *See also Chickasaw Nation v. State of Oklahoma ex rel Oklahoma Tax Commission*, 31 F.3d 964, 968 (10th Cir. 1994) (quoting *American Petrofina Co. of Texas v. Nance*, 859 F.2d 840,

841 (10th Cir. 1988) ("[t]he mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised.")). We agree with the district court that the primary purpose of the Act is regulation, not to raise revenues.

First Amendment

Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption.[10] Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef).

The Secretary responds that the Act does not suppress or restrict Goetz' speech, it merely requires he pay an assessment to fund the promotion of a commodity that he markets and is no different than compelled funding of unions or integrated bars. Furthermore, the Secretary and intervenors argue the Act is "government speech" (as opposed to commercial speech) and there are no First Amendment restrictions on "government speech."

This Court agrees with the Secretary and intervenors. *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ____, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), involved a First Amendment challenge to a generic advertising program for California peaches, nectarines, and plums which was established pursuant to a marketing order promulgated by the Secretary of Agriculture and supported by mandatory assessments imposed on the handlers of fruit. The Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit in *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (1995), which held the peach promotion program violated the First Amendment, and the Third Circuit in *Frame*, which held the Beef Promotion Act did not violate the First Amendment.

In *Wileman Bros.* the Supreme Court held that the generic marketing program did not raise a First Amendment issue for the Court because the marketing order did not impose restraint on the freedom of any producer to communicate any message to any audience, did not compel any person to engage in any actual or symbolic speech, and did not compel the producers to endorse or to finance any political or ideological views. *See id.* at 2138. The Supreme Court found its

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[10]The $1.00 per head assessment on the sale and importation of cattle funds the Operating Committee's activities, which include the promotion of the beef industry throughout the country through "generic advertising." The generic advertisements include the familiar "Beef, it's what's for dinner" promotion.

compelled speech cases inapplicable because there is no "compelled speech." The Court held the assessments for ads did not require the fruit producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond to a hostile message when they prefer to remain silent or require them to be publicly identified or associated with another's message. *See id.* at 2139. Furthermore, the Court said, the assessments are financial contributions for generic advertising that program participants do not disagree with, and the advertising is not attributed to individual handlers. *See id.* In addition, none of the generic ads promote any particular message other than encouraging consumers to buy California tree fruit. *See id.*

The Court concluded that the generic ads for California fruit are germane to the purposes of the marketing orders and the assessment is not used for ideological activities. *See id.* at 2140. The Court further concluded that generic advertising is a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords other policy judgments made by Congress. *See id.* at 2141. Finding the generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard, the Supreme Court reversed the Ninth Circuit decision. *See id.* at 2142.

In the case at bar, the district court incorrectly concluded that the Act was commercial speech and applied *Central Hudson.* The district court found the Act passed the *Central Hudson* test and did not violate Goetz' freedom of speech and association. *Goetz v. Glickman*, 920 F. Supp. at 1182-83. We find the district court erred in applying the *Central Hudson* test to Goetz' First Amendment claim. However, we can affirm the district court on a basis not relied on by the court if supported by record and law. *United States v. Corral*, 970 F.2d 719, 726 n. 5 (10th Cir. 1992). Therefore, we affirm the district court and find under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless.

Equal Protection

Finally, Goetz contends the assessment violates the Equal Protection Clause because it infringes on his First and Fifth amendment rights. Therefore, he argues, the Act must be reviewed under strict scrutiny to determine whether the statute is narrowly tailored to further a compelling governmental interest. Goetz argues the Act unfairly burdens producers, importers and collecting persons while benefitting the entire beef industry. Goetz also contends Congress' interests in preserving the American cattlemen's traditional way of life and avoiding the free rider problem are not compelling or substantial governmental interests. Goetz further argues the refund provisions of the Act suggest the government's interest is not compelling or

substantial. Goetz contends there are numerous less restrictive means available to Congress as evidenced by the legislative discussions.[11]

In response, the Secretary argues the failure of Goetz' First Amendment claim dooms his equal protection challenge as well. Since he does not allege a suspect class, the Secretary contends the strict scrutiny standard of review does not apply. Furthermore, the Act does not infringe on Goetz' equal protection rights because it makes an economic distinction and need only be rationally related to a legitimate governmental interest. The Secretary argues the Act easily survives the rational basis test because Congress has a compelling interest in strengthening the beef industry. In addition, the Secretary argues, Congress also rationally decided the members of the industry that have the most to gain should bear the economic costs involved.

The Fifth Amendment's Equal Protection Clause prohibits the federal government from discriminating between individuals or groups. Government classification that actually jeopardizes the exercise of a fundamental right or a suspect class (race, gender, etc.) must be reviewed under a strict scrutiny standard and must be precisely tailored to further a compelling governmental interest. *Edwards v. Valdez*, 789 F.2d 1477, 1483 (10th Cir. 1986). If no suspect class or fundamental right is involved, the Equal Protection Clause only requires that the classification rationally further a legitimate governmental interest. *See Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1223-24 (10th Cir. 1990).

We agree with the district court's determination that the Act does not violate Goetz' First and Fifth Amendment rights, and the strict scrutiny standard of review does not apply. Although Goetz failed to address his equal protection claims under the rational basis test, the court in *Frame* identified several rational bases for Congress' enactment of the statute: (1) an assessment on the initial sale of cattle is easier to administer; (2) ranchers would be most benefitted by the Act; and (3) ranchers could pass the cost on to others. *Frame*, 885 F.2d at 1137-38. This Court

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[11]Goetz contends his fundamental rights under the First and Fifth Amendments have been infringed and therefore strict scrutiny applies. In addition, Goetz contends that the Beef Promotion Act is presumed to be unconstitutional for the purposes of analysis of his First and Fifth Amendment claims. However, we conclude Goetz' claims must be analyzed under the rational basis test and the Act, therefore, is presumptively constitutional and the burden falls on Goetz to show that the Act is irrational or arbitrary and cannot further a legitimate governmental interest. *See United States v. Phelps*, 17 F.3d 1334, 1345 (10th Cir. 1994), *cert. denied*, 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994). In his appellate brief, Goetz fails to address his equal protection claim under the rational basis test, arguing only the strict scrutiny standard of review.

finds the Act easily survives Goetz' equal protection challenge as well.

Conclusion

The judgment of the district court is AFFIRMED in all respects on Goetz' Commerce Clause, Taxing Clause and Equal Protection Clause claims. The district court's decision is AFFIRMED on Goetz' first amendment claims under the reasoning of the Supreme Court in *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ____, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997).

NATIONAL DAIRY PROMOTION AND RESEARCH BOARD

COURT DECISION

GALLO CATTLE COMPANY v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CIV. NO. S-98-1619 EJG/JFM.
Filed October 1, 1998.

Dairy order — Promotional program — First amendment — Freedom of speech — Freedom of association — Sanction.

The district court granted the United States Department of Agriculture's (USDA) motion to dismiss plaintiff's petition, in which plaintiff contends that the National Dairy Board's (NDB) requirement that dairy producers pay assessments to fund generic advertising violates plaintiff's first amendment speech and association rights; but denied USDA's motion for sanctions pursuant to Federal Rule of Civil Procedure 11, in which USDA contends that plaintiff continued to litigate the generic advertising issue despite Supreme Court precedent. The district court, relying on *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S.Ct. 2130 (1997), held that NDB's collection of mandatory fees and use of those fees to promote Bovine Growth Hormone does not violate plaintiff's first amendment rights because the NDB promotional program does not curtail plaintiff's right to disseminate its own message; is not actual or symbolic speech by, or attributable to, plaintiff; and is politically and ideologically neutral.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ORDER OF DISMISSAL

This matter is before the court on defendant's motions to dismiss and for sanctions. After reviewing the record and the documents filed in connection with the motions the court has determined that oral argument will not be of material assistance. Accordingly, the hearing set for October 5, 1998 is VACATED and the matter is ordered submitted. *See* Local Rule 78-230(h). For the reasons that follow, the motion to dismiss is GRANTED and the motion for sanctions is DENIED.

BACKGROUND

This is a complaint for review of federal agency action, brought pursuant to 7 U.S.C. § 4509(b). On April 16, 1996 plaintiff filed a petition with defendant contending that the National Dairy Board's requirement that dairy producers pay

assessments to fund generic advertising violates plaintiff's first amendment speech and association rights.[1] On April 22, 1998 defendant issued its decision denying plaintiff's petition.

The instant complaint seeking judicial review was filed May 11, 1998 in the Fresno Division of the Eastern District of California. By order filed August 31, 1998, the complaint was transferred to the Sacramento Division and reassigned to Judge Edward J. Garcia.[2]

Defendant moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the complaint does not state a claim in light of the Supreme Court's ruling in *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S.Ct. 2130 (1997). In addition, defendant moves for sanctions pursuant to Federal Rule of Civil Procedure 11 contending that plaintiff's counsel's continued litigation of this issue in the face of Supreme Court precedent and numerous lower court rulings is sanctionable conduct. The court agrees with defendant's first premise and will dismiss the complaint without leave to amend; however, the motion for sanctions will be denied. While plaintiff's counsel has stretched the bounds of zealous advocacy to its zenith, he has not exceeded them.

DISCUSSION

A. Motion to Dismiss

Wileman involved a first amendment challenge to the requirement of mandatory assessments for generic advertising in the California tree fruit industry. The court held that compelled funding of advertising in a regulated industry was a form of economic regulation, not commercial speech. *Wileman*, 117 S.Ct. at 2142. Such a regulatory scheme neither violates nor implicates the first amendment because: 1) it does not restrain a producer's right to communicate any message to any audience; 2) it does not compel a producer to engage in any actual or symbolic speech; and 3) it does not compel endorsement or financing of political or ideological views. *Id.* at 2138.

Plaintiff contends *Wileman* doesn't apply because of distinctions between the

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[1]The Board's requirements are derived from the Dairy Stabilization Act, 7 U.S.C. § 4501 *et seq.*, and the Dairy Promotion Program, 7 C.F.R. § 1150.101 *et seq.*

[2]The order of transfer included a related case order, relating the above-captioned case to two other cases on Judge Garcia's civil docket: *Gallo Cattle Company v. USDA*, Civ. No. S-96-1146 EJG/JFM and *Gallo Cattle Company v. Veneman*, Civ. No. S-96-0740 EJG/JFM.

dairy and tree fruit industries. One is less regulated than the other, and one involves manufactured commodities while the other does not. However, as pointed out to plaintiff and its counsel by this very court on more than one occasion in the last year, these are distinctions without a difference.[3]

> 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. The California Cut Flower Commission, Civ. No. S-96-0102 EJG/GGH, Reporter's Transcript of Hearing on Defendants' motions, August 4, 1997, 12:15 - 13:2.

> Plaintiff says defendant reads the Supreme Court's opinion too broadly, that *Wileman* does not require dismissal of its case because the marketing order at issue here does no more than compel participation in generic advertising and does not otherwise regulate the dairy industries.
>
> It appears plaintiff misunderstands the regulatory scheme underlying the dairy industry, as well as misinterprets *Wileman*. . . . [N]umerous facets of the milk producers businesses are regulated, including the setting of minimum prices and distribution of revenues, which requirements clearly displace competition.
>
> While the marketing order at issue in this case does not specifically concern

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[3]In this regard, the court takes judicial notice of the decisions emanating from both the Fresno and Sacramento divisions of this court appended to defendant's moving and reply papers. *See Matsui Nursery v. California Cut Flower Commission*, Civ. No. S-96-0102 EJG/GGH; *Delano Farms v. California Table Grape Commission*, Civ. No. F-96-6053 OWW/DLB; *Gallo Cattle Company v. Veneman*, Civ. No. S-96-0740 EJG/JFM; *Donald B. Mills, Inc. v. USDA*, Civ. No. F-97-5890 OWW/SMS; *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Commission*, Civ. No. F-95-5428 OWW/DLB.

> itself with these other aspects, and is limited solely to collection of assessments for participation in generic advertising, that does not make the industry itself any less regulated. In addition, the Supreme Court's *Wileman* opinion does not turn on the degree to which the Government has otherwise displaced free market [competition].

Gallo Cattle Company v. Veneman, Civ. No. S-96-0740 EJG/JFM, Reporter's Transcript of hearing on Defendant's Motion for Summary Judgment, November 17, 1997, 4:1-23.

Plaintiff's first amendment claim against the federal government's program of compelled funding of generic advertising for the dairy industry at the national level, fails for the same reasons as plaintiff's virtually identical claim against the state government's virtually identical program which is in place at the state level, a case already resolved by this court against plaintiff. The only discernible difference is the existence of one additional argument against the national program which is absent from plaintiff's complaint against the state program.

In paragraph 22 of the instant complaint plaintiff objects to what it describes as the "National Dairy Board's tax expenditure promoting Bovine Growth Hormone." Plaintiff does not provide this substance to its dairy cows nor is it present in plaintiff's cheese. Because plaintiff is opposed to artificial hormones and does not want its tax dollars used in this manner, it objects to the Board's promotion of the same. Apparently, plaintiff contends that because the promotion of artificial hormones is contrary to plaintiff's practice, assessing money from plaintiff to promote artificial hormones contravenes the first amendment.

This argument is not persuasive. Application of the three-step *Wileman* analysis shows that the collection of mandatory fees to promote the use of artificial growth hormones does not run afoul of the first amendment. First, plaintiff's right to disseminate its own message is not curtailed. In fact, plaintiff has done just that by seeking and receiving approval to use the phrase "no artificial hormones" on its cheese. Complaint, ¶ 22.

Second, promotion of bovine growth hormone by the *Board* does not translate into actual or symbolic speech by *plaintiff*. As the Supreme Court noted in *Wileman*: "The use of assessments to pay for advertising does not require respondents to repeat an objectional message out of their own mouths. . . . Respondents are not required themselves to speak, but are merely required to make contributions for advertising. . . . Furthermore, the advertising is attributed not to respondents, but to the California Tree Fruit Agreement or `California Summer Fruits.'" *Wileman*, 117 S.Ct. at 2139. Similarly, promotion of artificial growth

hormones is not a message attributed to plaintiff; rather, it is the message of the National Dairy Board.

Third, plaintiff has failed to show a connection between the "promotion" of artificial growth hormones and endorsement of a specific political or ideological message. Nor could it. The purpose of the legislation challenged in this case is 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). To the extent the use of growth hormones increases milk production, the entire dairy industry benefits; thus, the legislation's purpose is met. *Cf. United States v. Frame*, 885 F.2d 1119, 1135-37 (3d Cir. 1989) (promotion of message that eating beef is healthy is ideologically neutral).

Finally, plaintiff has failed to characterize his objection to the promotion of growth hormones in a way in which the court could "infer a dispute over anything more than mere strategy." *Frame*, 885 F.2d at 1137. A disagreement with the content of the advertising or the promotional purposes espoused by the Board are administrative challenges to the program, not constitutional ones.

Based on the foregoing, plaintiff's complaint fails to state a claim and defendant's motion to dismiss is GRANTED.

B. Motion for Sanctions

Defendant seeks reimbursement of its reasonable attorneys fees incurred preparing its motion to dismiss contending that plaintiff's complaint was filed in violation of Federal Rule of Civil Procedure 11. Specifically, defendant argues that the first amendment claim raised in the complaint is frivolous in light of the Supreme Court's *Wileman's* decision and the subsequent reliance on *Wileman* by the judges of this district.

Plaintiff characterizes its complaint somewhat differently, describing the claims and arguments raised within it as recognition of a disagreement between the parties and the court concerning the scope and breadth of *Wileman*. Since neither the Ninth Circuit nor the Supreme Court have ruled on *Wileman's* applicability outside the tree fruit industry, plaintiff's counsel contends that his continued efforts to advocate for the modification of *Wileman* within the context of other industries are not just warranted, but are required lest he waive his client's rights.

The court is inclined to agree. While plaintiff has failed to persuade the judges of this district that mandatory funding of generic advertising may implicate the first amendment dependent upon the nature of the industry, the *Wileman* decision has not been applied by either the Ninth Circuit or the Supreme Court outside of the

tree fruit industry. Accordingly, plaintiff's complaint is not filed in violation of Rule 11.

Based on the foregoing, defendant's motion for sanctions is DENIED.

CONCLUSION

1. Defendant's motion to dismiss is GRANTED with prejudice and without leave to amend.
2. Defendant's motion for sanctions is DENIED.
3. The Clerk is directed to close this case.

IT IS SO ORDERED.

GALLO CATTLE COMPANY, a California limited partnership v. THE UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 97-15198.
Decided November 3, 1998.

(Cite as: 159 F.3d 1194) (9th Cir.).

Dairy Promotion — Interim relief — Judicial review — Jurisdiction.

A milk producer sought judicial review of the Judicial Officer's denial of its request for interim relief. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the Eastern District of California dismissing the complaint for lack of subject matter jurisdiction. The court of appeals held that the Dairy and Tobacco Adjustment Act of 1983 does not grant the district court jurisdiction to review the agency's denial of interim relief until the agency issues a final ruling on the merits of the underlying petition; the Administrative Procedure Act does not independently vest district courts with jurisdiction to review an agency's discretionary denial of interim relief; the Administrative Procedure Act's waiver of sovereign immunity in suits seeking judicial review of agency action under 28 U.S.C. § 1331 does not apply because the agency's denial of interim relief is not made reviewable by statute and is not final agency action; and due process does not require immediate judicial review of the agency's denial of interim relief.

United States Court of Appeals
Ninth Circuit.

Before: FLETCHER, T.G. NELSON, Circuit Judges, and WHALEY,* District Judge.

WHALEY, District Judge:

Gallo Cattle Company appeals the district court's dismissal of its Complaint for lack of subject matter jurisdiction. Gallo, a milk producer required under federal law to pay assessments to the National Dairy Promotion and Research Board, is currently challenging the constitutionality of these assessments in an ongoing administrative proceeding before the Secretary of Agriculture. In the administrative proceeding Gallo sought permission to escrow current and future assessments pending resolution of the administrative proceeding. Gallo's request was denied and Gallo brought suit in district court seeking review of the Secretary's decision denying Gallo's request for interim relief. Concluding that it lacked subject matter jurisdiction, the district court granted the Department of Agriculture's Motion for Judgment on the Pleadings. We affirm.

FACTUAL BACKGROUND

Gallo Cattle Company ("Gallo") owns one of the largest dairy herds in the nation. Gallo uses the milk from its herd solely for the production of cheese. As a dairy producer, Gallo is subject to the provisions of the Dairy and Tobacco Adjustment Act of 1983 ("Dairy Act"), Pub.L. No. 98-180, 97 Stat. 1128 (1983) (codified as amended 7 U.S.C. §§ 4501-38). The Dairy Act requires the Secretary of Agriculture to establish a national program for dairy product promotion, research, and consumer education, *see* 7 U.S.C. § 4504 (1992), which the Secretary did in 1984. *See* 7 C.F.R. pt. 1150 (1997). This program, the Dairy Promotion Program, is administered by the National Dairy Promotion and Research Board ("National Board"), which consists of 36 milk producers appointed by the Secretary of Agriculture. 7 C.F.R. § 1150.131 (1997).

Pursuant to the Dairy Promotion Program, milk producers are required to pay to the National Board a 15 per hundredweight assessment on milk for commercial

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*Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

use in fluid form or for manufactured products, including cheese. 7 C.F.R. § 1150.152 (1997). The assessment is reduced by up to 10 per hundredweight for payments made to a "qualified" state dairy program. 7 C.F.R. §§ 1150.153, 1150.152(c)(1997).[1] The National Board uses the assessments to defray the cost of administering the Dairy Promotion Program, which includes the costs associated with dairy product promotion, research projects, and nutrition education projects. *See generally* 7 C.F.R. § 1150.140 (1997).

PROCEDURAL BACKGROUND

On April 16, 1996, Gallo filed a petition with the United States Secretary of Agriculture ("Secretary") challenging the assessments it was required to pay to the National Board pursuant to the Dairy Promotion Program as violative of the First Amendment of the United States Constitution. In its Petition, Gallo sought interim relief. Specifically, Gallo sought permission to pay its assessments into escrow pending a decision on the merits of the petition. In an Order filed on May 29, 1996, the judicial officer, who acts for the Secretary in the adjudication of these petitions, denied Gallo's request for interim relief.

On June 18, 1996, Gallo filed an action in the United States District Court for the Eastern District of California seeking review of the judicial officer's Order denying interim relief. On October 7, 1996, Gallo moved for a preliminary injunction and/or summary judgment, and on October 8, 1996, the respondent, the United States Department of Agriculture ("USDA") moved for judgment on the pleadings. On November 8, 1996, the district court ruled from the bench that neither the Dairy Act nor the Administrative Procedure Act vested it with jurisdiction over the action. Accordingly, the district court dismissed Gallo's Complaint for lack of subject matter jurisdiction and filed an order memorializing that ruling on November 13, 1996. On January 10, 1997, Gallo timely filed its Notice of Appeal.

Since the dismissal by the district court, the United States Supreme Court issued its opinion in *Glickman v. Wileman Bros.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). In *Glickman*, the Court upheld a marketing order promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act

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[1]Gallo participates in a California dairy program administered by the California Milk Producers Advisory Board. Pursuant to that program, Gallo pays to the California Board 10 per hundredweight of milk produced. Accordingly, because California's program is a "qualified" dairy program as defined by the National Dairy Act, Gallo's payment to the California program reduces its assessment due under the National Dairy Act. *See* 7 U.S.C. § 4504(g) (1992).

of 1937, the constitutionality of which had also been challenged as violative of the First Amendment. On November 14, 1997, this court ordered the parties to submit supplemental briefing on the effect, if any, of the *Glickman* decision on this appeal.[2]

DISCUSSION

We review *de novo* a district court's conclusion that it lacks subject matter jurisdiction. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996).

I. THE DAIRY PROMOTION PROGRAM DOES NOT GRANT THE DISTRICT COURT JURISDICTION TO REVIEW THE AGENCY'S DENIAL OF INTERIM RELIEF, UNTIL SUCH TIME AS THE SECRETARY RULES ON THE MERITS OF THE UNDERLYING PETITION.

Title 7 U.S.C. § 4509 (1992) sets forth the petition and review provisions of the Dairy Promotion Program. The statutory provision for administratively challenging the legality of any order issued pursuant to the Dairy Promotion Program is found in subsection (a) of § 4509, which provides:

> 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. § 4509(a) (emphasis added). The statutory provision conferring jurisdiction in the federal district courts to review the Secretary's administrative ruling is found in the next subsection of § 4509, which provides in relevant part:

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[2]Given this court's conclusion that the district court did not have jurisdiction to review the Judicial Officer's denial of interim relief, any impact of the decision in *Glickman* on Gallo's underlying Petition currently before the Secretary is not before the court.

> The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review *such ruling*, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling.

7 U.S.C. § 4509(b) (emphasis added).

Thus, Congress has explicitly provided the procedure that is to be used to challenge orders issued pursuant to the Dairy Promotion Program.[3] Such a procedure mandates exhaustion of administrative remedies prior to seeking judicial review in district court. *See Rasmussen v. Hardin*, 461 F.2d 595, 597-98 (9th Cir. 1972) (interpreting the same language in 7 U.S.C. § 608c(15) as requiring a milk handler to exhaust administrative remedies prior to challenging marketing orders promulgated under the Agricultural Marketing Agreement Act). Further, while judicially-created exhaustion requirements may be waived by the courts for discretionary reasons, statutorily-provided exhaustion requirements deprive the court of jurisdiction and, thus, preclude any exercise of discretion by the court. *See Reid v. Engen*, 765 F.2d 1457, 1462 (9th Cir. 1985).

Here, the district court correctly interpreted § 4509 as vesting it with jurisdiction only after the Secretary rules on the merits of Gallo's petition. Section 4509(a) provides that the Secretary will make "a ruling" on the petition. The use of the singular form of "ruling" in § 4509(a) indicates that only one ruling will be rendered for each petition filed-the Secretary's final decision on the merits of the petition. Pursuant to § 4509(b), "such ruling[s]" are reviewable by the district courts to determine if they are in accordance with law. The word "such" in § 4509(b), identifying those rulings over which the district court has jurisdiction to review, necessarily refers back to the "ruling on the petition" made by the Secretary

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[3]We have interpreted such provisions as requiring that all challenges, including constitutional ones, first be presented to the Secretary of Agriculture. *See, e.g., Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1195-96 (9th Cir. 1990) (holding that an action challenging the constitutionality of almond marketing orders was properly dismissed by the district court for failure to exhaust administrative remedies before the Secretary of Agriculture); *see also Rasmussen v. Hardin*, 461 F.2d 595, 597-98 (9th Cir. 1972) (holding that a milk producer-handler's due process challenge to a marketing order was properly dismissed for failure to exhaust administrative remedies). Sound policy reasons underlie the requirement that all challenges, including constitutional ones, be presented first to the Secretary; it prevents circumvention of the exhaustion requirement, gives the district court the benefit of the Secretary's experience and understanding of the milk industry, and allows for the possibility of resolution of the challenge without reaching the constitutional question. *See Saulsbury*, 917 F.2d at 1195 (internal citations omitted).

pursuant to § 4509(a). *Cf. Public Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 628 (9th Cir. 1985) (concluding that beginning a sentence with the words "such suits" necessarily refers back to the "suits" specified in the previous sentence). Therefore, § 4509(b) vests jurisdiction in the district courts to review only the Secretary's final ruling on a petition filed pursuant to § 4509(a).

The administrative decision that Gallo seeks the district court to review is not "such [a] ruling" as contemplated by § 4509 because it is not the ruling by the Secretary on Gallo's Petition. To the contrary, it is merely an order denying the interim relief, which Gallo is seeking *pending the Secretary's ruling* on its Petition. Accordingly, because the Secretary has not yet ruled on Gallo's Petition, the district court correctly concluded it had not yet acquired jurisdiction Pursuant to § 4509(b).

Gallo's argument to the contrary is difficult to discern; it is premised on the erroneous conclusion that § 4509(b) also vests the district court with jurisdiction to review final agency action by the Secretary that inflicts actual injury, even if that action occurs prior to the Secretary's ruling on a petition. That conclusion, however, cannot be reconciled with the plain language of § 4509. The agency action complained of here, whether denominated a ruling, a decision, or an order, is not the Secretary's ruling on Gallo's Petition challenging the assessments imposed by the Dairy Promotion Program. Accordingly, § 4509(b) cannot be the basis for district court jurisdiction to review the decision.

II. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT INDEPENDENTLY VEST THE FEDERAL DISTRICT COURTS WITH JURISDICTION TO REVIEW AN AGENCY'S DISCRETIONARY DENIAL OF INTERIM RELIEF.

Gallo alternatively asserts that the district court had jurisdiction to review the judicial officer's denial of interim relief pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1989) ("APA"). However, despite the broad language of the Administrative Procedure Act, it is well settled that the APA does not independently confer jurisdiction on the district courts. *See Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998); *Bonneville Power Admin.*, 767 F.2d at 627; *McCartin v. Norton*, 674 F.2d 1317, 1319 (9th Cir. 1982). Rather. the APA prescribes standards for judicial review of an agency action, once jurisdiction is otherwise established. *See Staacke v. United States Secretary of Labor*, 841 F.2d 278, 282 (9th Cir. 1988) (citing *Califano*, 430 U.S. at 106-07 & n. 6, 97 S.Ct. 980). Accordingly, the APA could not provide the district court with jurisdiction to review the judicial officer's denial

of interim relief.

Nonetheless, while beyond dispute that the APA does not provide an independent basis for subject matter jurisdiction, a federal court has jurisdiction pursuant to 28 U.S.C. § 1331 over challenges to federal agency action as claims arising under federal law, unless a statute expressly precludes review. *See Parola v. Weinberger*, 848 F.2d 956, 958 (9th Cir. 1988). Thus, while the APA does not confer a district court with jurisdiction, it does provide a waiver of sovereign immunity in suits seeking judicial review of a federal agency action under § 1331. *Id.*

However, the APA's waiver of sovereign immunity contains several limitations. Of relevance here is § 704, which provides that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review." 5 U.S.C. § 704. As we have already concluded that the agency action complained of here is not made reviewable by § 4509, the judicial review provision of the Dairy Promotion Program, it is only reviewable if it constitutes "final agency action" for which there is no other adequate remedy in a court. Gallo's assertion that the decision to deny interim relief is "final agency action" is without merit.

Agency action is "final" if a minimum of two conditions are met: "[f]irst, the action must mark the consummation of the agency's decision making process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1196 (9th Cir. 1997) (internal quotes omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997)); *see also FTC v. Standard Oil Co.*, 449 U.S. 232, 241, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980) (noting that the action must be a definitive statement of the agency's position with concrete legal consequences).

The judicial officer's discretionary decision not to allow Gallo to pay its assessments into escrow is not a "final agency action" because it does not determine the rights or obligations of the parties, nor are there legal consequences flowing from it. While Gallo has an obligation to pay assessments to the National Board, that obligation arises pursuant to the Dairy Promotion Program and the regulations promulgated thereunder. *See* 7 U.S.C. § 4504; 7 C.F.R. § 1150.152. It does not arise from the judicial officer's denial of interim relief. The judicial officer's denial of interim relief imposes no obligation on Gallo at all. Further, there are no legal consequences arising from the decision denying interim relief, nor does the decision fix the rights of the parties.

While Gallo obliquely refers to the civil penalty that can be imposed for failure

to timely pay any assessment due, that potential consequence does not result from the judicial officer's denial of interim relief. Rather, any penalty imposed on Gallo for untimely payment of assessments would result from Gallo's disregard of its statutory obligation. Further, the authority for any such penalty is 7 U.S.C. § 4510(b), not the judicial officer's order denying interim relief. Accordingly, as there are no legal consequences resulting from the order denying interim relief and, thus, no "final agency action," 28 U.S.C. § 1331 and § 704 of the APA could not vest the district court with jurisdiction to review the order.

Finally, Gallo asserts that due process requires that either § 4509 or the APA be construed as vesting the district court with jurisdiction over its Complaint because a contrary construction would result in "irreparable injury" to Gallo with no "clear and certain remedy." A monetary assessment on milk producers is without question a deprivation of property. Further, since the judicial officer here has denied interim relief pending the conclusion of the administrative proceeding, the constitutionality of those assessments will be determined post-deprivation. Accordingly, the Due Process Clause requires that Gallo have, in addition to a fair opportunity to challenge the assessments, a clear and certain remedy for a successful challenge. *See McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18, 36-39, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). Gallo has both.

First, Gallo has an opportunity to challenge these assessments both in an administrative proceeding before the Secretary of Agriculture and in a suit filed in district court to determine whether the Secretary's ruling is in accordance with law. Second, Gallo has a clear and certain remedy for a successful challenge because a refund of any assessments found not to have been due would be in order. *See, e.g., Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 559 (9th Cir. 1988); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983).

Indeed, this court has already held that the post-deprivation remedy available to Gallo, namely a refund of assessments found not to have been due, is constitutionally sufficient in that it provides a "clear and certain remedy." *See Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993). The court in *Cal-Almond* rejected a due process challenge to a statutory scheme that required annual assessments to be paid pending the conclusion of the administrative proceeding wherein the constitutionality of the assessments was being challenged. *Id.* While the plaintiffs in *Cal-Almond* argued that this procedure did not provide them with a "clear and certain remedy" in the event they prevailed, the court held that a refund of any assessments found not to have been due is a sufficient remedy

for parties successfully challenging the constitutionality of a marketing order. *Id.* (*citing Saulsbury*, 917 F.2d at 1195).

Gallo's attempt to distinguish *Cal-Almond* from the instant case is unsuccessful. Gallo asserts that since the Government's counsel here has refused to stipulate to a refund of all assessments found not to have been due, the constitutionally sufficient remedy available to the plaintiffs in *Cal-Almond* is not present here. The *Cal-Almond* decision, however, does not suggest that due process requires plaintiffs be given a pre-trial guarantee that a favorable judgment will be paid. *See also Saulsbury*, 917 F.2d at 1195 (refusing to find that the remedy available to milk handlers who succeed in challenging a marketing order is constitutionally deficient because there was no fund from which the Secretary could award damages). We are satisfied that if Gallo prevails in its challenge to the dairy assessments, an appropriate remedy may be fashioned. The refusal of defense counsel to stipulate to a refund does not foreclose that remedy.

Gallo also cites *United States v. Cal-Almond, Inc.*, 102 F.3d 999 (9th Cir. 1996) ("*Cal-Almond II*") in support of its due process argument. That decision, however, is inapposite. *Cal-Almond II*, an enforcement proceeding, was "an unusual case," wherein we upheld the district court's use of its inherent equitable power to stay the enforcement proceeding and the distribution of assessments already paid, pending the resolution of an administrative challenge to the constitutionality of the assessments. The court in *Cal-Almond II* noted that its conclusion that a district court has the inherent equitable power to stay an enforcement proceeding and the distribution of assessments, is particularly true when there is unreasonable delay by the Secretary in ruling on the petition challenging the assessment or bad faith by the Secretary in bringing the enforcement proceeding. *Id.* at 1004.

While the court in *Cal-Almond II* recognized the district court's equitable power to fashion such a remedy in an "unusual case" properly before it, *see id.* at 1005, it did not suggest that due process requires that such a remedy be available in every case. Indeed, the availability of such a remedy would effectively eviscerate the statutory exhaustion requirement. *See Saulsbury*, 917 F.2d at 1195-96. Accordingly, we find no merit to Gallo's argument that due process requires immediate judicial review of an agency's decision denying interim relief.

CONCLUSION

The district court properly dismissed Gallo's Complaint for lack of subject matter jurisdiction. The district court was not yet vested with jurisdiction pursuant to § 4509(b) of the Dairy Act, because the Secretary had not yet ruled on Gallo's Petition. Additionally, the APA could not vest the district court with jurisdiction

since the APA does not independently confer jurisdiction in federal district courts but, rather, prescribes the standards for judicial review once jurisdiction is independently established. Finally, general federal question jurisdiction, pursuant to 28 U.S.C. § 1331 and § 704 of the APA, is also precluded as the Secretary's discretionary denial of interim relief does not constitute "final agency action."

AFFIRMED.

ANIMAL QUARANTINE AND RELATED LAWS

DEPARTMENTAL DECISIONS

In re: GARLAND E. SAMUEL.
A.Q. Docket No. 98-0002.
Decision and Order filed August 17, 1998.

Default — Failure to answer — Swine health — Legal representation - Ability to pay — Civil penalty.

The Judicial Officer affirmed Judge Baker's (ALJ) Default Decision and Order assessing a civil penalty of $2,000 for eight violations of the Swine Health Protection Act and the regulations issued under the Swine Health Protection Act. Respondent failed to file a timely answer to the Complaint, and the Default Decision and Order was properly issued in accordance with 7 C.F.R. § 1.139. Respondent may appear by or with counsel in an agency proceeding (5 U.S.C. § 555(b)), but Respondent bears the responsibility of obtaining counsel and has no right in disciplinary administrative proceedings under the Swine Health Protection Act to have counsel provided by the government. Respondent's inability to pay a civil penalty is a circumstance to be considered for the purpose of determining the amount of a civil penalty to be assessed in an animal quarantine case. However, the burden is on Respondent to plead and prove, by producing documentation, the lack of ability to pay the civil penalty. Based on Respondent's suggestion that he is able to pay the civil penalty by making monthly payments and Complainant's agreement to the payment of the civil penalty over a period of 80 months, the ALJ's Order assessing a $2,000 civil penalty is modified to provide that Respondent shall pay the civil penalty in 80 monthly payments of $25 each.

James A. Booth, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, 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 Swine Health Protection Act, as amended (7 U.S.C. §§ 3801-3813) [hereinafter the Swine Health Protection Act]; the regulations issued under the Swine Health Protection Act (9 C.F.R. §§ 166.1-.15) [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 January 14, 1998.

The Complaint alleges that: (1) on or about February 19, 1997, and March 6, 1997, Garland E. Samuel [hereinafter Respondent] permitted untreated garbage to be fed to swine, in violation of section 166.2(a) of the Regulations (9 C.F.R. §

166.2(a)) (Compl. ¶¶ II, IV(A)); (2) on or about March 3, 1997, March 6, 1997, and March 27, 1997, Respondent permitted a dead hog to rot in a garbage treatment area, in violation of section 166.5(a) of the Regulations (9 C.F.R. § 166.5(a)) (Compl. ¶¶ III, IV(B), V(A)); (3) on or about March 27, 1997, and April 10, 1997, Respondent refused to provide information concerning the source of garbage, in violation of section 166.13(d) of the Regulations (9 C.F.R. § 166.13(d)) (Compl. ¶¶ V(B), VII); and (4) on or about April 4, 1997, Respondent failed to make his facility available for inspection during normal business hours, in violation of section 166.10(c)(2) of the Regulations (9 C.F.R. § 166.10(c)(2)) (Compl. ¶ VI).

Respondent was served with the Complaint on February 27, 1998. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on May 7, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. On June 1, 1998, Respondent filed objections to Complainant's Motion for Default Decision and Proposed Default Decision.

On June 16, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued a Default Decision and Order [hereinafter Initial Decision and Order] 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's objections to Complainant's Motion for Default Decision and Proposed Default Decision were not meritorious; (2) concluded that Respondent violated the Swine Health Protection Act and sections 166.2(a), 166.5(a), 166.10(c)(2), and 166.13(d) of the Regulations (9 C.F.R. §§ 166.2(a), .5(a), .10(c)(2), .13(d)), as alleged in the Complaint; and (3) assessed a civil penalty of $2,000 against Respondent.

On July 15, 1998, Respondent 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 August 7, 1998, Complainant filed Complainant's Response to Respondent's Appeal to the Secretary from the Decision of the Administrative Law Judge [hereinafter Complainant's Response], and on August 11, 1998, the Hearing Clerk transmitted the record of this proceeding to the

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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)).

Judicial Officer for a decision.

Based upon a careful consideration of the record in this proceeding, I adopt the Initial Decision and Order as the final Decision and Order.[2] 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 conclusion.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 69—SWINE HEALTH PROTECTION

. . . .

§ 3803. Prohibition of certain garbage feeding; exemption

(a) No person shall feed or permit the feeding of garbage to swine except in accordance with subsection (b) of this section.

(b) Garbage may be fed to swine only if treated to kill disease organisms, in accordance with regulations issued by the Secretary, at a facility holding a valid permit issued by the Secretary, or the chief agricultural or animal health official of the State where located if such State has entered into an agreement with the Secretary pursuant to section 3808 of this title or has primary enforcement responsibility pursuant to section 3809 of this title.

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[2]While I adopt the $2,000 civil penalty assessed against Respondent by the ALJ, I have, based on Respondent's suggestion that he is able to pay the civil penalty by making monthly payments (Respondent's July 15, 1998, filing [hereinafter Appeal Petition]) and Complainant's agreement to the payment of the civil penalty in 80 equal monthly payments of $25 each (Complainant's Response at 5-6), provided that Respondent shall pay the $2,000 civil penalty in 80 equal monthly payments of $25 each. (Decision and Order, *infra*.)

§ 3805. Civil penalties

(a) Assessment by Secretary

Any person who the Secretary determines, after notice and opportunity for a hearing on the record in accordance with sections 554 and 556 of title 5, is violating or has violated any provision of this chapter or any regulation of the Secretary issued hereunder, other than a violation for which a criminal penalty has been imposed under this chapter, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation. Each offense shall be a separate violation. The amount of such civil penalty shall be assessed by the Secretary by written order, taking into account the gravity of the violation, degree of culpability, and history of prior offenses[.]

§ 3807. General enforcement provisions

. . . .

(b) Access to premises or facility and books and records; examination; samples

Any person subject to the provisions of this chapter shall, at all reasonable times, upon notice by a duly authorized representative of the Secretary, afford such representative access to his premises or facility and opportunity to examine the premises or facility, the garbage there at, and books and records thereof, to copy all such books and records and to take reasonable samples of such garbage.

7 U.S.C. §§ 3803, 3805(a), 3807(b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

. . . .

SUBCHAPTER L—SWINE HEALTH PROTECTION

. . . .

§ 166.2 General restrictions.

(a) No person shall feed or permit the feeding of garbage to swine unless the garbage is treated to kill disease organisms, pursuant to this Part, at a facility operated by a person holding a valid license for the treatment of garbage[.]

§ 166.5 Licensed garbage-treatment facility standards.

Garbage-treatment facilities shall be maintained as set forth in this section.

(a) Insects and animals shall be controlled. Accumulation of any material at the facility where insects and rodents may breed is prohibited.

§ 166.10 Licensing.

. . . .

(c) *Demonstration of compliance with the regulations.* . . .

(2) The licensee shall make the premises, facilities, and equipment available during normal business hours for inspections by an inspector to determine continuing compliance with the Act and regulations.

§ 166.13 Licensee responsibilities.

. . . .

(d) A licensee shall supply, upon request by an inspector, information concerning sources of garbage. Such information shall include the dates of supply and the names and addresses of the person and/or organization from which the garbage was received.

9 C.F.R. §§ 166.2(a), .5(a), .10(c)(2), .13(d).

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

. . . .

. . . [R]espondent 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 . . . Decision and Order as the Findings of Fact, and this Decision [and Order] is issued pursuant to section 1.139 of the Rules of Practice. . . . (7 C.F.R. § 1.139.)

In response to the Complainant's Motion for . . . Default Decision [and Proposed Default Decision], Respondent filed a 3-page response, plus attachments, including three tapes. . . . [Respondent's response to Complainant's Motion for Default Decision and Proposed Default Decision] would have constituted an answer to the Complaint had [it] been timely filed, which [it was] not. However, [Respondent has not raised meritorious objections to Complainant's Motion for Default Decision and Proposed Default Decision. Therefore, this Decision and Order is issued without further procedure, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139)].

Findings of Fact

1. [Garland] E. [Samuel] is an individual whose mailing address is 318 S. Walters, San Antonio, Texas 78203.

2. On or about February 19, 1997, and March 6, 1997, Respondent permitted untreated garbage to be fed to swine, in violation of 9 C.F.R. § 166.2(a).

3. On or about March 3, 1997, March 6, 1997, and March 27, 1997, Respondent permitted a dead hog[, which could be a breeding host for insects and rodents,] to rot in a garbage treatment area, in violation of 9 C.F.R. § 166.5(a).

4. On or about March 27, 1997, and April 10, 1997, Respondent refused to provide information concerning the source of garbage, in violation of 9 C.F.R. § 166.13(d).

5. On or about April 4, 1997, Respondent failed to make his facility available for inspection during normal business hours, in violation of 9 C.F.R. § 166.10(c)(2).

Conclusion

By reason of the Findings of Fact [in this Decision and Order, *supra*], Respondent has violated the [Swine Health Protection] Act and the Regulations issued under the [Swine Health Protection] Act (9 C.F.R. §[§ 166.1-.15]). . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in Respondent's Appeal Petition. First, Respondent contends that he was unable to obtain counsel to represent him in this proceeding and states that he needs assistance with respect to this proceeding (Appeal Petition).

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 desires assistance of counsel in an agency proceeding bears the responsibility of obtaining counsel. Moreover, a respondent who is unable to obtain counsel 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 Swine Health Protection Act.[3]

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[3]*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 (continued...)

Second, Respondent contends that he receives $611 per month in social security benefits "to live out of" and is not able to pay a $2,000 civil penalty (Appeal Petition). Section 6(a) of the Swine Health Protection Act (7 U.S.C. § 3805(a)) requires the Secretary to take into account the gravity of the violation, degree of culpability, and history of prior offenses for the purpose of determining the amount of any civil penalty to be assessed. While the Swine Health Protection Act does not require consideration of a violator's inability to pay a civil penalty for the purpose of determining the amount of a civil penalty to be assessed, the Judicial Officer has held that a violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be

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[1](...continued)
deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st 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 Steven M. Samek*, 57 Agric. Dec. 185, 188 (1998) (stating that 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 proceedings, such as those under the Animal Welfare Act) (Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek); *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).

assessed in animal quarantine cases and plant quarantine cases.[4] (Disciplinary administrative proceedings instituted under the Swine Health Protection Act fall under the rubric of animal quarantine cases.[5]) However, the burden is on the respondents in animal quarantine cases and plant quarantine cases to plead and prove, by producing documentation, the lack of ability to pay the civil penalty.[6] Respondent has failed to produce any documentation supporting his assertion that he lacks the ability to pay a $2,000 civil penalty, and Respondent's undocumented assertion that he lacks the ability to pay the civil penalty falls far short of the proof necessary to establish an inability to pay.[7]

Moreover, Respondent suggests that he is able to pay the assessed $2,000 civil penalty in $10 monthly payments (Appeal Petition). Complainant states that "[b]ased on [R]espondent's claim of limited income, Complainant is willing to accept that [R]espondent make 80 equal monthly payments of twenty five dollars ($25.00) per month until the two thousand dollars ($2,000.00) civil penalty is paid in full." (Complainant's Response at 5.) In view of Respondent's suggestion that he is able to pay the civil penalty by making monthly payments, and Complainant's agreement to the payment of the civil penalty in 80 equal monthly payments of $25 each, I am modifying the ALJ's Initial Decision and Order to provide for Respondent's payment of the $2,000 civil penalty in 80 equal monthly payments of $25 each.

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[4]*In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[5]*See generally In re Rex Kneeland*, 50 Agric. Dec. 1571, 1574 (1991) (reducing civil penalties for violations of the Swine Health Protection Act and regulations issued under the Swine Health Protection Act in accordance with the *Kaplinsky* policy, and stating that the *Kaplinsky* policy only applies to animal quarantine cases and plant quarantine cases).

[6]*In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[7]*See In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding that undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

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

Order

Respondent Garland E. Samuel is assessed a civil penalty of $2,000. The civil penalty shall be paid by certified checks or money orders made payable to the "Treasurer of the United States," and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The civil penalty assessed in this Order shall be paid by Respondent in 80 equal monthly payments of $25 each. The initial $25 monthly payment must be received by the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 90 days after service of this Order on Respondent. After the initial $25 monthly payment, Respondent shall pay $25 in each of the next succeeding 79 months, and the payments must be received by the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, on or before the 15th day of each of those 79 months. If Respondent fails to make any payment in full or if any payment is received by the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, after the date on which the payment is due, all remaining payments shall become due and payable in full immediately.

Respondent shall indicate on each certified check or money order that payment is in reference to A.Q. Docket No. 98-0002.

In re: JERRY LYNN STOKES, d/b/a TAYLOR CATTLE.
A.Q. Docket No. 98-0007.
Decision and Order filed October 6, 1998.

Default — Failure to answer — Intent — Ability to pay — Civil penalty.

Sheila Hogan Novak, 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 Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120) [hereinafter the Animal Quarantine Acts]; regulations issued under the Animal Quarantine Acts (9 C.F.R. §§ 71.1-.20, 78.1-.43); 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 6, 1998.

The Complaint alleges that: (1) on or about July 23, 1997, Jerry Lynn Stokes, d/b/a Taylor Cattle [hereinafter Respondent], moved approximately two cows interstate from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 71.18(a)(1)(i), because the cattle were not accompanied interstate by a statement or other document containing required information (Compl. ¶ II); (2) on or about July 23, 1997, Respondent moved a brucellosis exposed cow from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 78.8, because the brucellosis exposed cow was not moved to a recognized slaughtering establishment, a quarantined feedlot, or otherwise, as required (Compl. ¶ III); (3) on or about July 23, 1997, Respondent moved approximately one cow from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 78.9(b)(3)(ii), because the cow was not accompanied interstate by a certificate, as required (Compl. ¶ IV).

Respondent was served with the Complaint on April 13, 1998.[1] Respondent failed to answer the Complaint within 20 days after service of the Complaint, as provided by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On June 24, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. Respondent was served with Complainant's Motion for Default Decision and Complainant's

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[1]The Domestic Return Receipt for Article Number [P] 368421006 indicates that the Complaint was delivered to Respondent on April 13, 1994. However, the violations alleged in the Complaint are alleged to have occurred on or about July 23, 1997; the Complaint was not filed until April 6, 1998; the letter from the Hearing Clerk accompanying the Complaint is dated April 6, 1998; and the Domestic Return Receipt for Article Number [P] 368421006 was returned to the Hearing Clerk on April 20, 1998. I find that the Complaint was not served on Respondent on April 13, 1994, as indicated on the Domestic Return Receipt for Article Number [P] 368421006, and I infer that the Complaint was served on Respondent on April 13, 1998.

Proposed Default Decision on July 6, 1998. Respondent failed to file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service, as provided by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On August 12, 1998, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] filed a Default Decision and Order [hereinafter Initial Decision and Order] in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), in which the Chief ALJ: (1) concluded that Respondent violated 9 C.F.R. §§ 71.18(a)(1)(i), 78.8, and 78.9(b)(3)(ii), as alleged in the Complaint; and (2) assessed Respondent a $3,000 civil penalty (Initial Decision and Order at 4).

On August 25, 1998, Respondent 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).[2] On September 18, 1998, Complainant filed Complainant's Response to Respondent's Appeal, and on October 1, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

Based upon a careful consideration of the record in this proceeding, I adopt 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 Chief ALJ's conclusion.

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

. . . .

. . . [R]espondent failed to file an answer within the time prescribed in [section 1.136(a) of the Rules of Practice] (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 [section 1.136(a) of the Rules of Practice] (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint.

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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)).

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 Decision and Order] as the Findings of Fact, and this Decision [and Order] is issued pursuant to section 1.139 of the Rules of Practice . . . (7 C.F.R. § 1.139).

Findings of Fact

1. Jerry Lynn Stokes is an individual who does business as Taylor Cattle with a mailing address of P.O. Box 545, Garrison, Texas 75946.

2. On or about July 23, 1997, Respondent moved interstate approximately two cows from Garrison, Texas, to Coushatta, Louisiana, in violation of . . . 9 C.F.R. § 71.18(a)(1)(i), because the cattle were not accompanied interstate by a statement or other document containing required information.

3. On or about July 23, 1997, Respondent moved a brucellosis exposed cow from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 78.8, because the brucellosis exposed cow was not moved to a recognized slaughtering establishment, a quarantined feedlot, or otherwise, as required.

4. On or about July 23, 1997, Respondent moved approximately one cow from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 78.9(b)(3)(ii), . . . because the cow was not accompanied interstate by a certificate, as required.

Conclusion

By reason of the facts contained in the Findings of Fact [in this Decision and Order], Respondent has violated 9 C.F.R. §§ 71.18(a)(1)(i), 78.8, and 78.9(b)(3)(ii). . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in Respondent's untitled August 25, 1998, filing [hereinafter Appeal Petition]. First, Respondent contends that the civil penalty assessed by the Chief ALJ is excessive because the brucellosis exposed cow that was moved from Garrison, Texas, to Coushatta, Louisiana, on or about July 23, 1997, was moved "across the state line [by] accident," and he violated 9 C.F.R. § 78.8 by "mistake" (Respondent's Appeal Pet. at 1-2).

Civil penalties may be imposed for violations of the brucellosis regulations (9 C.F.R. §§ 78.1-.43) even under circumstances in which the violations are unintentional and result from a "mistake" or "accident," as Respondent contends

occurred in this case.[3]

Section 3 of the Act of February 2, 1903, as amended, sets forth the sanctions that may be imposed for violations of the regulations at issue in this proceeding, 9 C.F.R. §§ 71.18(a)(1)(i), 78.8, and 78.9(b)(3)(ii), as follows:

§ 122. Offenses; penalty

> Any person, company, or corporation *knowingly* violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The

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[3]See *In re John Casey*, 54 Agric. Dec. 91, 102 (1995) (stating that it is well settled that civil penalties may be imposed for violations of the brucellosis regulations irrespective of whether the violations are committed knowingly or with intent); *In re Myles C. Culbertson* (Decision as to Myles C. Culbertson, M.S. "Buddy" Major, Jr., and Stuart Major), 53 Agric. Dec. 1030, 1056 (1994) (concluding that respondents violated a provision of the brucellosis regulations (9 C.F.R. § 78.9(b)(3)(ii) (1987)) and stating that respondents M.S. "Buddy" Major, Jr., and Stuart Major erroneously imply in their appeal petition that complainant must prove that the violations were knowing), *rev'd on other grounds*, 69 F.3d 465 (10th Cir. 1995); *In re Dean Reed* (Decision as to Dean Reed and Pete Donathan), 52 Agric. Dec. 90, 108 (1993) (concluding that respondents violated numerous provisions of the brucellosis regulations and stating that civil penalties are routinely imposed without proof that respondents "knowingly" committed the violations), *aff'd*, 39 F.3d 1192 (10th Cir. 1994); *In re Howard Eastland*, 51 Agric. Dec. 1033, 1045 (1992) (concluding that respondent violated provisions of the brucellosis regulations (9 C.F.R. § 78.7(a)-(c) (1987)) and stating that intent is not an element of the violation of the regulations); *In re Bob Smith* (Decision as to Charles Reed), 50 Agric. Dec. 356, 367 (1991) (concluding that respondent Charles Reed violated provisions of the brucellosis regulations (9 C.F.R. §§ 78.7 (1986), 78.7(b) (1986), 78.9(b)(3)(ii) (1988)) and stating that intent is not an element of a violation of the regulations); *In re Basil L. Burns*, 48 Agric. Dec. 881, 882 (1989) (concluding that respondent violated provisions of the brucellosis regulations (9 C.F.R. § 78.8(a)(2)-(a)(3) (1986)); rejecting respondent's contention that the civil penalties should be reduced because the violations were not intentional; and stating that intent is not an element of respondent's violations of administrative regulations); *In re Harry L. Floyd*, 48 Agric. Dec. 94, 97 (1989) (concluding that respondent violated provisions of the brucellosis regulations (9 C.F.R. §§ 78.7(a)(1), 78.8(a)(1)(i), 78.9(c)(3) (1986)); rejecting respondent's contention that the civil penalties should be reduced because the violations were not intentional; and stating that intent is not an element of respondent's violations of the administrative regulations); *In re Roy Carter*, 46 Agric. Dec. 207, 211 (1987) (concluding that respondent violated 9 C.F.R. §§ 71.18, and 78.9(d)(3) (1984) and rejecting respondent's contention that complainant must show that the violations were willful or knowing).

> Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

21 U.S.C. § 122 (emphasis added).

The plain language of 21 U.S.C. § 122 authorizes the Secretary of Agriculture to issue an order assessing a civil penalty, after an opportunity for an administrative proceeding, without proof that the respondent *knowingly* or intentionally violated the Act of February 2, 1903, as amended, or the regulations or orders issued thereunder. The term *knowingly* in 21 U.S.C. § 122 is used only in connection with criminal proceedings.[4] Therefore, even if Respondent's violation of 9 C.F.R. § 78.8 was an accident or mistake, as Respondent contends, Respondent has presented no basis for finding that the $3,000 civil penalty assessed by the Chief ALJ is excessive.

Second, Respondent requests a waiver or significant reduction of the civil penalty assessed by the Chief ALJ on the ground that he (Respondent) is unable to pay the civil penalty (Respondent's Appeal Pet. at 2). A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in animal quarantine cases and plant quarantine cases.[5] However, the burden is on the respondents in animal quarantine cases and plant quarantine cases to prove, by producing documentation, the lack of ability to pay the civil penalty.[6] Respondent has failed to produce any documentation supporting his assertion that he lacks the ability to pay a $3,000 civil penalty, and Respondent's undocumented assertion that he lacks the ability to pay the civil penalty falls far short of the proof necessary to establish

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[4] *In re Dean Reed* (Decision as to Dean Reed and Pete Donathan), 52 Agric. Dec. 90, 108 (1993), *aff'd*, 39 F.3d 1192 (10th Cir. 1994).

[5] *In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 10 (Aug. 17, 1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[6] *In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 10-11 (Aug. 17, 1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

an inability to pay the civil penalty.[7]

Moreover, even if a violator proves that he or she is unable to pay the civil penalty, the civil penalty is not reduced if the violation is serious or the violator is a repeat violator.[8] In 1994, Respondent moved at least one test eligible cow interstate without a certificate and without a document listing proper individual identification information, in violation of 9 C.F.R. §§ 71.18(a)(1)(i) and 78.9(b)(3)(ii), and Respondent was assessed a civil penalty of $500 for the violations. *In re Jerry Stokes*, 54 Agric. Dec. 1103 (1995). Therefore, even if Respondent had met his burden and proven, with documentation, that he was unable to pay the civil penalty, I would not reduce the civil penalty assessed by the Chief ALJ because Respondent is a repeat violator.

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

Order

Respondent Jerry Lynn Stokes, d/b/a Taylor Cattle, is assessed a civil penalty of $3,000. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States," and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

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[7]*See In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 11 (Aug. 17, 1998) (holding that undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding that undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

[8]*See In re Robert L. Heywood*, 53 Agric. Dec. 1315, 1321 (1993) (setting forth the policy in animal quarantine and plant quarantine cases regarding the reduction of civil penalties based on inability to pay and stating that civil penalties will not be reduced for serious violations or repeat violators) (Decision and Order and Remand Order).

Respondent's payment of the civil penalty shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, 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 A.Q. Docket No. 98-0007.

In re: CONRAD PAYNE.
A.Q. Docket No. 98-0004.
Decision and Order filed December 8, 1998.

Failure to file timely answer — Default — Civil Penalty — Pork sausage — Sixth amendment —Seventh amendment.

The Judicial Officer affirmed the default decision by Administrative Law Judge Dorothea A. Baker (ALJ) assessing a civil penalty of $750 against Respondent for importing approximately 4 pounds of pork sausage from The Netherlands into the United States, in violation of 9 C.F.R. §§ 94.11 and 94.13. The default decision was properly issued because Respondent failed to file an answer to the Complaint in accordance with 7 C.F.R. § 1.136(c). Therefore, Respondent is deemed to have admitted the allegations in the Complaint and waived his right to a hearing. 7 C.F.R. § 1.139. The Judicial Officer rejected Respondent's contentions that his rights under the Fifth, Sixth, and Seventh Amendments to the United States Constitution were violated. Respondent did not indicate the manner in which the proceeding violated his rights under the Fifth, Sixth, and Seventh Amendments. However the Judicial Officer: (1) reviewed the record and found nothing to indicate that Respondent's Fifth Amendment rights had been violated; (2) noted that the proceeding was not a criminal prosecution and that it is well settled that the Sixth Amendment is only applicable to criminal proceedings and is not applicable to administrative proceedings; and (3) noted that Congress may create statutory public rights, as it did with the enactment of the Act of February 2, 1903, as amended, and assign their adjudication to an administrative agency before which a litigant has no right to a jury trial, without violating the Seventh Amendment, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). Respondent contended that Complainant failed to prove its case beyond a reasonable doubt. The Judicial Officer stated that the standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard, *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983); *Steadman v. SEC*, 450 U.S. 91 (1981), and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the Act of February 2, 1903, as amended, is preponderance of the evidence. The Judicial Officer further stated that Complainant is not required to prove that Respondent violated 9 C.F.R. §§ 94.11 and 94.13, as alleged in the Complaint, because Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint and waived his right to a hearing, based on Respondent's failure to file an answer within 20 days after he was served with the Complaint. Respondent contended that Complainant did not prove that the pork sausage carried animal diseases. The Judicial Officer found that the disease status of the pork sausage, which is the subject of the Complaint, is not relevant to Respondent's violation of 9 C.F.R. §§ 94.11 and 94.13.

James A. Booth, for Complainant.
Respondent, pro se.
Initial decision issued by Dorothea A. Baker, 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 section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111); regulations issued under the Act of February 2, 1903, as amended (9 C.F.R. pt. 94); 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 11, 1998.

The Complaint alleges that on or about June 30, 1997, Conrad Payne [hereinafter Respondent], "in violation of 9 C.F.R. §§ 94.11(a), (b), (c), and 94.13(a) and (b), imported approximately 4 pounds of pork sausage ('Cervelaat Worst') from The Netherlands into the United States at Chicago, Illinois, and the pork sausage was not prepared in an eligible inspected establishment, not fully cooked in a container hermetically sealed, not accompanied by an approved meat inspection certificate, and not in accordance with other requirements of 9 C.F.R. §§ 94.11(b), (c), and 94.13(a) and (b)" (Compl. ¶ II).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on May 8, 1998.[1] Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On June 12, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. Respondent was served with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision, and on July 7, 1998, Respondent filed objections to Complainant's Motion for Default Decision and Proposed Default Decision.

On September 18, 1998, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued a Default Decision and Order in which the ALJ: (1) found that Respondent violated 9 C.F.R. pt. 94, as alleged in the Complaint; and (2) assessed a civil penalty of $750 against Respondent (Default Decision and Order at 2-3).

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[1]Memorandum to the File, dated May 8, 1998, from Regina Paris, Hearing Clerk's Office.

On October 27, 1998, Respondent 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).[2]

On November 19, 1998, Complainant filed Complainant's Response to Respondent's Appeal, and on November 25, 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, and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Default Decision and Order as the final Decision and Order. Additions or changes to the Default 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 conclusion.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

21 U.S.C.:

TITLE 21—FOOD AND DRUGS

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CHAPTER 4—ANIMALS, MEATS, AND MEAT AND DAIRY PRODUCTS

. . . .

SUBCHAPTER III—PREVENTION OF INTRODUCTION AND SPREAD OF CONTAGION

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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)).

§ 111. Regulations to prevent contagious diseases

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

21 U.S.C. § 111.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

. . . .

SUBCHAPTER C—EXPORTATION AND IMPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

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PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, BOVINE SPONGIFORM ENCEPHALOPATHY; PROHIBITED AND RESTRICTED IMPORTATIONS

. . . .

§ 94.11 Restrictions on importation of meat and other animal products from specified regions.

(a) Austria, The Bahamas, Belgium, Channel Islands, Chile, Czech Republic, Denmark, Finland, France, Germany, Great Britain (England, Scotland, Wales, and the Isle of Man), Hungary, Italy, Japan, The Netherlands, Northern Ireland, Norway, Papua New Guinea, Poland, Republic of Ireland, Republic of Korea, Spain, Sweden, Switzerland, and Uruguay, which are declared in § 94.1 to be free of rinderpest and foot-and-mouth disease, supplement their national meat supply by the importation of fresh (chilled or frozen) meat of ruminants or swine from regions that are designated in § 94.1(a) to be infected with rinderpest or foot-and-mouth disease; or have a common land border with regions designated as infected with rinderpest or foot-and-mouth disease; or import ruminants or swine from regions designated as infected with rinderpest or foot-and-mouth disease under conditions less restrictive than would be acceptable for importation into the United States. Thus, even though this Department has declared such regions to be free of rinderpest and foot-and-mouth disease, the meat and other animal products produced in such free regions may be commingled with the fresh (chilled and frozen) meat of animals from an infected region, resulting in an undue risk of introducing rinderpest or foot-and-mouth disease into the United States. Therefore, meat of ruminants or swine, and other animal products, and ship stores, airplane meals, and baggage containing such meat or animal products originating in the free regions listed in this section shall not be imported into the United States unless the following requirements in addition to other applicable requirements of chapter III of this title are met. However, meat and meat products which meet the requirements of § 94.4 do not have to comply with the requirements of this section. As used in this section the term "other animal product" means all parts of the carcass of any ruminant or swine, other than meat and articles regulated under part 95 or 96 of this chapter.

(b) All meat or other animal product from such regions, whether in personal-use amounts or commercial lots (except that which has been fully cooked by a commercial method in a container hermetically sealed promptly after filling but before such cooking and sealing produced a fully sterilized product which is shelf-stable without refrigeration) shall have been prepared only in an inspected establishment that is eligible to have its

products imported into the United States under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and the regulations in § 327.2, chapter III of this title, issued thereunder, and shall be accompanied by a Department-approved meat inspection certificate prescribed in § 327.4 in chapter III of this title, or similar certificate approved by the Administrator, as adequate to effectuate the purposes of this section, regardless of the purpose or amount of product in the shipment.

(c) *Additional certification.* Meat of ruminants or swine or other animal products from regions designated in paragraph (a) of this section must be accompanied by additional certification by a full-time salaried veterinary official of the agency in the national government that is responsible for the health of animals within that region. Upon arrival of the meat of ruminants or swine or other animal products in the United States, the certification must be presented to an authorized inspector at the port of arrival. The certification must give the name and official establishment number of the establishment where the animals were slaughtered, and shall state that:

(1) The slaughtering establishment is not permitted to receive animals that originated in, or have ever been in, or that have been aboard a means of conveyance at the time such means of conveyance called at or landed at a port in, a region listed in § 94.1(a) as a region infected with rinderpest or foot-and-mouth disease;

(2) The slaughtering establishment is not permitted to receive meat or other animal products derived from ruminants or swine which originated in such a rinderpest or foot-and-mouth disease infected region, or meat or other animal products from a rinderpest and foot-and-mouth disease free region transported through a rinderpest or foot-and-mouth disease infected region except in containers sealed with serially numbered seals of the National Government of the noninfected region of origin;

(3) The meat or other animal product covered by the certificate was derived from animals born and raised in a region listed in § 94.1(a)(2) as free of rinderpest and foot-and-mouth disease and the meat or other animal product has never been in any region in which rinderpest or foot-and-mouth disease existed;

(4) The meat or other animal product has been processed, stored, and transported to the means of conveyance that will bring the article to the United States in a manner to preclude its being commingled or otherwise in contact with meat or other animal products that do not comply with the conditions contained in this certificate.

§ 94.13 Restrictions on importation of pork or pork products from specified regions.

Austria, The Bahamas, Bulgaria, Chile, Denmark, Germany, Great Britain (England, Scotland, Wales, and the Isle of Man), Hungary, Luxembourg, The Netherlands, Northern Ireland, Republic of Ireland, Spain, Switzerland, and Yugoslavia, which are declared to be free of swine vesicular disease in § 94.12(a), are regions that either supplement their national pork supply by the importation of fresh (chilled or frozen) pork from regions where swine vesicular disease is considered to exist; have a common border with such regions; or have certain trade practices that are less restrictive than are acceptable to the United States. Thus, the pork or pork products produced in such regions may be commingled with fresh (chilled or frozen) meat of animals from a region where swine vesicular disease is considered to exist resulting in an undue risk of swine vesicular disease introduction into the United States. Therefore, pork or pork products and ship stores, airplane meals, and baggage containing such pork, other than those articles regulated under part 95 or part 96 of this chapter, produced in such regions shall not be brought into the United States unless the following requirements are met in addition to other applicable requirements of part 327 of this title:

(a) All such pork or pork products, except those treated in accordance with § 94.12(b)(1)(i) of this part, shall have been prepared only in inspected establishments that are eligible to have their products imported into the United States under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and under § 327.2 of this title and shall be accompanied by the foreign meat inspection certificate required by § 327.4 of this title. Upon arrival of the pork or pork products in the United States, the foreign meat inspection certificate must be presented to an authorized inspector at the port of arrival.

(b) Unless such pork or pork products are treated according to one of the procedures described in § 94.12(b) of this part, the pork or pork products must be accompanied by an additional certificate issued by a full-time salaried veterinary official of the agency in the national government responsible for the health of the animals within that region. Upon arrival of the pork or pork products in the United States, the certificate must be presented to an authorized inspector at the port of arrival. The certificate shall state the name and official establishment where the swine involved were slaughtered and the pork was processed. The certificate shall also state that:

(1) The slaughtering establishment is not permitted to receive animals that originated in, or have ever been in a region listed in § 94.12(a) as a region in which swine vesicular disease is considered to exist;

(2) The slaughtering establishment is not permitted to receive pork derived from swine which originated in such a region or pork from swine from a swine vesicular disease free region which has been transported through a region where swine vesicular disease is considered to exist except pork which was transported in containers sealed with serially numbered seals of the National Government of a region of origin listed in § 94.12 as a region considered free of the disease.

(3) The pork has been processed, stored, and transported to the means of conveyance that will bring the article to the United States in a manner that precludes its being commingled or otherwise coming in contact with pork or pork products that have not been handled in accordance with the requirements of this section.

9 C.F.R. §§ 94.11(a)-(c), .13(a)-(b).

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

. . . .

. . . Respondent failed to file an answer within the time prescribed in [section 1.136(a) of the Rules of Practice] (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 [section 1.136(a) of the Rules of Practice] (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 . . . Decision and Order as the Findings of Fact, and this Decision [and Order] is issued pursuant to section 1.139 of the Rules of Practice. . . . (7 C.F.R. § 1.139.) On July 7, 1998, Respondent filed . . . objections to the Motion for Default Decision. However, [Respondent's] objections do not dispute the factual allegations of the Complaint nor do they furnish a basis for not granting Complainant's Motion for Default Decision. . . .

Findings of Fact

1. Conrad Payne is an individual whose mailing address is CEG-E Unit 21615, Box 36, APO AE 09703.

2. On or about June 30, 1997, Conrad Payne, Respondent, in violation of 9 C.F.R. §§ 94.11(a), (b), and (c), and 94.13(a) and (b), imported approximately 4 pounds of pork sausage from The Netherlands into the United States at Chicago, Illinois, and the pork sausage was not prepared in an eligible inspection establishment, not fully cooked in a container hermetically sealed, not accompanied by an approved meat inspection certificate, and not in accordance with other requirements of 9 C.F.R. §§ 94.11(a), (b), and (c), and 94.13(a) and (b).

Conclusion

By reason of the Findings of Fact [in this Decision and Order], Respondent has violated the Act [of February 2, 1903, as amended,] and . . . regulations issued under the Act [of February 2, 1903, as amended] (9 C.F.R. § 94.0 *et seq.*). . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises six issues in a letter which Respondent filed on October 27, 1998, and addressed to "Mrs. Dawson," Hearing Clerk, Office of the Administrative Law Judges, USDA [hereinafter Appeal Petition]. First, Respondent states that he is appealing the ALJ's Default Decision and Order based on the Fifth Amendment to the United States Constitution (Appeal Pet. at 1), which provides, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Respondent does not indicate the manner in which this proceeding violated his

rights under the Fifth Amendment to the United States Constitution. However, I have carefully reviewed the record in this proceeding, and I find nothing to indicate that Respondent's rights under the Fifth Amendment to the United States Constitution have been violated.

Second, Respondent states that he is appealing the ALJ's Default Decision and Order based on the Sixth Amendment to the United States Constitution (Appeal Pet. at 1), which provides, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

Respondent does not indicate the manner in which the proceeding violated his rights under the Sixth Amendment to the United States Constitution. However, I note that this proceeding is not a criminal prosecution, but rather, a civil disciplinary administrative proceeding conducted in accordance with the Administrative Procedure Act, under the Act of February 2, 1903, as amended, and the sanction imposed against Respondent in this proceeding is a civil penalty. It is well settled that the Sixth Amendment to the United States Constitution is only applicable to criminal proceedings and is not applicable to administrative proceedings.[3] Thus, I conclude that Respondent's rights under the Sixth

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[3]*See United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating that the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Loaisiga*, 104 F.3d 484, 486 (1st Cir.) (stating that deportation proceedings are civil matters exempt from Sixth Amendment protections; they are primarily conducted by administrative bodies and not by courts), *cert. denied*, 117 S. Ct. 2447 (1997); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (stating that deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment); *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6th Cir. 1991) (holding that the Sixth Amendment does not apply to a civil matter, such as a labor relations proceeding conducted by the National Labor Relations Board); *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983) (holding that the Sixth Amendment does not apply to administrative discharge proceedings conducted by the National Guard because such

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Amendment to the United States Constitution are not implicated in this administrative proceeding.

Third, Respondent states that he is appealing the ALJ's Default Decision and Order based on the Seventh Amendment to the United States Constitution (Appeal Pet. at 1), which provides, as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

Respondent does not indicate the manner in which the proceeding violated his rights under the Seventh Amendment to the United States Constitution. However, I note that courts have long construed the phrase "Suits at common law" in the Seventh Amendment as referring to cases analogous to those tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was

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[1](...continued)
proceedings are not criminal in nature); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1366 (10th Cir. 1979) (rejecting the characterization of Occupational Safety and Health Administration administrative proceedings, in which civil penalties can be assessed, as criminal proceedings and the argument that the Sixth Amendment is applicable to such proceedings); *Camp v. United States*, 413 F.2d 419, 422 (5th Cir.) (holding that there is no Sixth Amendment right to counsel in non-criminal administrative proceedings before the Selective Service Board), *cert. denied*, 396 U.S. 968 (1969); *Haven v. United States*, 403 F.2d 384, 385 (9th Cir. 1968) (holding that the Sixth Amendment right to counsel does not apply in administrative proceedings in the selective service process), *cert. dismissed*, 393 U.S. 1114 (1969); *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9th Cir. 1960) (stating that the Sixth Amendment applies only to criminal proceedings and that Congress may properly provide civil proceedings for the collection of civil penalties which are civil or remedial sanctions rather than punitive and the Sixth Amendment has no application to such proceedings); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee under the Sixth Amendment applies only to those proceedings technically criminal in nature); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the Sixth Amendment is only applicable to proceedings technically criminal in nature and concluding that the Sixth Amendment is not applicable to administrative proceedings under the Packers and Stockyards Act of 1921); *In re Saulsbury Enterprises, Inc.*, 57 Agric. Dec. 82, 100 (1997) (concluding that Article III, § 2 of the United States Constitution and the Sixth Amendment, which afford the right to a jury trial in criminal proceedings, are not applicable to administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)).

customary.[4] Congress may create statutory public rights, as it did with the enactment of the Act of February 2, 1903, as amended, and assign their

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[4]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that "[t]he Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right'"); *Tull v. United States*, 481 U.S. 412, 417 (1987) (stating that the Court has construed the language of the Seventh Amendment to require a jury trial on the merits in those actions that are analogous to "Suits at common law"); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449 (1977) (stating that "[t]he phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (stating that the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Parsons v. Bedford*, 3 Pet. 433, 445-46 (1830) (construing the phrase "Suits at common law" in the Seventh Amendment as referring to cases tried in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not customary); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating that the Seventh Amendment right to a jury trial attaches in cases involving legal rather than equitable claims); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that the Supreme Court has consistently interpreted the phrase "Suits at common law" in the Seventh Amendment to refer to suits in which legal rights are to be ascertained and determined, in contradistinction to those suits in which equitable rights alone are recognized and equitable remedies are administered), *cert. denied*, 513 U.S. 1148 (1995); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that the right to a jury turns on the nature of the issue to be resolved and on the forum in which it is to be resolved); *Welch v. TVA*, 108 F.2d 95, 99 (6th Cir. 1939) (stating that the usual method of determining the value of private property taken for public use has been to accord the land owner the right to have damages assessed by a jury, but this is a matter of legislative discretion because condemnation proceedings by the United States for the use and benefit of the Tennessee Valley Authority are not suits at common law in which the right to trial by jury is guaranteed by the Seventh Amendment), *cert. denied*, 309 U.S. 688 (1940); *NLRB v. Tidewater Exp. Lines, Inc.*, 90 F.2d 301, 303 (4th Cir. 1937) (per curiam) (stating that the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits as were maintainable under common law at the time the amendment was adopted); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits of such character as were maintainable at common law at the time the amendment was adopted); *In re Hudson*, 170 B.R. 868, 873-74 (E.D.N.C. 1994) (stating that the right to a jury trial under the Seventh Amendment extends only to matters of private right and finding that a creditor who files a claim with the bankruptcy court loses the Seventh Amendment right to a jury trial); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating that the United States Supreme Court has interpreted the right to trial by jury to mean the right which existed in suits under common law in 1791, when the Seventh Amendment was adopted; the Seventh Amendment does not create a jury trial right, it simply preserves the right that already existed under the common law).

adjudication to an administrative agency before which a litigant has no right to a jury trial, without violating the Seventh Amendment's requirement that jury trial is to be preserved in suits at common law.[5] Thus, I conclude that the

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[5]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that if a claim that is legal in nature asserts a public right, then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (noting that the Seventh Amendment is not applicable to administrative proceedings); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449-461 (1977) (stating that when Congress creates statutory public rights, it may assign their adjudication to an administrative agency with which a jury trial would be incompatible without violating the Seventh Amendment's injunction that jury trial is to be preserved at common law); *Pernell v. Southhall Realty*, 416 U.S. 363, 383 (1974) (assuming that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency; and stating that *Block v. Hirsh*, 256 U.S. 135 (1921), stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (stating that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication); *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1378 (5th Cir. 1996) (stating that application to the Environmental Protection Agency for a boiler and industrial furnace permit required under the Resource Conservation and Recovery Act triggered a public rights dispute; therefore the applicant has no right to a jury trial under the Seventh Amendment), *cert. denied*, 519 U.S. 1055 (1997); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating that when the government sues in its sovereign capacity to enforce public rights, Congress may assign the fact-finding and initial adjudication to an administrative forum); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that in cases in which "public rights" are being litigated, e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, the Seventh Amendment does not prohibit Congress from assigning that fact-finding function and initial adjudication to an administrative forum with which a jury would be incompatible), *cert. denied*, 513 U.S. 1148 (1995); *Sasser v. Administrator, EPA*, 990 F.2d 127, 130 (4th Cir. 1993) (holding that a person charged in an administrative complaint for discharging pollutants has no Seventh Amendment right to a jury trial and stating that "[g]enerally speaking, the Seventh Amendment does not apply to disputes over statutory public rights, 'those which arise between the Government and persons subject to its authority in connection with the performance of constitutional functions of the executive and legislative departments'"); *Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226, 228 (Fed. Cir.) (stating that public rights may be constitutionally adjudicated by legislative courts and administrative agencies without implicating the Seventh Amendment right to a jury trial), *cert. denied*, 506 U.S. 829 (1992); *Myron v. Hauser*, 673 F.2d 994, 1004 (8th Cir. 1982) (stating that generally the Seventh Amendment is not applicable to administrative or statutory proceedings and concluding that the Seventh Amendment is not applicable to reparation proceedings before the Commodity Futures Trading Commission); *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979) (stating that the Supreme Court has held that the Seventh Amendment right to a jury trial does not extend to situations where Congress has seen fit to set up an administrative procedure

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Seventh Amendment to the United States Constitution does not entitle Respondent to a jury trial in this administrative proceeding.

Fourth, Respondent contends that Complainant has failed to prove beyond a reasonable doubt that Respondent violated 9 C.F.R. pt. 94, as alleged in the Complaint (Appeal Pet. at 1).

As an initial matter, the standard of proof applicable in this proceeding is not

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[5](...continued)
for adjudication of disputes arising out of statutorily created rights), *cert. denied*, 449 U.S. 854 (1980); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that at least when only public rights are involved, Congress may provide for administrative fact-finding with which a jury trial would be incompatible and even where the statutory public rights are enforceable in favor of a private party they can be committed to an administrative agency for determination); *Floyd S. Pike Electrical Contractor, Inc. v. Occupational Safety and Health Review Comm'n*, 557 F.2d 1045 (4th Cir. 1977) (per curiam) (stating that the Seventh Amendment is not a bar to the imposition of civil penalties by an administrative tribunal, as authorized by the Occupational Safety and Health Act of 1970); *Penn-Dixie Steel Corp. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 1078, 1080 (7th Cir. 1977) (stating that the Supreme Court held in *Atlas Roofing Co., supra*, that the Seventh Amendment does not bar Congress from assigning to an administrative agency the task of adjudicating Occupational Safety and Health Act violations); *Dorey Electric Co. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 357, 358 (4th Cir. 1977) (per curiam) (stating that the Supreme Court held in *Atlas Roofing Co., supra*, that the Seventh Amendment poses no bar to the disposition of a charge of the violation of the Occupational Safety and Health Act and the assessment of a civil penalty by an administrative tribunal); *Mohawk Excavating, Inc. v. Occupational Safety and Health Review Comm'n*, 549 F.2d 859, 865 (2d Cir. 1977) (stating that the Seventh Amendment is not a bar to the imposition of civil penalties through the administrative process without a jury trial in the enforcement of the Occupational Safety and Health Act); *Clarkson Construction Co. v. Occupational Safety and Health Review Comm'n*, 531 F.2d 451, 455-56 (10th Cir. 1976) (stating that it is within the power of Congress to choose an administrative process for the enforcement of the safe and healthful working conditions objective of the Occupational Safety and Health Act of 1970 and the administrative proceeding which resulted in the imposition of a civil sanction for the violation of the Act is not an action at common law within the meaning of the Seventh Amendment; hence no jury trial right arises); *National Velour Corp. v. Durfee*, 637 A.2d 375, 379 (R.I. 1994) (stating that if an action involves the adjudication of public rights, no jury is required pursuant to the Seventh Amendment); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating that where a right is created by statute and committed to an administrative forum, jury trial is not required by the Seventh Amendment); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 100 (1997) (holding that there is no constitutional right to a jury trial in administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988) (rejecting respondent's contention that he was improperly denied a jury trial in an administrative proceeding under the Animal Welfare Act, and stating that it is well settled that a jury trial is not required in an administrative disciplinary proceeding), *aff'd*, 878 F.2d 358, 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).

"beyond a reasonable doubt," as Respondent contends. Instead, the standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[6] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the Act of February 2, 1903, as amended, is preponderance of the evidence.[7]

Moreover, Complainant is not required to prove that Respondent violated 9 C.F.R. §§ 94.11 and 94.13, as alleged in the Complaint, because Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint and waived his right to a hearing, based on Respondent's failure to file an answer within 20 days after he was served with the Complaint (7 C.F.R. §§ 1.136(c), .139).

A copy of the Complaint and a copy of the Rules of Practice were served on Respondent on May 8, 1998.[8] Sections 1.136, 1.139, and 1.141 of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

> **§ 1.136 Answer.**
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> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
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> . . . .
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> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed

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[6]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

[7]*In re Myles C. Culbertson* (Decision as to Myles C. Culbertson, M.S. Buddy Major, Jr., and Stuart Major), 53 Agric. Dec. 1030, 1045 (1994), *rev'd on other grounds*, 69 F.3d 465 (10th Cir. 1995); *In re Dean Reed* (Decision as to Dean Reed and Pete Donathan), 52 Agric. Dec. 90, 106 (1993), *aff'd*, 39 F.3d 1192 (10th Cir. 1994); *In re Terry Horton*, 50 Agric. Dec. 430, 441 (1991); *In re Bob Smith* (Decision as to Charles Reed), 50 Agric. Dec. 356, 366 (1991); *In re Ralph Mooney*, 45 Agric. Dec. 484, 498 (1986).

[8]See note 1.

to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on May 8, 1998, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondent must file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130 et seq. and 70.1 et seq.). Failure to file an answer within the prescribed time shall constitute an admission of all material allegations of this Complaint and a waiver of hearing.

Compl. at 2.

Likewise, Respondent was informed in the letter of service, which accompanied the Complaint and Rules of Practice, 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, as follows:

CERTIFIED RECEIPT REQUESTED

February 12, 1998

Mr. Conrad Pyane [sic]
CEG-E Unit 21615
Box 36
APO AE 09703

Dear Mr. Payne:

Subject: In re: Conrad Payne, Respondent -
A.Q. Docket No. 98-0004

Enclosed is a copy of a Complaint, which has been filed with this office under . . . Section 2 of the Act of February 2, 1903, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal

in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated February 12, 1998, from Joyce A. Dawson, Hearing Clerk, USDA, Office of Administrative Law Judges, to Mr. Conrad Payne (emphasis in original).

On June 12, 1998, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On July 7, 1998, Respondent filed objections to Complainant's Motion for Default Decision and Proposed Default Decision, but Respondent did not dispute the factual allegations in the Complaint or furnish any basis for not granting Complainant's Motion for Default Decision. On September 18, 1998, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ issued the Default Decision and Order in which she found that Respondent admitted the allegations in the Complaint by reason of default and assessed a civil penalty of $750 against Respondent.

I find, under the circumstances in this proceeding, that the Default Decision and Order was properly issued and that the Complainant is not required to prove the allegations in the Complaint by a preponderance of the evidence, since Respondent, by his failure to file an answer, is deemed to have admitted the allegations of the

Complaint.

Fifth, Respondent states that "[t]he Department of Agriculture has failed to prove that the pork sausage carried animal disease(s) that do not occur in the United States and would infect domestic farm animals in the United States" (Appeal Pet. at 1).

The disease status of the pork sausage, which is the subject of the Complaint, is not relevant to this proceeding. Proof that the pork sausage imported by Respondent carried animal disease is not a prerequisite to concluding that Respondent violated 9 C.F.R. §§ 94.11 and 94.13, as alleged in the Complaint. Title 9 C.F.R. §§ 94.11 and 94.13 require, *inter alia*, that pork sausage imported into the United States from The Netherlands must have been prepared as prescribed and must be accompanied by a meat inspection certificate, and neither 9 C.F.R. § 94.11 nor 9 C.F.R. § 94.13 provides an exemption for pork sausage that does not carry a disease. Thus, even if I found that the pork sausage, which is the subject of the Complaint, did not carry any disease, that finding would not constitute a defense to the allegation that Respondent violated 9 C.F.R. §§ 94.11 and 94.13.

Sixth, Respondent states that "[t]he Department of Agriculture has admitted to willfully destroying evidence that would have been instrumental in proving my innocence in a court of law or judicial hearing" (Appeal Pet. at 1). Respondent does not indicate the nature of the evidence that was destroyed, and I find nothing in the record to indicate that any evidence was destroyed.

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[9] Respondent has shown no basis for

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[9]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (setting aside the default decision, which was based upon respondent's statements during two telephone conference calls with the administrative law judge and complainant's counsel, because respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived respondent of its right to due process under the Fifth Amendment to the United States Constitution) (Remand Order); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision 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) (setting aside the default decision 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) (Remand Order), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer) (Order Vacating Default Decision and Remanding Proceeding), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remanding the (continued...)

setting aside the Default Decision and Order and allowing Respondent to file an Answer.[10] The Rules of Practice clearly provide that an answer must

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[9](...continued)
proceeding to the administrative law judge for the purpose of receiving evidence because complainant had no objection to respondent's motion for remand) (Remand Order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (setting aside a default decision and accepting a late-filed answer because complainant did not object to respondent's motion to reopen after default) (Order Reopening After Default).

[10]*See generally In re Hines & Thurn Feedlot, Inc.*, 57 Agric. Dec. ___ (Aug. 24, 1998) (holding that the default decision was proper where respondents filed an answer 23 days after they were served with the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. __ (July 16, 1998) (holding that the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); In *re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where (continued...)

[10](...continued)
respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984)
(continued...)

be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)).

Further, the requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its large workload in an expeditious and economical manner. The United States Department of Agriculture's four administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 40 to 60 cases per year. As such, 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.'"[11] If Respondent was permitted to contest some of the allegations of fact after failing to file a timely answer, 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.

Accordingly, the Default Decision and Order was properly issued in this

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[10](...continued)
(holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[11]*See 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 also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that 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) (stating that 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) (stating that 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).

proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution.[12]

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

Order

Respondent Conrad Payne is assessed a civil penalty of $750 which shall be paid by a certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, 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 A.Q. Docket No. 98-0004.

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[12]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980).

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: JACK D. STOWERS, d/b/a SUGAR CREEK KENNELS.
AWA Docket No. 97-0022.
Decision and Order filed July 16, 1998.

Default — Admissions — Rules of practice — Civil penalty — Failure to file timely answer — Cease and desist order.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein assessing a civil penalty of $5,000 against Respondent and directing Respondent to cease and desist from violating the Animal Welfare Act (AWA) and the Regulations and Standards issued under the AWA. Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. There is no indication in the disposition of a previous disciplinary proceeding instituted against Respondent, *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), *modified by In re Jack D. Stowers*, 56 Agric. Dec. 300 (1997) (Order Modifying Order), that the United States Department of Agriculture would initiate no further action against Respondent for violations of the AWA and the Regulations and Standards. The civil penalty assessed against Respondent is warranted in law and justified by the facts.

Colleen A. Carroll, for Complainant.
C. David Little, Frankfort, IN, for Respondent.
Initial decision issued by Edwin S. Bernstein, 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], and 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 20, 1997.

The Complaint alleges that: (1) on June 20, November 6, and November 13, 1996, Jack D. Stowers, d/b/a Sugar Creek Kennels [hereinafter Respondent], failed to allow United States Department of Agriculture [hereinafter USDA] officials to inspect his facility in violation of section 16 of the Animal Welfare Act (7 U.S.C.

§ 2146) and section 2.126 of the Regulations (9 C.F.R. § 2.126); and (2) on September 25, 1996, Respondent (a) failed to make available to the Animal and Plant Health Inspection Service [hereinafter APHIS] records of the acquisition, disposition, and identification of dogs in violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75 of the Regulations (9 C.F.R. § 2.75); (b) failed to have the required health certificates for dogs in violation of section 2.78 of the Regulations (9 C.F.R. § 2.78); (c) failed to have any pound certificates for dogs in violation of section 2.133 of the Regulations (9 C.F.R. § 2.133); (d) failed to identify dogs in violation of section 2.50(b) of the Regulations (9 C.F.R. § 2.50(b)); (e) failed to provide adequate veterinary care for dogs in violation of section 2.40 of the Regulations (9 C.F.R. § 2.40); and (f) failed to ensure that primary enclosures for dogs were constructed and maintained so as to have no sharp points or edges that could injure the animals in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2) of the Standards (9 C.F.R. § 3.6(a)(2)) (Compl. ¶ II).

Respondent was served with the Complaint and the Rules of Practice on April 24, 1997. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On March 10, 1998, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondent violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act; and (3) assessed a civil penalty of $5,000 against Respondent (Default Dec. at 2-3).

On May 6, 1998, Respondent 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 26, 1998, Complainant filed Complainant's Response to Respondent's Objections to Decision and Order, and on May 27, 1998, the Hearing Clerk

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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)).

transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision 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.

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.

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, 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 regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

§ 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, 2146(a), 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 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.

. . . .

(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; 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.

. . . .

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.

(2) Each dealer and exhibitor shall use Record of Acquisition and Dogs and Cats on Hand (APHIS Form 7005/VS Form 18-5) and Record of Disposition of Dogs and Cats (APHIS Form 7006/VS Form 18-6) to make, keep, and maintain the information required by paragraph (a)(1) of this section: *Provided*, that if a dealer or exhibitor who uses a computerized recordkeeping system believes that APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6 are unsuitable for him or her to make, keep, and maintain the information required by paragraph (a)(1) of this section, the dealer or exhibitor may request a variance from the requirement to use APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6.

(i) The request for a variance must consist of a written statement describing why APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6 are unsuitable for the dealer or exhibitor to make, keep, and maintain the information required by paragraph (a)(1) of this section, and a description of the computerized recordkeeping system the person would use in lieu of APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6 to make, keep, and maintain the information required by paragraph (a)(1) of this section. APHIS will advise the person as to the disposition of his or her request for a variance from the requirement to use APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6.

(ii) A dealer or exhibitor whose request for a variance has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the request for a variance should not be denied. The denial of the variance shall remain in effect until the final legal decision has been rendered.

(3) The USDA Interstate and International Certificate of Health Examination for Small Animals (APHIS Form 7001/VS Form 18-1) may

be used by dealers and exhibitors to make, keep, and maintain the information required by § 2.79.

(4) One copy of the record containing the information required by paragraph (a)(1) of this section shall accompany each shipment of any dog or cat purchased or otherwise acquired by a dealer or exhibitor. One copy of the record containing the information required by paragraph (a)(1) of this section shall accompany each shipment of any dog or cat sold or otherwise disposed of by a dealer or exhibitor: *Provided, however*, that, except as provided in § 2.133(b) of this part for dealers, information that indicates the source and date of acquisition of a dog or cat need not appear on the copy of the record accompanying the shipment. One copy of the record containing the information required by paragraph (a)(1) of this section shall be retained by the dealer or exhibitor.

. . . .

§ 2.78 Health certification and identification.

(a) No dealer, exhibitor, operator of an auction sale, broker, or department, agency, or instrumentality of the United States or of any State or local government shall deliver to any intermediate handler or carrier for transportation, in commerce, or shall transport in commerce any dog, cat, or nonhuman primate unless the dog, cat, or nonhuman primate is accompanied by a health certificate executed and issued by a licensed veterinarian. The health certificate shall state that:

(1) The licensed veterinarian inspected the dog, cat, or nonhuman primate on a specified date which shall not be more than 10 days prior to the delivery of the dog, cat, or nonhuman primate for transportation; and

(2) when so inspected, the dog, cat, or nonhuman primate appeared to the licensed veterinarian to be free of any infectious disease or physical abnormality which would endanger the animal(s) or other animals or endanger public health.

(b) The Secretary may provide exceptions to the health certification requirement on an individual basis for animals shipped to a research facility for purposes of research, testing, or experimentation when the research facility requires animals not eligible for certification. Requests should be addressed to the Animal and Plant Health Inspection Service, Regulatory Enforcement and Animal Care, Animal Care, 4700 River Road, Unit 84, Riverdale, Maryland 20737-1234.

(c) No intermediate handler or carrier to whom any live dog, cat, or

nonhuman primate is delivered for transportation by any dealer, research facility, exhibitor, broker, operator of an auction sale, or department, agency, or instrumentality of the United States or any State or local government shall receive a live dog, cat, or nonhuman primate for transportation, in commerce, unless and until it is accompanied by a health certificate issued by a licensed veterinarian in accordance with paragraph (a) of this section, or an exemption issued by the Secretary in accordance with paragraph (b) of this section.

(d) The U.S. Interstate and International Certificate of Health Examination for Small Animals (APHIS Form 7001/VS Form 18-1) may be used for health certification by a licensed veterinarian as required by this section.

. . . .

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

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, condi-

tions and areas of noncompliance.

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

. . . .

§ 2.133 Certification for random source dogs and cats.

(a) Each of the entities listed in paragraphs (a)(1) through (a)(3) of this section that acquire any live dog or cat shall, before selling or providing the live dog or cat to a dealer, hold and care for the dog or cat for a period of not less than 5 full days after acquiring the animal, not including the date of acquisition and excluding time in transit. This holding period shall include at least one Saturday. The provisions of this paragraph apply to:

(1) Each pound or shelter owned and operated by a State, county, or city;

(2) Each private pound or shelter 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

(3) Each research facility licensed by USDA as a dealer.

(b) A dealer shall not sell, provide, or make available to any person a live random source dog or cat unless the dealer provides the recipient of the dog or cat with certification that contains the following information:

(1) The name, address, USDA license number, and signature of the dealer;

(2) The name, address, USDA license or registration number, if such number exists, and signature of the recipient of the dog or cat;

(3) A description of each dog or cat being sold, provided, or made available that shall include:

(i) The species and breed or type (for mixed breeds, estimate the two dominant breeds or types);

(ii) The sex;

(iii)The date of birth or, if unknown, then the approximate age;

(iv)The color and any distinctive markings; and

(v) The Official USDA-approved identification number of the animal. However, if the certification is attached to a certificate provided by a prior

dealer which contains the required description, then only the official identification numbers are required;

(4) The name and address of the person, pound, or shelter from which the dog or cat was acquired by the dealer, and an assurance that the person, pound, or shelter was notified that the cat or dog might be used for research or educational purposes;

(5) The date the dealer acquired the dog or cat from the person, pound, or shelter referred to in paragraph (b)(4) of this section; and

(6) If the dealer acquired the dog or cat from a pound or shelter, a signed statement by the pound or shelter that it met the requirements of paragraph (a) of this section. This statement must at least describe the animals by their official USDA identification numbers. It may be incorporated within the certification if the dealer makes the certification at the time that the animals are acquired from the pound or shelter or it may be made separately and attached to the certification later. If made separately, it must include the same information describing each animal as is required in the certification. A photocopy of the statement will be regarded as a duplicate original.

(c) The original certification required under paragraph (b) of this section shall accompany the shipment of a live dog or cat to be sold, provided, or otherwise made available by the dealer.

(d) A dealer who acquires a live dog or cat from another dealer must obtain from that dealer the certification required by paragraph (b) of this section and must attach that certification (including any previously attached certification) to the certification which he or she provides pursuant to paragraph (b) of this section (a photocopy of the original certification will be deemed a duplicate original if the dealer does not dispose of all of the dogs or cats in a single transaction).

(e) A dealer who completes, provides, or receives a certification required under paragraph (b) of this section shall keep, maintain, and make available for APHIS inspection a copy of the certification for at least 1 year following disposition.

(f) A research facility which acquires any live random source dog or cat from a dealer must obtain the certification required under paragraph (b) of this section and shall keep, maintain, and make available for APHIS inspection the original for at least 3 years following disposition.

(g) In instances where a research facility transfers ownership of a live random source dog or cat acquired from a dealer to another research facility, a copy of the certification required by paragraph (b) of this section

must accompany the dog or cat transferred. The research facility to which the dog or cat is transferred shall keep, maintain, and make available for APHIS inspection the copy of the certification for at least 3 years following disposition.

PART 3—STANDARDS

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

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

. . . .

(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;

(iii) Contain the dogs and cats securely;

(iv) Keep other animals from entering the enclosure;

(v) Enable the dogs and cats to remain dry and clean;

(vi) Provide shelter and protection from extreme temperatures and weather conditions that may be uncomfortable or hazardous to all the dogs and cats;

(vii) Provide sufficient shade to shelter all the dogs and cats housed in the primary enclosure at one time;

(viii) Provide all the dogs and cats with easy and convenient access to clean food and water;

(ix) Enable all surfaces in contact with the dogs and cats to be readily cleaned and sanitized in accordance with § 3.11(b) of this subpart, or be replaceable when worn or soiled;

(x) Have floors that are constructed in a manner that protects the

dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' and cats' feet to pass through any openings in the floor. If the floor of the primary enclosure is constructed of wire, a solid resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably must be provided; and

(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.

9 C.F.R. §§ 2.40, .50(b), .75(a), .78, .100(a), .126, .133; 3.6(a)(2) (footnotes omitted).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

A copy of the Complaint and [a copy of] the Rules of Practice . . . [footnote 1 omitted] were served on Respondent . . . on April 24, 1997. Respondent was informed in the letter of service [which accompanied the Complaint and Rules of Practice] 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 [in this Decision and Order] by Respondent's failure to file [a timely] answer, are adopted and set forth [in this Decision and Order] 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. Jack D. Stowers is an individual doing business as Sugar Creek Kennels, and whose address is 2203 S. CR 1300 E, Frankfort, Indiana 46041.

2. At all times material [to this proceeding] . . . Respondent was operating as a dealer as defined in the [Animal Welfare] Act and the Regulations.

3. On June 20, November 6, and November 13, 1996, Respondent willfully violated section 16 of the [Animal Welfare] Act (7 U.S.C. § 2146) and section

2.126 of the Regulations (9 C.F.R. § 2.126) by failing to allow department officials to inspect his facility.

4. On September 25, 1996, Respondent willfully violated section 10 of the [Animal Welfare] Act (7 U.S.C. § 2140) and section 2.75 of the Regulations (9 C.F.R. § 2.75) by failing to make available to APHIS, records of the acquisition, disposition, and identification of dogs.

5. On September 25, 1996, Respondent willfully violated section 2.78 of the Regulations (9 C.F.R. § 2.78) by failing to have any health certificates for dogs . . . .

6. On September 25, 1996, Respondent willfully violated section 2.133 of the Regulations (9 C.F.R. § 2.133) by failing to have any pound certificates for dogs . . . .

7. On September 25, 1996, Respondent willfully violated section 2.50(b) of the Regulations (9 C.F.R. § 2.50(b)) by failing to identify dogs . . . .

8. On September 25, 1996, Respondent willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide adequate veterinary care for dogs.

9. On September 25, 1996, Respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2) of the Standards (9 C.F.R. § 3.6(a)(2)) by failing to ensure that primary enclosures for dogs were constructed and maintained so as to have no sharp points or edges that could injure the animals contained [in the primary enclosures].

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the [Animal Welfare] Act and warranted under the circumstances.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues and requests that I vacate the Default Decision in Respondent's Objections to Proposed Decision and Motion to Vacate Order of March 10, 1998 [hereinafter Respondent's Appeal Petition].

First, Respondent contends that he was not served with a copy of the Complaint, until April or May 1998 (Respondent's Appeal Pet. ¶¶ 1-2). I disagree with Respondent. On February 21, 1997, the Hearing Clerk sent a letter dated February 21, 1997, and one copy each of the Complaint and the Rules of Practice,

by certified mail, return receipt requested, to Respondent at his address, 2203 S. CR 1300 E, Frankfort, Indiana 46041. Respondent acknowledges that 2203 S. CR 1300 E, Frankfort, Indiana 46041, is his address (Respondent's Appeal Pet. ¶ 3(1)). Nevertheless, the envelope containing the February 21, 1997, mailing was returned to the Hearing Clerk by the postal service marked "unclaimed." Thereafter, on April 24, 1997, the Hearing Clerk mailed the envelope containing the February 21, 1997, mailing by ordinary mail to Respondent at the same address.

Section 1.147(c)(1) of the Rules of Practice provides:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

In addition, sections 1.136, 1.139, and 1.141 of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by

the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on April 24, 1997, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R.

§ 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 2-3.

Likewise, the letter from the Hearing Clerk accompanying the Complaint and the Rules of Practice served April 24, 1997, on Respondent, provides:

CERTIFIED RECEIPT REQUESTED

February 21, 1997

Mr. Jack Stowers dba
Sugar Creek Kennels
2203 S. CR 1300 E.
Frankfort, Indiana 46041

Dear Mr. Stowers:

Subject: In re: Jack Stowers dba Sugar Creek Kennels - Respondent
AWA Docket No. 97-0022

Enclosed is a copy of a complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated February 21, 1997, from Joyce A. Dawson, Hearing Clerk, to Mr. Jack Stowers (emphasis in original).

On May 19, 1997, the Acting Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the allotted time (Letter dated May 19, 1997, from Regina A. Paris, Acting Hearing Clerk, to Mr. Jack Stowers). Respondent did not respond to this letter.

On December 10, 1997, Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. On December 12, 1997, the Hearing Clerk sent a letter dated December 12, 1997, and one copy each of Complainant's Motion for Default Decision and Proposed Default Decision, by certified mail, return receipt requested, to Respondent at his address, 2203 S. CR 1300 E, Frankfort, Indiana 46061. The December 12, 1997, letter from the Hearing Clerk clearly informs Respondent that he must file timely objections to the Proposed Default Decision, as follows:

CERTIFIED RECEIPT REQUESTED December 12, 1997
Mr. Jack Stowers dba
Sugar Creek Kennels
2203 S. CR 1300 E.
Frankfort, Indiana 46041

Dear Mr. Stowers:

Subject: In re: Jack Stowers dba Sugar Creek Kennels, Respondent
AWA Docket No. 97-0022

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order, together with a copy of the Proposed Decision and Order Upon Admission of Facts by Reason of Default, 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

Letter dated December 12, 1997, from Joyce A. Dawson, Hearing Clerk, to Mr. Jack Stowers. The December 12, 1997, mailing was returned to the Hearing Clerk by the postal service marked "unclaimed." On February 13, 1998, the Hearing Clerk mailed the envelope containing the December 12, 1997, mailing by ordinary mail to Respondent in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)). Respondent did not file objections to the Motion for Default Decision or the Proposed Default Decision within 20 days after service, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). On March 10, 1998, the ALJ issued the Default Decision in which he found that Respondent admitted the allegations in the Complaint by reason of default, ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and assessed a civil penalty of $5,000 against Respondent.

On May 6, 1998, 82 days after Respondent was served with a copy of Complainant's Motion for Default Decision and Proposed Default Decision,

Respondent filed objections to Complainant's Motion for Default Decision and Proposed Default Decision (Respondent's Appeal Pet.). In his objections, Respondent contends that "he . . . did not receive notice of the pendency of the Complaint filed in this matter" (Respondent's Appeal Pet. ¶ 1), and states

> [t]hat he became aware of some sort of proceeding in the latter part of February 1998 when he received a letter from the United States Department of Agriculture dated December 12, 1997 concerning a proposed decision and Order. Mr. Stowers brought this to his counsel, C. David Little, who is also mystified by the letter and Motion for Adoption, Proposed Decision and Order. . . .

Affidavit of Jack D. Stowers ¶ 1. However, Respondent admits that he is an individual doing business as Sugar Creek Kennels and that his address is 2203 S. CR 1300 E, Frankfort, Indiana 46061 (Compl. ¶ I(A); Respondent's Appeal Pet. ¶ 3(1)).

It was to Respondent's acknowledged address that the Hearing Clerk mailed a copy of the Complaint, a copy of the Rules of Practice, and a cover letter, by certified mail, return receipt requested, on February 21, 1997, and by ordinary mail on April 24, 1997. Moreover, the Complaint, Rules of Practice, and cover letter of the Hearing Clerk each expressly state that a failure to file a timely answer in this proceeding is deemed an admission of the allegations in the Complaint and could result in the entry of a default decision against Respondent. Respondent's answer, which is contained in Respondent's Appeal Petition (Respondent's Appeal Pet. ¶¶ 3-11), was filed on May 6, 1998, 1 year and 12 days after Respondent was served with the Complaint. Respondent's answer, which was due May 14, 1997, is filed too late, and Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint.

Further, Respondent's objections to Complainant's Motion for Default Decision and Proposed Default Decision, which are contained in Respondent's Appeal Petition, were filed on May 6, 1998, 82 days after Respondent was served with Complainant's Motion for Default Decision and Proposed Default Decision. Respondent's objections to Complainant's Motion for Default Decision and Proposed Default Decision, which were due March 5, 1998, are filed too late.

I disagree with Respondent's contention that he was not served with the Complaint until April or May 1998. The record clearly establishes that Respondent was properly served with a copy of the Complaint on April 24, 1997, but failed to file an answer within the allotted time as prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). I find that Respondent's answer and objections to

Complainant's Motion for Default Decision and Proposed Decision were not timely filed, and I find that the Default Decision was properly issued.

Second, Respondent contends that resolution of a previous disciplinary proceeding instituted against him under the Animal Welfare Act[2] includes an understanding that USDA would initiate no further actions against him (Respondent's Appeal Pet. ¶¶ 8-9). The record does not reveal how Respondent could have been under "the clear and unmistakable impression that no further action had been or was to be initiated by the United States Department of Agriculture against [him]" (Respondent's Appeal Pet. ¶ 9).

On December 23, 1996, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a decision in *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), in which he assessed Respondent a civil penalty of $15,000; revoked Respondent's license under the Animal Welfare Act; and ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. Nothing in the Chief ALJ's December 23, 1996, Decision and Order suggests that Respondent would thereafter be immune from "actions" instituted by USDA against him under the Animal Welfare Act. The Chief ALJ's December 23, 1996, Decision and Order concerns violations stemming from inspections and attempted inspections in 1995 or earlier. The violations, which are the subject of the instant proceeding, are based on inspections and attempted inspections of Respondent's facility in June, September, and November 1996. Nothing in the record in this proceeding, the Decision and Order in *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), or the modification of the Chief ALJ's December 23, 1996, Decision and Order in *In re Jack D. Stowers*, 56 Agric. Dec. 300 (1996) (Order Modifying Order), establishes that the 1996 violations, which are the subject of the instant proceeding, were adjudicated in *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996).

Third, Respondent challenges the propriety of the assessment of a $5,000 civil penalty against him in this proceeding, stating:

> . . . that the additional Complaint filed by the United States Department of Agriculture after a $15,000.00 civil penalty was imposed and after the Respondent basically was forced out of the business and eventually conceded to voluntarily surrender his license, to be vindictive, unwarranted, and superfluous, and constitutes unnecessary imposition on the Court to

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[2]*In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), *modified by In re Jack D. Stowers*, 56 Agric. Dec. 300 (1997) (Order Modifying Order).

> adjudicate matters which have already taken considerable time and effort and expense on the Court's time to have adjudicated.
>
> The quest of the United States Department of Agriculture to add an additional civil penalty is simply adding "salt to the wound" and is unconscionable and unjustified.

Respondent's Appeal Pet. ¶¶ 10-11. Respondent's assertions are without merit. The $5,000 civil penalty assessed against Respondent is warranted in law and justified in fact.

The Animal Welfare Act authorizes the Secretary of Agriculture to assess a civil penalty of $2,500 for each violation (7 C.F.R. § 2149(b)). Respondent committed nine violations under the Animal Welfare Act and the Regulations and Standards and could be assessed a maximum civil penalty of $22,500.

Section 19(b) of the Animal Welfare Act requires the Secretary to consider "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" when assessing a civil penalty (7 U.S.C. § 2149(b)). Respondent's nine violations were serious and willful. Moreover, Respondent has a history of previous violations of the Animal Welfare Act and the Regulations and Standards, *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996).

Respondent's history of previous violations clearly evidences chronic noncompliance and a lack of good faith. The circumstances support the assessment of a $5,000 civil penalty against Respondent, and the $5,000 civil penalty is well within the range of sanctions imposed in these kinds of cases.[3]

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[3]*See, e.g.*, *In re C.C. Baird*, 57 Agric. Dec.___ (July 7, 1998) (imposing a $5,350 civil penalty and a 10-day suspension for 51 violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189 (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 Peter A. Lang*, 57 Agric. Dec. 59 (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

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Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[4] Respondent has shown no basis for

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[3](...continued)
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 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).

[4]*See generally In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. 1121 (1996) (setting aside a default decision 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) (setting aside a default decision 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*, (continued...)

setting aside the Default Decision and allowing Respondent to file an Answer.[5]

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[4](...continued)
35 Agric. Dec. 195 (1976); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (vacating a default decision and remanding the case to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[5]*See generally In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal docketed*, No. 96-7124 (11th Cir. Nov. 8, 1996); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988)
(continued...)

[5](...continued)
(holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would

(continued...)

The Rules of Practice clearly provide that an answer must be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's answer was filed 1 year and 12 days after Respondent was served with the Complaint. Moreover, the Rules of Practice require that any objections to a motion for a decision must be filed within 20 days after service of the motion and the proposed decision (7 C.F.R. § 1.139). Respondent's objections to Complainant's Motion for Default Decision and Proposed Default Decision were filed 82 days after Respondent was served with Complainant's Motion for Default Decision and Proposed Default Decision.

Further, the requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its large workload in an expeditious and economical manner. The Department's four ALJs frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year. As such, 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.'"[6] If Respondent was permitted to contest some of the allegations of fact after failing to file a timely answer, 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

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[5](...continued)
be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[6]*See 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 also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that 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) (stating that 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) (stating that 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).

require additional personnel.

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 his rights under the due process clause of the Fifth Amendment to the United States Constitution.[7]

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

Order

1. Respondent Jack D. Stowers, 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. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent Jack D. Stowers is assessed a civil penalty of $5,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States and sent to:

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

The certified check or money order shall be forwarded to, and received by, Colleen A. Carroll, within 60 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. 97-0022.

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[7]*See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

In re: KARL MITCHELL d/b/a ALL ACTING ANIMALS.
AWA Docket No. 97-0028.
Decision and Order filed September 9, 1998.

Cease and Desist Order - Civil Penalty - Filing License Application and PVC Form Falsely Purporting to be Signed by Applicant and Veterinarian.

Chief Administrative Law Judge Victor W. Palmer found that Respondent violated the Animal Welfare Act and a regulation issued pursuant thereto by submitting a license application and a Program of Veterinary Care form (PVC) which were purportedly signed by the applicant for the license and the veterinarian who completed the PVC form, which instead had been signed by the Respondent. Chief Judge Palmer imposed a $750.00 civil penalty and a cease and desist order. In determining the penalty, Chief Judge Palmer noted that the violation did not endanger the welfare of animals and was unlikely to recur.

Donald A. Tracy, for Complainant.
Benjamin Zvenia, Las Vegas, NV, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (hereinafter "the Act") instituted by a Complaint filed on May 1, 1997, by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA). The Complaint alleged that the Respondent willfully violated the Act and the regulations and standards issued pursuant thereto (9 C.F.R. § 1.1 *et seq.*). Complainant requests a cease and desist order, assessment of civil penalties and suspension of Respondent's license.

I presided over a hearing in Las Vegas, Nevada, on May 14, 1998. Complainant was represented by Donald A. Tracy, Esq., Office of the General Counsel, Washington, D.C., and Respondent was represented by Benjamin Zvenia, Esq., Las Vegas, Nevada. Complainant filed proposed findings of fact, conclusions, order and brief on August 18, 1998. Respondent, filed its proposed findings, conclusions, order and brief on August 28, 1998, which, though late, have been accepted and considered.

References to the transcript of the hearing are cited herein as "Tr.". Complainant's exhibits are cited as "Cx". Respondent's exhibits are cited as "Rx".

For the reasons hereinafter stated, an order is being issued requiring Respondent to cease and desist from violating the Act and the regulations and assessing a civil penalty of $750.00.

Findings of Fact

1. Respondent, Karl Mitchell d/b/a All Acting Animals, is an individual whose address is P.O. Box 1085, Pahrump, Nevada 89041. (Answer.)
2. At all times material herein, Karl Mitchell was an "exhibitor", as defined in the Act, and held an exhibitor's license issued under the Act. (Answer.)
3. On May 28, 1996, Karl Mitchell submitted an application to the United States Department of Agriculture (USDA) for an exhibitor's license on behalf of Mike Tyson, his client, which Karl Mitchell signed as Mike Tyson, who purportedly acknowledged receipt of the regulations and agreed to comply with them. (Tr. 123.)
4. On May 28, 1996, Karl Mitchell submitted to the USDA, a Program of Veterinary Care form, which he signed both as Stephen Whipple, the veterinarian who purportedly filled out the form, and as Mike Tyson, the applicant for the license who purportedly certified that he understood his responsibilities to provide veterinary care. (Tr. 123.)
5. Prior to these submissions, Karl Mitchell had prepared an application for an exhibitor's license for Mike Tyson, which Mike Tyson signed. (Tr. 124.) Karl Mitchell also had Dr. Stephen Whipple, the veterinarian who treated animals Mitchell personally owned and exhibited, examine tigers owned by Mike Tyson, and Dr. Whipple did complete and sign a Program of Veterinary Care form (PVC), respecting Tyson's tigers, for submission to the United States Department of Agriculture. (Tr. 117, Tr. 118, Tr. 124.) However, Karl Mitchell and his wife had a rancorous separation during which time these documents were lost or destroyed. (Tr. 122.)
6. Karl Mitchell had been engaged by Mike Tyson to instruct him in the proper care and handling of tigers that Mr. Tyson owned and wished to raise, breed and use for publicity photographs. (Tr. 120-21.) Inasmuch as this use of his tigers constituted an "exhibition", Mr. Mitchell counseled Mr. Tyson on his need for an exhibitor's license under the Act. Mr. Tyson told Mitchell, "handle it" (Tr. 125 and Tr. 145), and Mitchell then obtained the requisite forms and saw to their completion. When they were lost or destroyed, Mitchell was reluctant to tell Mr. Tyson and ask him to sign new forms. Moreover, Mitchell was in Ohio at Mr. Tyson's home when Mr. Tyson was not, and Mitchell wished to have the tigers' housing facilities in Las Vegas pre-approved before their return to Las Vegas. (Tr. 125-26). He therefore undertook to submit duplicate forms for those which had been lost, and Mitchell signed both Tyson's and Whipple's names. (Tr. 124-26.)
7. Karl Mitchell did not recall all the data that was needed to complete the PVC

form when he attempted to duplicate it and it was incomplete. Gregory Wallen, the USDA inspector who received the PVC form noted the lack of needed information and the fact that handwriting did not vary between the body of the form and the signatures, and sent these documents to his regional office. (Tr. 57-61.) Upon subsequent investigation Mr. Mitchell admitted signing the forms, but denied that he had intended anything fraudulent, he merely was trying to expedite his job of getting the permits for Mr. Tyson. (Tr. 127.)

8. Karl Mitchell has been continuously licensed as an exhibitor since 1988 (Tr. 132) and there is no evidence of any prior violations. He fully cooperated with the investigators. (Tr. 35 and Tr. 65). His personal income at this time is low and diminished. (Tr. 146-48). No false information was contained in the documents submitted by Respondent (Tr. 137), other than the fact that the acknowledgment of the receipt of the regulations and standards and the agreement to comply with them had not been signed by the applicant.

Conclusions of Law

1. Respondent violated the Act and a regulation (9 C.F.R. § 2.2(a)) in that he submitted a license application and a Program of Veterinary Care form (PVC) which were purportedly signed by the applicant for the license and the veterinarian who completed the PVC form, which instead had been signed by the Respondent.
2. The appropriate sanction for this violation by Respondent is the issuance of a cease and desist order and the assessment of a civil penalty in the amount of $750.00.

Discussion

When Karl Mitchell was engaged by Mike Tyson to instruct him in the proper care and handling of his tigers, Mitchell told Tyson that he needed a USDA exhibitor's license to raise, breed and use the tigers for publicity photographs. Tyson told Mitchell to "handle it".

Thereupon, Mitchell obtained the needed forms; had his own veterinarian, Dr. Stephen Whipple, examine the animals and their housing facilities; and saw to the forms being duly completed and signed by both Mike Tyson and Dr. Whipple. But he lost them. Mitchell, who had accompanied the tigers when they were temporarily moved to Tyson's Ohio home, found himself in a serious predicament. Neither Tyson nor Whipple were available to sign new forms and he didn't want to delay the necessary USDA inspection of the Las Vegas property in advance of

the tigers' return. Nor, one would suspect, did he wish to provoke Tyson by asking him to sign new forms because the originals had been lost. So he duplicated the documents as best he could and signed both names. There was no attempt to defraud anyone, but the license application must be concluded to be false in that the pertinent regulation requires:

> ". . . The applicant shall acknowledge receipt of the regulations and standards and agree to comply with them by signing the application form before a license will be issued." 9 C.F.R. § 2.2(a).

Inasmuch as Mike Tyson denies that Mitchell has authority to sign his name (Cx 2), if a license had been issued based on this application, its enforceability would have been in doubt. Accordingly, Mitchell is a licensed exhibitor who has violated the Act and a pertinent regulation, and is therefore subject to the sanctions set forth at 7 U.S.C. § 2149.

In that this violation did not endanger the welfare of animals, is not ongoing, and is unlikely to recur, it would be inappropriate and excessive to apply the Act's provisions for suspension or revocation set forth at 7 U.S.C. § 2149(a).

On the other hand, under 7 U.S.C. § 2149(b), a civil penalty not to exceed $2,500.00 for a violation, may be assessed and a cease and desist order issued. In respect to the appropriate amount of the civil penalty, the Act requires that due consideration be given 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.

Taking those factors into consideration, a civil penalty substantially less than the $2,500.00 maximum is appropriate. Mitchell's business is small and not very profitable. He has no prior violations. His commission of this violation is better characterized as a foolish rather than a fraudulent act.

Accordingly, the following order is being entered.

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 regulations and, in particular, shall cease and desist from furnishing any false records to the Department.
2. Respondent is assessed a civil penalty of $750.00, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and shall be forwarded to Donald A. Tracy, United States Department

of Agriculture, Office of the General Counsel, Room 2022 South Building, Washington, D.C. 20250-1400.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision and Order shall become final and effective without further proceedings 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 sections 1.130, 1.142 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.130, 1.142, 1.145).

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

[This Decision and Order became final October 19, 1998.-Editor]

In re: CHERYL A. ZIEMANN.
AWA Docket No. 98-0007.
Decision and Order filed September 29, 1998.

Failure to appear at hearing - Admission of material allegations - Acting as a dealer without obtaining a license.

Operated as a dealer, as defined in the Act, without obtaining a license. Respondent, in her Answer, conceded that she transported puppies but contended that she did so as an employee. Judge Bernstein found that because an IRS Form 1099 indicated that Respondent was not an employee and her alleged employer paid no social security and unemployment taxes for her and provided no health plan or retirement plan for her, Respondent was not acting as an employee but was acting as a dealer. Therefore, Respondent violated the Act by acting as a dealer without obtaining a license.

Donald A. Tracy, 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 January 13, 1998, 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 Act and the regulations and standards issued under the Act (9 C.F.R. §§ 1.1 *et seq.*).

Both Complainant and I made repeated requests to Respondent to participate in a telephone conference to establish a time and place for the oral hearing in this matter. Although Respondent apparently received the letters in which such requests were made, she failed to make herself available for a conference call.

Following these unsuccessful attempts, on May 29, 1998, I issued an order

scheduling the hearing for August 19, 1998, in Washington, D.C. A copy of the order was served upon Respondent. Several days before the hearing, Respondent sent Complainant a letter discussing Complainant's exhibits. However, Respondent failed to appear at the hearing.

The Rules of Practice governing these proceedings provide that a respondent who fails to appear at the hearing, "shall be deemed to have . . . admitted any facts which may be presented at the hearing." This failure to appear also "constitutes an admission of all the material allegations of fact contained in the complaint." 7 C.F.R. § 1.141(e). In addition, Complainant presented persuasive evidence in support of the Complaint's allegations. This consisted of credible testimony by Mr. Jimmy Patschke, an experienced USDA investigator who investigated the charges against Respondent, and documentary evidence.

Based upon Complainant's credible and uncontroverted evidence, and Complainant's factual allegations which I deem to be admitted by Respondent, I make the following findings, conclusions, and order.[1]

Findings of Fact

1. Respondent, Cheryl A. Ziemann, is an individual whose address is Route 1, Box 25, Decatur, Nebraska 68020.

2. At all times material, Respondent was operating as a dealer as defined in the Act and the regulations (Tr. 18, 23-25, 31, 41; Complaint, para. I).

3. At no time material, did Respondent have a license under the Act (Tr. 14; Complaint, para. II).

4. On over 20 occasions between August 14, 1995, and January 2, 1996, Respondent negotiated the purchase of dogs for Mr. Richard Waldron (Tr. 23, 25, 31, 39, 41; Complaint, para. II).

5. On these same occasions, Respondent transported the dogs, whose purchase she had negotiated, from the sellers to Mr. Waldron (CX 1-77; Tr. 18, 24; Complaint, para. II).

6. Respondent was not an employee of Mr. Waldron. She received an Internal Revenue Service ("IRS") Form 1099 reflecting that the money which Mr. Waldron paid her was for "Nonemployee compensation" (CX 90).

7. Ms. Ziemann's relationship with Mr. Waldron did not have any of the indicia of employment. Mr. Waldron did not pay social security, he did not provide a health plan or a retirement plan, and he did not pay unemployment taxes

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[1]Complainant's exhibits are referred to as "CX" and the hearing transcript is referred to as "Tr."

(Tr. 26).

8. Both USDA and Mr. Waldron told Ms. Ziemann that she would need a license for her activities (CX 83, 91).

Conclusions of Law

1. The Secretary has jurisdiction.

2. Respondent operated as a dealer as defined in the Act without obtaining a license, and thereby wilfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1).

Discussion

The Act requires anyone operating as a dealer to be licensed by the Secretary, 7 U.S.C. § 2134. The Act defines dealer to include any person who, "in commerce, for compensation or profit, . . . transports . . . or negotiates the purchase or sale of . . . any dog . . . for . . . use as a pet," 7 U.S.C. § 2131(f).

Mr. Jimmy Patschke, an experienced APHIS investigator, conducted an investigation which included interviews of Ms. Ziemann, Mr. Waldron, and other purchasers for whom Ms. Ziemann obtained puppies, and sellers of the puppies. These interviews revealed that Ms. Ziemann was operating as a dealer. Mr. Patschke also obtained documentary evidence in the form of animal transfer records and canceled checks which confirmed Ms. Ziemann's status as a dealer.

Ms. Ziemann, in her Answer, conceded that she transported the puppies. In addition, the evidence demonstrates that she negotiated the purchase of the puppies. The transportation of the puppies constitutes dealing under the Act.

Ms. Ziemann's contention was that she was an employee of Mr. Waldron and thus exempt from the licensing requirements. The uncontradicted evidence, however, is that Ms. Ziemann was an independent contractor working on a fee basis. Her pay was reported to the IRS as "Nonemployee compensation" and she had none of the normal indicia of employment. Most tellingly, Mr. Waldron did not pay either social security or unemployment compensation as he would be required to do if she had been an employee. Therefore, Ms. Ziemann was operating as a dealer, not an employee, while not licensed.

In assessing a civil penalty under the Act, a judge must consider the size of Respondent's business, the gravity of the violation, and Respondent's good faith and previous violations. The record indicates that Respondent was able to make a small living through her brokering and transport of puppies. The violations are serious and go to the heart of the Act. In order to implement and enforce the Act's

goals, all dealers must go through a licensing process. This enables the Secretary to monitor their activities and the care they provide their animals. Moreover, licensing is necessary to permit the enforcement of the holding period and other anti-pet theft aspects of the Act and regulations. Ms. Ziemann did not display good faith since both Mr. Waldron and the Department alerted her to the need to obtain a license, but she refused to do so. Ms. Ziemann does not have any previous violations.

The Department has limited resources available in its enforcement efforts and therefore relies heavily on the deterrent effect of disciplinary proceedings and sanctions. Sanctions are necessary to dissuade Respondent and others from committing similar violations. The Act authorizes a maximum penalty of $2,500 per violation. I, therefore, find that the civil penalty of $2,000, requested by Complainant, is appropriate. In addition, as requested by Complainant, Respondent should be disqualified from obtaining a license under the Act for one year and continuing until she has paid the civil penalty assessed against her.

Order

1. Respondent, her agents and employees, successors and assigns, directly or indirectly 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 operating as a dealer without first obtaining a license from the Secretary.

2. Respondent is assessed a civil penalty of $2,000, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and forwarded to Donald A. Tracy, 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 one year from becoming licensed under the Act and regulations, and continuing until she has paid the civil penalty assessed against her.

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 December 22, 1998.-Editor]

In re: RICHARD LAWSON, STANLEY CURTIS, AND JOHN M. CURTIS, d/b/a NOAH'S ARK ZOO.
AWA Docket No. 96-0047.
Decision and Order filed October 15, 1998.

Cease and desist order — Civil penalty — Willful — Sanction policy — Disqualification order — Preponderance of the evidence — Failing to allow inspection — Failing to maintain complete records — Failing to provide adequate veterinary care — Failing to identify animals — Failing to provide adequate housing — Failing to provide clean premises and clean primary enclosures — Failing to rapidly remove excess water — Failing to properly store food — Failing to provide adequate water.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondents failed to comply with the Regulations by failing to allow APHIS to inspect Respondents' animals, facilities, and records (9 C.F.R. § 2.126); by failing to provide and maintain programs for disease control and prevention, euthanasia, and adequate veterinary care supervised by a veterinarian, and by failing to provide veterinary care to animals in need of care (9 C.F.R. § 2.40); by failing to maintain complete records showing the acquisition and disposition of animals (9 C.F.R. § 2.75); by failing to properly identify animals (9 C.F.R. § 2.50); and by failing to comply with the Regulations and Standards relating to the care and housing of animals: that Respondents failed to remove animal and food wastes (9 C.F.R. § 3.125(d)); that Respondents failed to properly store food (9 C.F.R. §§ 3.1(e), .125(c)); that Respondents failed to adequately ventilate indoor housing facilities (9 C.F.R. § 3.126(b)); that Respondents failed to rapidly eliminate excess water from housing facilities for animals (9 C.F.R. § 3.127(c)); that Respondents failed to provide polar bears with primary enclosures that were clean and had adequate space and water (9 C.F.R. §§ 3.104(a), (e), .107(a)(1)); that Respondents failed to keep the premises clean and in good repair, free of accumulations of trash (9 C.F.R. § 3.131(c)); and that Respondents failed to keep primary enclosures clean of animal waste (9 C.F.R. § 3.131(a)). However, since the ALJ erroneously found no willfulness and did not impose a disqualification period, the Judicial Officer found willfulness and imposed a 2-year disqualification period. 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 Department's sanction policy places great weight upon the recommendations of administrative officials, who recommended a $22,500 civil penalty, a 2-year disqualification, and (implicitly) a cease and desist order. 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 $13,500, and (3) Respondents are disqualified from becoming licensed under the Animal Welfare Act for 2 years.

Sharlene A. Deskins, for Complainant.
Russell L. McLean, III, Waynesville, North Carolina, for Respondents.
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 May 6, 1996.

The Complaint alleges that Richard Lawson, Stanley Curtis, and John M. Curtis, d/b/a Noah's Ark Zoo [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards: (1) by operating as a dealer and an exhibitor without a license; (2) by failing to allow the Animal and Plant Health Inspection Service [hereinafter APHIS] to inspect Respondents' animals, facilities, and records; (3) by failing to provide and maintain programs for disease control and prevention, euthanasia, and adequate veterinary care supervised by a veterinarian and failing to provide veterinary care to animals in need of care; (4) by failing to maintain complete records showing the acquisition and disposition of animals; (5) by failing to properly identify animals; and (6) by failing to comply with the Regulations and Standards relating to the care and housing of animals. On May 24, 1996, Respondents filed an Answer denying the material allegations of the Complaint. On December 17, 1996, Complainant filed Motion to Correct Error in Complaint, and also on December 17, 1996, Administrative Law Judge Edwin S. Bernstein issued Order to Correct Typographical Error in Complaint. On January 29, 1997, Respondents refiled Respondents' Answer.

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing on July 30-31, 1997, in Asheville, North Carolina, and on September 17, 1997, in Waynesville, North Carolina. Sharlene Deskins, Esq., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Russell L. McLean, III, of Waynesville, North Carolina, represented Respondents. On November 21, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof [hereinafter Complainant's Brief], and Respondents filed their Brief [hereinafter Respondents' Brief].

On January 13, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] assessing Respondents a civil penalty of $4,000 and ordering Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On February 11, 1998, Complainant filed Complainant's Appeal Petition and Motion for Extension of Time in Which to File Its Brief in Support of Its Appeal Petition 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).* The time for filing Complainant's brief in support of Complainant's Appeal Petition was extended to April 21, 1998.**

On March 2, 1998, Respondents filed Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition. By Informal Order of March 12, 1998, the time for filing Complainant's opposition to Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition was extended to April 2, 1998.

On April 21, 1998, Complainant filed Complainant's Appeal Petition, and Brief in Support of Its Appeal Petition and Opposition To the Respondents' Motion To Dismiss the Complainant's Appeal Petition [hereinafter Complainant's Appeal]; however, since the time for filing Complainant's opposition to the Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition expired on April 2, 1998, the portion of Complainant's Appeal relating to Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition is rejected. On May 19, 1998, Respondents filed Respondents' Brief in response to Complainant's Appeal [hereinafter Respondents' Reply]. On May 21, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition and a decision.

Respondents contend in Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition, as follows:

> 1. That the Complainant has failed to file a proper notice of appeal pursuant to 7 C.F.R. § 1.145 in that the issues on appeal are not clearly designated.
>
> 2. Further, the Complainant has failed to cite the record, statutes, regulations or authorities that they have relied upon for their issues on appeal pursuant to 7 C.F.R. § 1.145.
>
> 3. That the Complainant has failed to follow other procedures necessary for a proper appeal in this venue.

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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)).

**See Informal Order, filed February 11, 1998; Informal Order, filed March 12, 1998; Informal Order, filed March 31, 1998; Informal Order, filed April 10, 1998.

Based upon a careful consideration of Complainant's Appeal Petition and Motion for Extension of Time in Which to File Its Brief in Support of Its Appeal Petition, and of Complainant's Appeal, I find that Complainant complied with the requirements of 7 C.F.R. § 1.145. Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition is dismissed.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ that Respondents violated*** the Animal Welfare Act and the Regulations and Standards, as alleged in paragraphs IV and V of the Complaint. However, I disagree with the ALJ that Complainant did not prove the violation alleged in paragraph III of the Complaint. But, my disagreement with the ALJ on paragraph III of the Complaint does not invalidate the ALJ's analyses, findings, or conclusions beyond paragraph III. Further, although I disagree with much of the ALJ's dicta in the ALJ's discussion, again, my disagreement does not invalidate the rest of the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of 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"; Respondents' exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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

***The ALJ did not find that Respondents' violations of the Animal Welfare Act and the Regulations and Standards were willful. As discussed in this Decision and Order, *infra*, I find that Respondents' violations were willful.

§ 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 . . .;

(g) The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is

intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes horses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes;

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, 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[.]

. . . .

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.]

§ 2134. Valid license for dealers and exhibitors required

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

have been suspended or revoked.

. . . .

§ 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.

§ 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.

. . . .

§ 2145. Consultation and cooperation with Federal, State, and local governmental bodies by Secretary of Agriculture

(a) The Secretary shall consult and cooperate with other Federal departments, agencies, or instrumentalities concerned with the welfare of animals used for research, experimentation or exhibition, or administration of statutes regulating the transportation in commerce or handling in connection therewith of any animals when establishing standards pursuant to section 2143 of this title and in carrying out the purposes of this chapter.

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, 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 regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

. . . .

§ 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)-(h), 2133, 2134, 2140, 2141, 2145(a), 2146(a), 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.

. . . .

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.

. . . .

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(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.

. . . .

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

. . . .

(viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license[.]

. . . .

§ 2.5 Duration of license and termination of license.

(a) A license issued under this part shall be valid and effective unless:

. . . .

(2) The license is voluntarily terminated upon request of the licensee, in writing, to the APHIS, REAC Sector Supervisor.

. . . .

§ 2.11 Denial of initial license application.

(a) A license will not be issued to any applicant who:

(1) Has not complied with the r[e]quirements of §§ 2.1, 2.2, 2.3, and 2.4 and has not paid the fees indicated in § 2.6;

(2) Is not in compliance with any of the regulations or standards in this subchapter[.]

. . . .

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.

. . . .

(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.

. . . .

(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.

. . . .

(c) A class "C" exhibitor shall identify all live dogs and cats under his or her control or on his or her premises, whether held, purchased, or otherwise acquired:

(1) As set forth in paragraph (b)(1) or (b)(3) of this section, or

(2) By identifying each dog or cat with:

(i) An official USDA sequentially numbered tag that is kept on the door of the animal's cage or run;

(ii) A record book containing each animal's tag number, a written description of each animal, the data required by § 2.75(a), and a clear photograph of each animal; and

(iii) A duplicate tag that accompanies each dog or cat whenever it leaves the compound or premises.

. . . .

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.

(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.

. . . .

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

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

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

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

. . . .

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.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

. . . .

SUBPART E—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.101 Facilities, general.

. . . .

(d) *Storage.* Supplies of food shall be stored in facilities which adequately protect such supplies from deterioration, molding, or contamination by vermin. Refrigerators and freezers shall be used for perishable food. No substances which are known to be or may be toxic or

harmful to marine mammals shall be stored or maintained in the marine mammal food storage areas.

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§ 3.104 Space requirements.

(a) *General.* Primary enclosures, including pools of water housing marine mammals, shall comply with the minimum space requirements prescribed by this part. They shall be constructed and maintained so that the animals contained therein are provided with sufficient space, both horizontally and vertically so that they are able to make normal postural and social adjustments with adequate freedom of movement, in or out of the water. An exception to these requirements is provided for in § 3.110, "Veterinary care." Primary enclosures smaller than required by the standards are also allowed to be used for temporary holding purposes such as training and transfer. Such enclosures shall not be used for permanent housing purposes or for periods longer than specified by an attending veterinarian.

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(e) *Polar bears.* Primary enclosures housing polar bears shall consist of a pool of water, a dry resting and social activity area, and a den.

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ANIMAL HEALTH AND HUSBANDRY STANDARDS

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§ 3.106 Water quality.

(a) *General.* The primary enclosure shall not contain water which would be detrimental to the health of the marine mammal contained therein.

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§ 3.107 Sanitation.

(a) *Primary enclosures.* (1) Animal and food waste in areas other than the pool of water shall be removed from the primary enclosure at least daily, and more often when necessary to prevent contamination of the marine mammals contained therein and to minimize disease hazards.

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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

§ 3.125 Facilities, general.

. . . .

(c) *Storage.* Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

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§ 3.126 Facilities, indoor.

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(b) *Ventilation.* Indoor housing facilities shall be adequately ventilated by natural or mechanical means to provide for the health and to prevent discomfort of the animals at all times. Such facilities shall be provided with fresh air either by means of windows, doors, vents, fans, or air-conditioning and shall be ventilated so as to minimize drafts, odors, and moisture condensation.

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§ 3.127 Facilities, outdoor.

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(c) *Drainage.* A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

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§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

(b) *Sanitation of enclosures.* Subsequent to the presence of an animal with an infectious or transmissible disease, cages, rooms, and hard-surfaced pens or runs shall be sanitized either by washing them with hot water (180 F. at source) and soap or detergent, as in a mechanical washer, or by washing all soiled surfaces with a detergent solution followed by a safe and effective disinfectant, or by cleaning all soiled surfaces with saturated live steam under pressure. Pens or runs using gravel, sand, or dirt, shall be sanitized when necessary as directed by the attending veterinarian.

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

9 C.F.R. §§ 1.1; 2.1(a)(1), (a)(3)(viii), .5(a)(2), .11(a)(1)-(2), .40, .50(b)(1)(i), (ii), (3)(i)-(iii), (c), .75(b)(1)(i)-(vii), .100(a), .126; 3.1(e), .101(d), .104(a), (e), .106(a), .107(a)(1), .125(c), (d), .126(b), .127(c), .131(a)-(c).

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

. . . .

Statement of the Case

Respondents, Richard Lawson, Stanley Curtis, and John Curtis, moved to North Carolina from Florida . . . around 1990 [(Tr. 293, 448-49, 511-13)]. John Curtis, formerly known as John Disken, changed his name to John Curtis after his adoption by Stanley Curtis [(Tr. 19-20, 327, 447); and Stanley Curtis was Stanley Creighton before Stanley Curtis' adoption (Tr. 504). On October 11, 1991, Lawrence D. Briles, Jr.,] applied for an [Animal Welfare Act] license . . . to open a zoo at Route 6, Box 399, Murphy, North Carolina, to be called King Kong Zoo[, Inc. (CX 3). Stanley R. Curtis was] listed as the president and John Disken (Curtis) as secretary/treasurer (CX [3]). The exotic animals to be exhibited at the zoo were owned by Stanley Curtis who had owned the animals for over [15] years in Florida [(Tr. 454, 475, 515)].

On January [31,] 1992, APHIS conducted a pre-license inspection of the facility [(CX 24 at 1, items 1, 3)]. The inspection report states that the facility had two sites [(CX 24 at 2, item 5)]. The first site was identified as being on "Hwy 64, 3.9 miles west of Murphy, NC, next to livestock market" [(CX 24 at 1, item 8).] The address for the second site, which the inspection report described as an "indoor petting zoo under construction . . ." [(CX 24 at 2, item 7, at "2nd site"),] was in the "Flea Market Area" [(CX 24 at 2, item 5).] The inventory for the zoo listed a variety of animals, including such exotic animals as polar bears, tigers, leopards, and jaguars (CX 24 [at 2, item 7 at "Inventory"]).

John Curtis responded to the [pre-license] inspection with a letter[, dated February 12, 1992, explaining] . . . many of the deficiencies found by the inspector related to construction activities at the proposed zoo [(CX 32 at 2)]. John Curtis also added that "[t]he license applied for was for our `flea market' location. This structure will house baby animals. It was this facility that we requested to have inspected, not the main facility" (CX 32 [at 2]).

APHIS wrote back [on March 4, 1992,] to John Curtis that:

> Please be aware that both locations must be in compliance before a license will be issued. All regulated animals owned by King Kong Zoo, Inc.[,] will be held to the standards of the Animal Welfare Act. New applications are not required at this time; however, you may discuss with Dr. Zaidlicz [the

APHIS inspector], postponing the prelicense process in order to have time to bring the main facility into compliance.

CX 31.

. . . [A]bout this time [in 1992, APHIS inspector] Dr. Zaidlicz and agents from federal and state wildlife agencies "raided" King Kong Zoo (Tr. 289[-90]). Complainant did not provide any additional information about this raid apart from a newspaper article[, *Cherokee Scout*, at A9, dated August 21, 1996], which reported that as a result of this "early morning raid" it was determined that, except for two black bears [and cubs,] Stanley "Curtis had a valid license to hold and care for exotic animals" ([Tr. 403-05;] CX 38).

After the raid, Respondents decided to discontinue their efforts to build a zoo at the King Kong site and to expand the site of the petting zoo at 100 Blairsville Road (Highway 129) in Murphy[, North Carolina,] to include large animals [(Tr. 291, 450)]. Robert Disken, John Curtis' brother, had been operating the petting zoo until Respondents took it over (Tr. 291, 449-52). Richard Lawson was issued a license for the zoo [on June 24, 1992], which was called "Noah's Ark Zoo," and became the owner of the petting zoo (CX 26; Tr. 453). The record indicates that the facility had been [last] inspected on June 16, 1992, a week before being licensed, but a copy of the [June 16, 1992,] inspection report was not presented at the hearing (CX 30 [at 1, item 5]). The facility was presumably in compliance with the Regulations and Standards since [section 2.11(a)(2) of the Regulations states that] a license cannot be issued unless a facility is in compliance [with the Regulations and Standards] (9 C.F.R. § 2.11[(a)(2)]).

Although [billboards advertised] both King Kong Zoo and Noah's Ark Zoo . . . to the public . . . [(CX 21 at 1, CX 40)], the record is not clear whether King Kong Zoo had ever exhibited animals to the public or whether Noah's Ark Zoo exhibited animals for more than a few months after it was acquired by Respondents in 1992. What the record shows is that [o]n October [20,] 1993, APHIS issued an "Official Warning" to Stanley Curtis, alleging that King Kong Zoo[, Inc.,] was "[p]roviding animals for exhibition without a valid USDA [l]icense" (CX 37). The circumstances prompting the warning were not given at the hearing nor was there any clarification as to whether this ambiguous warning meant that King Kong [Zoo, Inc.,] was allegedly exhibiting animals or was providing animals to someone else for exhibition. William Groce, an APHIS investigator, [testified that John Curtis told him (investigator Groce) that lion cubs] . . . were being transferred daily between [King Kong Zoo, Inc., and Noah's Ark Zoo] (. . . [Tr. 303, 624]). [Investigator Groce] testified that lion cubs were being "loaned" by Stanley and John Curtis to Noah's Ark Zoo to have people have their photographs taken with

them and that he was told that the animals at King Kong Zoo were to be transferred to Noah's Ark Zoo (Tr. 303, 420[, 613]), but no records or other evidence was presented at the hearing showing a daily transfer of animals, and investigator Groce said he did not see anyone from the public at Noah's Ark Zoo [on August 24,] 1993 (Tr. 611). [Dr. John Michael] Guedron, an APHIS [Veterinary Medical Officer [hereinafter VMO]], stated in an affidavit dated January 31, 1996, that Noah's Ark Zoo "has been open to the public since before I began doing the inspections [in 1993]" (CX 20 [at 2]). However, [VMO Dr. Guedron] provided no supporting details and at the hearing testified that he did not know whether the zoo was open or exhibiting animals to the public (Tr. 132). John Curtis testified that King Kong Zoo had existed in name only [(Tr. 535)] and . . . never [got past a pre-license inspection (Tr. 535-37)] . . . and that Noah's Ark Zoo was [open only as a petting zoo for only 8 months and then] closed to the public in 1992 [(Tr. 450-52),] when construction for a larger facility was started (Tr. . . . 467 . . .). Violet Harris, a frequent visitor of the flea market located across the street from Noah's Ark Zoo, testified [on September 17, 1997,] that the zoo had not been open for the last 3 years (Tr. 438[-39]).

John Curtis testified that his job at Noah's Ark [Zoo] was to be the animal "keeper" [(Tr. 451)] and to convert it from a petting zoo by building new facilities to accommodate larger animals [(Tr. 455)]. From 1992 until at least 1996, the facility was under construction [(Tr. 467)]. Mr. Curtis said the construction included a perimeter fence, a new sewer system, animal cages that exceeded the space requirements of federal and state regulations, heated dens, and two 60,000-gallon water tanks for the polar bears [(Tr. 455-56, 464)]. John Curtis said that Stanley Curtis, who provided the money for the construction, had invested over $300,000 (Tr. . . . 455-56). Respondent presented photographs at the hearing reflecting the status of the zoo's construction at the time of the hearing in September 1997 (Tr. 541-55; RX 2-18[, 20, 24]).

Some of the exotic animals owned by Stanley Curtis were kept at a quonset hut leased by John Curtis on property adjacent to the site of the former King Kong Zoo located 4 or 5 miles from Noah's Ark Zoo [(Tr. 170, 172, 177, 510, 515)]. APHIS VMO Dr. John Guedron [testified] John Curtis told him that the animals at the quonset hut were to be ["brought over"] . . . to Noah's Ark [Zoo] as construction of their cages was completed[; and there is testimony by APHIS senior investigator Terry Groce that the animals would be loaned or transferred to Noah's Ark Zoo] (Tr. 175, 219-20, 296-99). Investigator Groce also [testified] he was told by John Curtis that the animals at Noah's Ark [Zoo], including polar bears, had come from the site of the quonset hut [(Tr. 290-97)]. Records further show that Stanley Curtis had transferred or donated exotic animals to Noah's Ark [Zoo and Richard Lawson

(CX 7, 15)]. The last of the animals at the quonset hut were transferred to Noah's Ark Zoo on May [8,] 1996 [(Tr. 207-10)]. Inspectors referred to the quonset hut as "site 2," while Respondents referred to it as the "Hunters Ridge" property (Tr. [88-89, 207, 264-65, 310], . . . 516, 538 . . .). John Curtis [testified that] the animals at the quonset hut were Stanley [Curtis'] "private collection" and that Stanley [Curtis] was not in the business of buying and selling exotic animals (Tr. . . . 475).

On February [9], 1993, APHIS inspector Ralph Ayers went to Noah's Ark Zoo to conduct an inspection, but ["]no one was [available to accompany [inspector Ayers] to the facility"] (CX 30 [at 2, item 7, III, item 51]). [Inspector Ayers] returned to the facility on May 17, 1993, and again no one was present [(CX 29 at 2, item 7, IV, item 51)]; he saw several signs saying "Keep Out," [and] he went to the residence of Richard Lawson who told him that John Disken (Curtis) had the key, but that he was not home [(CX 29 at 2, item 7, IV, item 51)]. John Curtis was the contact person for inspections (Tr. 41). [Inspector] Ayers told [Richard] Lawson that [inspector Ayers] considered [Richard] Lawson to be "refusing inspection" (CX 29 [at 2, item 7, IV, item 51]). APHIS then sent [Richard] Lawson [an official] warning [letter dated October 20, 1993, documenting Richard Lawson's] failure to allow APHIS officials to have access to the [facilities, property, animals, and records] (CX 1). Nevertheless, APHIS renewed [Richard] Lawson's license on June 24, 1993, and again [on June 24,] 1994 (CX 26, 27). [On December 27,] 1994, APHIS sent [Richard] Lawson another [official] warning letter about four items at [Noah's Ark Z]oo not being in compliance with the Regulations [and Standards] for the care of animals[, but t]he warning did not refer to any failure to allow an inspection and the inspection report on which this warning is based, and which presumably would have provided more information about the basis for the violations, was not presented at the hearing (CX 2).

In an affidavit, [VMO Dr.] John Guedron said he conducted inspections of the facility in June and October 1995, but, again, the reports of the inspections were not presented at the hearing and there were no allegations that [VMO Dr. Guedron] was refused access to the zoo (CX 20). The only information about the 1995 inspections was provided by John Curtis who testified that:

> [BY JOHN CURTIS:]
>
> A. Dr. Guedron, he was coming in to do the regular inspection. Well, I'm back there and I'm all by myself, right, so I'm back there in the back and I've got my wire welder, my torch set and I'm building a cage, okay, and he come back there and everything else was all right, yeah, looking good.

Then he starts complaining about the miscellaneous building material. He called it trash, a brand new twelve hundred dollar wire welder. Well, he come in there and started writing it up for form board, he just took off the thing. There's no animal in the cage, matter of fact, there was no wire on the cage. He'd write that up. It just seemed like the best thing -- then they fined Richard thirteen hundred and some dollars for miscellaneous building material. I measured it. It was something like eighty feet away from the nearest -- that was the lions, and it was form boards, I mean.

BY MR. McLEAN:

Q. Okay. So anyway he started writing up Richard for a construction project. Is that right?

A. Well, the construction. So, I think Richard or somebody called Ms. Goldentire [Elizabeth Goldentyer, DVM, an APHIS Animal Care Specialist] in Florida and made the suggestion to her that they'd probably be better off just to voluntarily surrender the license until the thing was done, I mean, because you can't strap a welder on your back, a torch in one hand, pliers in this hand, and figure that every time someone's going to walk in the door, you got building material on the ground. That just blew my top, also. It's not that whatever you were doing was good and right, it was what you did wrong. I mean, he's step right over, if you were doing a great job, he'd step over it and say "well look at that, there's a bent nail." Just can't handle that.

Tr. 487-88.

On June 24, 1995, APHIS renewed Noah's Ark [Zoo's] license for another year with an expiration date of June 24, 1996 (CX 4).

On January 17, 1996, [VMO Dr.] Guedron went to Noah's Ark Zoo to conduct an inspection [(CX 20 at 2; Tr. 20). VMO Dr. Guedron] told John Curtis that he also wanted to inspect two polar bears and a tiger which were reportedly [housed] behind a trailer located adjacent to the zoo [(Tr. 20-21). John] Curtis responded that the animals were Stanley Curtis' privately-owned animals, that they were on private property and that APHIS had no authority to inspect such animals [(CX 20 at 2). John Curtis] added that since the zoo was not exhibiting any animals, a license was not needed and that Richard Lawson would surrender the license and apply for a new one when the facility was completed [(Tr. 23, 530; CX 20 at 2). John Curtis] then refused to allow [VMO Dr.] Guedron to conduct an inspection [(Tr. 23). VMO Dr.] Guedron advised [John] Curtis to use APHIS' "voluntary

surrender form" to surrender the license (Tr. 24 . . .[; CX 20 at 2]). [Section 2.5(a)(2) of t]he Regulations provides that a licensee can voluntarily [terminate] his/her license "upon request of the licensee, in writing, to the APHIS, REAC Sector Supervisor" (9 C.F.R. § 2.5[(a)](2)).

[Richard] Lawson sent a Mailgram to APHIS at 2:59 p.m., on January 17, 1996, stating that he was voluntarily surrendering his license (CX 9). [Richard Lawson] also sent on the same date the "Voluntary Surrender Affidavit" form containing under "Remarks" the statement that "[n]ew construction not compleated [sic] at this time, and zoo will remain closed untill [sic] compleated [sic]" (CX 10).

[VMO Dr.] Guedron reported the incident to his supervisor, Richard Watkins, a doctor of veterinary medicine, who contacted William Groce, a senior investigator with APHIS' regulatory enforcement branch [(Tr. 309]). [Investigator] Groce then began making plans for APHIS to "enter the premises" [(Tr. 309). Investigator Groce] contacted a special agent for the Office of the Inspector General [hereinafter OIG] "requesting assistance of his people to gain access as peaceful as possible" [(Tr. 310)] and followed this [contact] with a meeting with two OIG agents "at which time [he] . . . updated them on the intelligence that [he] had gathered" [(Tr. 310)]. Next, the local sheriff's office and the state troopers were notified [(Tr. 310-11)]. State wildlife officials also became involved [when they heard a radio transmission from the OIG agents to the State of North Carolina Highway Patrol (Tr. 311). Investigator] Groce assembled the group for a planning session at a motel on January 25, 1996, before proceeding to Noah's Ark [Zoo (Tr. 259-60, 310-11)]. The group that gathered was composed of [investigator] Groce, VMO Dr.] Guedron, [sector supervisor] Watkins, two armed OIG special agents, two state troopers, one wildlife official, and one or two deputy sheriffs [(Tr. 311)]. The plan was for the group to proceed to the Noah's Ark site in three or four cars and for [investigator] Groce, the two OIG agents, and the two state troopers to approach the trailer at the site while [VMO Dr.] Guedron and [sector supervisor] Watkins were to wait in their cars in radio contact until "we made sure that everything was okay . . ." [(Tr. 311).]

The group's vanguard advanced as planned on the trailer where they were met by Stanley Curtis [(Tr. 311-12)]. Stanley [Curtis] invited them into the trailer and called John Curtis who was . . . in the zoo [(CX 21 at 3; Tr. 312). Investigator] Groce told John and Stanley [Curtis] that his group was there to inspect Noah's Ark Zoo and also the animals at the site of the quonset hut [(Tr. 312-13)]. John Curtis [testified that he] asked the two OIG agents for identification . . . [but that] they told him they did not have to show him any identification because they were Federal Bureau of Investigation [hereinafter FBI] agents [(Tr. 492)]. John Curtis told [investigator] Groce that [investigator Groce] did not have the authority to

inspect the polar bears and tiger because they were privately-owned animals, but acquiesced in the inspection because these animals had been moved by Stanley Curtis to [Noah's Ark Z]oo the day before [(Tr. 313; CX 15, 21)]. After being in the trailer a few minutes, [investigator] Groce came out, waved to [inspector] Guedron and [sector supervisor] Watkins, and told them that they could proceed with the inspection (. . . CX 21 at 3). As for the state troopers, John Curtis [testified] that "all they did when they were there on the 25th was kick around the dirt and stand over there and look at the fence" (Tr. 495).

[VMO Dr.] Guedron testified that the site [had been] under construction [as long as he had been going there (Tr. 142, 198)], that it had a "closed today" sign [(Tr. 131-32; CX 17A)], and that there was no indication that the animals were being exhibited [(Tr. 131-33). Investigator] Groce testified that he saw an unidentified man and a woman at the site . . . looking for John Curtis and who told him that "they were there on behalf of Noah's Ark Zoo to try to keep the facility open as a zoo because they thought it served a good function in the community" (Tr. . . . [318-]19).

The inspectors, accompanied by John Curtis, began their inspection [(Tr. 131; CX 14 at 2, item 7). VMO Dr.] Guedron said they began with a barn on the site where farm animals were kept [(Tr. 139). The inspectors] found three dogs in the barn, including one Doberman [(Tr. 136). VMO Dr. Guedron] cited the dogs as a non-compliant item because the zoo had no identifying records or tags for the dogs and had no exercise program for them [(Tr. 136-39; CX 14 at 3-4, item 7, III, items 32, 45, 46)]. Other items he identified as non-compliant were a strong odor of ammonia in the barn due to poor ventilation [(CX 14 at 3, item 7, III, item 15)]; backed-up [waste material] in the tiger cage due to a clogged drain [(Tr. 157; CX 14 at 2, item 7, III, item 14)]; inadequate water drainage around enclosures [(Tr. 163; CX 14 at 3, item 7, III, item 24)]; inadequate enclosure space, inadequate water, and no resting area and den for the polar bears [(Tr. 87-88, 141-42; CX 14 at 3, 5, item 7, III, items 29, 35, Addendum to III, item 30)]; poor housekeeping caused by trash and scrap material at the site [(Tr. 164; CX 14 at 3, item 7, III, item 37)]; unrefrigerated meat [(CX 14 at 2, item 7, III, item 13(4))]; chicken parts spilling from a box with ice [(Tr. 146-48; CX 14 at 2, item 7, III, item 13(3); CX 17Q)]; an unrefrigerated cattle carcass in the back of a truck [(Tr. 151; CX 14 at 2, item 7, III, item 13(1))]; inadequate cleaning of enclosures [(CX 14 at 4, item 7, IV, item 36(1), (2))]; excessive feces in the llama enclosure [(CX 14 at 4, item 7, IV, item 36(3))]; and lack of veterinary care for a lion with signs of lameness in one foot and two young lions with dull, dry hair (. . . [CX 14 at 4, item 7, IV, item 48(1), (2))].

VMO Dr. Guedron testified that, after the inspection of the zoo, [investigator]

Groce told John Curtis that they wanted to inspect the quonset hut [at site number 2 (Tr. 88-89). John] Curtis said the animals at the quonset hut were privately-owned . . ., that APHIS had no authority to inspect them, and that he would not accompany them to the site [(CX 21 at 4). Investigator] Groce, [VMO Dr.] Guedron, [sector supervisor] Watkins, and two of their armed escort proceeded to the quonset hut, but [John] Curtis did not appear [(Tr. 313-14). VMO Dr. Guedron and sector supervisor Watkins] said they heard a chimpanzee [vocalizing] inside the hut[. However,] the building was locked and they did not conduct an inspection. (Tr. 88-89, 266, 313-14; CX 21 at 4-5.)

On the following day, January 26, [1996, VMO Dr. Guedron, sector supervisor Watkins, and investigator Groce] returned to Noah's Ark [Zoo (CX 20 at 3, CX 21 at 5)]. While [checking] records, [VMO Dr.] Guedron spotted a [gun] in a desk . . . [(Tr. 494-95)]. . . . John Curtis picked it up to show the inspectors that it was just a broken BB gun that he had used to control rodents [(Tr. 495). John Curtis] then gave the BB gun to [investigator] Groce at his request (Tr. . . . 357, 495). [VMO Dr.] Guedron and [sector supervisor] Watkins [testified that they] did not . . . go to the quonset hut site on January 26[, 1996] (Tr. 90, 234). [However, investigator Groce testified that he asked John Curtis to go to "Site Number Two" (where the quonset hut is located), but John Curtis refused (Tr. 314-15)].

John Curtis testified that when the inspectors had appeared on January 25[, 1996,] he was in the process of performing the daily cleaning of the animal cages [(Tr. 482, 484)]. [John Curtis] said he had to interrupt his cleaning to accompany the inspectors before he had time to clean the debris around the drains to allow water to drain from the pens after hosing them down, but cleaned the drains during the inspection as [VMO Dr.] Guedron cited the backed-up water as a non-compliant item (Tr. 482-84).

As for the dogs, [John Curtis] said they were his personal animals and that they were never exhibited [(Tr. 472)]. He had brought them into the barn on the day of the inspection because the temperature was below freezing that day, noting that the Doberman was a short-haired dog (Tr. 47[1-72]). [VMO Dr.] Guedron said he knew the dogs were John Curtis' personal dogs, but that they were still "regulated" dogs because they were "on a licensed facility, on the property adjacent to and in proximity of exhibit animals" (Tr. 137-38).

[John] Curtis [testified that] the fan for the cooler that was used to keep meat for the animals at [Noah's Ark] Zoo broke 2 days before the inspection [(Tr. 500)], but that the temperature [(17 degrees)] in any event was below that of a cooler at the time of the inspection [(Tr. 501). John Curtis testified] that after the inspection, he put the chicken parts . . . in a freezer that he owned at the flea market across the street [(Tr. 501-02)]. As for the [cow carcass, John Curtis testified] that [the cow

carcass] had been put in the truck to be taken with other trash to be buried at a dump (Tr. . . . 542[-43]).

[John] Curtis testified that the cage for the polar bears [at Noah's Ark Zoo (Tr. 461-62; RX 20)] was still under construction at the time of the [January 25, 1996,] inspection [(Tr. 519-22)], but that he gave them water every day [(Tr. 555-56)]. As for the animals that [VMO Dr.] Guedron said needed veterinary care, [John] Curtis said he had a veterinarian check them the following day and that the veterinarian . . . ["wrote a letter up saying they looked okay], except for maybe a worn spot . . . on one of the leopards, and I think a couple of other things" (Tr. . . . 556).

On January 31, 1996, [sector supervisor] Watkins sent [Richard] Lawson a letter stating "per your request, your USDA License under the Animal Welfare Act has been cancelled effective the date shown above" [(CX 18).] The caption above the letter states:

RE: CANCEL LICENSE
License No. : 55-C-114
Cancellation Date: 01/17/96

[CX 18.]

At the hearing[, sector supervisor Richard] Watkins testified that [he told Richard Lawson in a telephone conversation that the date that the written surrender statement is processed is the date the license is terminated (Tr. 58); and that] the license was not canceled until January 31, 1996, when the information was entered into the computer (Tr. [60-]63).

In May [of 1996], 4 months after the cancellation of the license, [inspector Groce], [VMO Dr.] Guedron, and [sector supervisor] Watkins conducted an inspection of the quonset hut [(Tr. 190-92)]. They found 2 leopards, 2 tigers, 2 ligers, and a chimpanzee [(Tr. 217)] in what [VMO Dr.] Guedron said were "deplorable conditions" [(Tr. 208). VMO Dr.] Guedron, who said the animals were not being exhibited [(Tr. 218)], claimed that the inspection was conducted pursuant to ["a verbal agreement and a handshake" (Tr. 212)], but [sector supervisor] Watkins testified that they had inspected the facility pursuant to a search warrant (Tr. . . . 235). [VMO Dr.] Guedron qualified his testimony by saying that the "agreement" had come about after APHIS had threatened Respondents with an action to confiscate the animals if they refused to allow an inspection (Tr. 216-17). On May 8[, 1996,] the animals were transferred to Noah's Ark Zoo, where the tigers were put in their completed cages [(Tr. 219-20), the leopards were put into transport enclosures (Tr. 220), and] the other animals were placed in temporary

enclosures [(Tr. 219-20). VMO Dr.] Guedron [testified] that APHIS then decided not to proceed with its action to confiscate the animals because their living conditions had improved and Respondents had "corrected the non compliants [sic] at the quonset hut" (Tr. 2[16-19]).

In October 1996, Stanley Curtis contacted Ty Sutherlin, a licensed animal dealer, about getting a chimpanzee [(Tr. 560-61)]. Stanley [Curtis] told [Ty] Sutherlin that he wanted the chimpanzee for John Curtis whose "chimp had just died . . . that John was heart broke and he wanted to get John another chimp" [(Tr. 571).] In the course of their conversation, they reached an agreement for Stanley [Curtis] to trade a [white] lion cub for [two of Ty] Sutherlin's chimpanzee[s] [(Tr. 562-63)]. Stanley [Curtis] told [Ty] Sutherlin that he could not sell animals, but that he could trade for them [(Tr. 562). Stanley] Curtis received one chimpanzee in April 1997 (Tr. . . . 570).

. . . .

Law

The purpose of the Animal Welfare Act is to provide for the humane care and treatment of animals regulated under the Animal Welfare Act (7 U.S.C. § 2131). . . . Section [2 of the Animal Welfare Act] defines "dealer," "animal," and "exhibitor," as follows:

> (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 . . .;
>
> (g) The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet . . .;
>
> (h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether

operated for profit or not[.][1]

7 U.S.C. § 2132(f)-(h).

Section [3 of the Animal Welfare Act (7 U.S.C. § 2133)] provides for the licensing of dealers and exhibitors. Section 4 of the Animal Welfare Act provides:

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

7 U.S.C. § 2134.

Section [16(a) of the Animal Welfare Act] gives the Secretary the authority to inspect exhibitors and dealers subject to the [Animal Welfare] Act; it also gives the Secretary the authority to confiscate any animals that are suffering because of the failure of a dealer or exhibitor to comply with Regulations or Standards promulgated by the Secretary for the care of animals [(7 U.S.C. § 2146(a))].

The Regulations and Standards promulgated by the Secretary are contained in 9 C.F.R. §§ 1.1-3.142. Section 2.1 [of the Regulations] applies, *inter alia*, to the licensing of dealers and exhibitors, but section 2.1(a)(3)(viii) excludes from the licensing requirement "[a]ny person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license" [(9 C.F.R. § 2.1(a)(3)(viii)).]

Complainant has the burden of proving a violation of the Animal Welfare Act and [the] Regulations [and Standards] 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)].

Discussion

At the hearing, Respondents took the position that they did not allow an inspection of the polar bears and tiger on January 17[, 1996,] and did not allow an inspection of the quonset hut on January 25[, 1996,] because the animals were

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[1]Respondents' activities meet the [Animal Welfare] Act's jurisdictional requirements, since Stanley Curtis . . . moved his animals in commerce from Florida to North Carolina.

Stanley Curtis' "private collection" animals and were located on private property, rather than being on the [Noah's Ark Z]oo's property [(Tr. 20-25; CX 20 at 2-3)]. [Respondents] also contend in their brief that they did not have to allow an inspection because they had canceled their license and were not exhibiting animals at the time of the inspections [(Respondents' Brief at 1-3)].

With respect to whether the animals were being exhibited, Noah's Ark [Zoo] displayed a sign that the public could see, which . . . could create an inference that animals were being offered for exhibition to the public [(CX 17A, 17B, 40)]. But a sign, in itself, does not necessarily establish that the animals were in fact being exhibited. Complainant's witnesses claimed that [Noah's Ark Z]oo was open to the public [(Tr. 132-33, 611)], but provided no information on which they based this assertion, other than to say that they saw two persons at [Noah's Ark Z]oo on January 25, [1996,] who, as it turns out, were there to support [Noah's Ark Z]oo, rather than to see the animals being exhibited [(Tr. 276-77, 318-19)]. On the other hand, as early as 1993, Respondents had posted [several] "keep out" sign[s] at the zoo [(CX 29 at 2, item 7, IV, item 51)] and at the time of the January 1996 inspections, the zoo had a "closed today" sign [(Tr. 131-34)] and was still undergoing construction [(Tr. 142). VMO Dr. Guedron and sector supervisor Watkins] also testified that they had not seen signs of the animals being exhibited in January or May 1996 [(Tr. 133-34, 277-78)]. Complainant has thus failed to show by a preponderance of the evidence that Noah's Ark Zoo was exhibiting animals at any time after 1993, and, specifically, did not show that [Noah's Ark Z]oo was exhibiting animals [o]n or after January 1996.

Since Respondents were not exhibiting animals, [Respondents] were not exhibitors as defined by the [Animal Welfare] Act, and therefore [Respondents] were not required to have a license as exhibitors for their privately-owned animals [o]n or after January 1996. However, when [Respondents] . . . voluntarily sought an exhibitor's license from APHIS in 1992, they subjected themselves to the Regulations [and Standards] and, until the license was . . . terminated, had to abide by those Regulations [and Standards], which include [a requirement that licensees allow APHIS officials to inspect] their facility pursuant to 9 C.F.R. § 2.126 . . . . APHIS [officials] not only had the authority to inspect the animals actually on [Noah's Ark Z]oo's premises, but also the animals owned by Stanley Curtis who, by his actions (providing animals to the zoo), clearly made [his animals] a part of the licensed Noah's Ark Zoo venture. Section 2.1(a)(2) of the Regulations (9 C.F.R. § 2.1(a)(2)) provides in pertinent part that "[a]ll premises, facilities, or sites where such person operates or keeps animals shall be indicated on the application form or on a separate sheet attached to it." . . . [T]his requirement is to identify sites where animals associated with the licensed facility are located so that

they can be inspected for compliance with the [Animal Welfare] Act and the Regulations and Standards, which, in this case, would be Stanley Curtis' animals located at the trailer and quonset hut destined for Noah's Ark Zoo. Thus, as long as Noah's Ark Zoo was licensed, whether actually exhibiting animals or not, APHIS [officials were] acting within [their] authority by demanding an inspection of the animals at the trailer and at the quonset hut. [Footnote omitted.]

Respondents contend that they had [terminated] their license [(CX 9, 10). VMO Dr.] Guedron, however, had attempted . . . inspection on January 17, 1996 [(CX 20 at 2)], before [Richard] Lawson requested that the license be [terminated (CX 20 at 2)]. Respondents therefore violated [section 2.126 of] the Regulations (9 C.F.R. § 2.126) [by] failing to allow an inspection on January 17[, 1996,] while Noah's Ark Zoo was still a licensed facility.

As for the inspections on January 25 and 26, 1996, Complainant contends that its inspectors could still conduct an inspection at that time because the [termination] did not take effect until January 31[, 1996 (Complainant's Brief at 12-15). Richard] Lawson, however, had followed exactly [section 2.5(a)(2) of] the Regulations [(9 C.F.R. § 2.5(a)(2))] and [VMO Dr.] Guedron's advice to [terminate] the license [(Tr. 24; CX 9, 10, 20 at 2)]. . . . Moreover, even [sector supervisor] Watkins' letter gives January 17[, 1996,] as the cancellation date [(CX 18)]. Accordingly, I find that the license was [terminated] on January 17, 1996, but after [VMO Dr.] Guedron had attempted . . . inspection.

However, even though the license had been [terminated], I further find, on the basis of equitable estoppel, that Respondents' refusal to allow an inspection on January 17, [1996,] before the [termination], should not allow them to conceal what a lawful inspection would have revealed. "Equitable estoppel . . . precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or a defense, regardless of its substantive validity." *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1107 (1st Cir. 1986). Because of Respondents' improper conduct [in refusing to allow APHIS officials to inspect their place of business] on January 17, [1996,] they are precluded from claiming that their license had been [terminated] at the time of the inspections on January 25 and 26[, 1996]. The findings of the inspectors on those dates can therefore be considered in determining whether Respondents at that time were complying with the [Animal Welfare Act and the Regulations and S]tandards for the care of animals.

The inspectors' findings, for the most part, were not challenged by Respondents. [The inspectors] found that three lions were not being provided veterinary care. Although a later examination by a veterinarian did not reveal any significant problems with the animals, the lack of veterinary care is, nevertheless, a violation of section 2.40 of the [Regulations] (9 C.F.R. § 2.40).

A broken refrigerator, even if only broken for a day or two, would not allow for the proper storage of perishable food items. It constitutes a violation of the food storage provisions of sections 3.1(e) and 3.125(c) of the Standards [(9 C.F.R. §§ 3.1(e), .125(c))]. However, with respect to the storage of the [cattle] carcass, there was no violation [of section 3.101(d) of the Standards (9 C.F.R. § 3.101(d))] as [the cattle carcass] was destined to be buried at the dump.

The failure to properly ventilate the barn constitutes a violation of section 3.126(b) [of the Standards (9 C.F.R. § 3.126(b))].

The polar bears did not have adequate space and water. Although Respondents were constructing what appears to be a spacious enclosure and pool for the bears, this [fact] does not preclude a finding that, as of the date of the inspection, the facilities for these animals did not meet the requirements of section 3.104[(a) and] (e) [of the Standards (9 C.F.R. § 3.104(a), (e))].

The failure to keep the facility clean of standing water, excessive trash, and animal wastes constitutes violations of sections 3.107(a), 3.125(d), 3.127(c), and 3.131(a) and (c) [of the Standards (9 C.F.R. §§ 3.107(a), .125(d), .127(c), .131(a), (c))] even though the construction activities at [Noah's Ark Z]oo accounted for part of these problems. However, [while waste material in the tiger cage] due to a clogged drain [is a] violation [of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)), I am not assessing Respondents a civil penalty for the violation because John Curtis was cleaning the tiger cage at the time the inspection began and his cleaning was interrupted by the inspection].

Complainant contends that John Curtis' dogs -- his personal pets -- were regulated animals even though not exhibited because they were on the same premises as animals to be exhibited. . . . [N]either the [Animal Welfare] Act nor the Regulations [and Standards] prohibit APHIS in these circumstances from . . . [regulating] personal pets . . . on an exhibitor's premises. . . . [Footnote omitted. Considerable] weight is . . . given to . . . APHIS' . . . interpretation of the Regulations [issued under] the statute [APHIS] enforces. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 84[2-45] (1984). Therefore, since Respondents did not maintain records on John [Curtis'] pets, or provide tags . . . or . . . an exercise program, [Respondents] violated [sections 10 and 11 of the Animal Welfare Act (7 U.S.C. §§ 2140, 2141) and] sections 2.50 and 2.75 of the [Regulations (9 C.F.R. §§ 2.50, .75), but, since Complainant failed to allege a lack of an exercise program for dogs in the Complaint, a violation of section 3.8 of the Standards (9 C.F.R. § 3.8) is not found].

Complainant contends that Respondents refused an inspection of the quonset hut on January 25 and 26[, 1996]. John Curtis' conduct constituted a refusal to allow an inspection on January 25[, 1996 (CX 20 at 3); moreover, inspector Groce

asked to inspect the site on January 26[, 1996, and John Curtis refused to allow inspection (Tr. 314-15)]. . . .

Respondents are also alleged to have been an exhibitor on and after February 1, 1996. As [discussed in this Decision and Order, *supra*,] Respondents had [terminated] their license and were not exhibiting animals. Respondents, therefore, were not an exhibitor as defined by the Animal Welfare Act on and after February 1, 1996.

Finally, [Complainant argues that] Respondents are alleged to have acted as a dealer or exhibitor without having a license in October 1996 when they traded for a chimpanzee [(Complainant's Brief at 25)]. However, Respondents were not exhibiting animals at the time of the acquisition of the chimpanzee [and] had not been an exhibitor for at least the previous 3 years. . . . Moreover, the record shows that Stanley Curtis had acquired the chimpanzee for John Curtis' use and enjoyment. In these circumstances, Respondents did not violate the Animal Welfare Act or the Regulations and Standards, as they were within the licensing exemption for non-exhibiting animal owners, as provided by section 2.1(a)(3)(viii) of the Regulations (9 C.F.R. § 2.1(a)(3)(viii)).[4]

Sanction

The Department'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, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3)], 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 also commands, in determining the civil penalty to assess, that:

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[4][Almost at the end of the hearing, Complainant's motion to amend the Complaint to conform to the evidence was granted, in that John Curtis and Stanley Curtis were charged for operating without a license from January 1, 1993, to September 17, 1997 (Tr. 626-29). However, since the animal exchange described by Complainant was not shown to be for compensation or profit, the exchange was exempt under 7 U.S.C. § 2132(f) and 9 C.F.R. §§ 1.1 and 2.1(a)(3)(viii).]

> 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 penalty may be compromised by the Secretary.

7 U.S.C. § 2149(b).

Complainant contends that the warning letters sent to Respondents in 1993 [(Tr. 305-06; CX 1)] and 1994 [(Tr. 307; CX 2)] should also be considered in the imposition of a sanction [(Complainant's Brief at 8, ¶ 12)]. The Secretary has held that such warnings can be considered. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 264 (1997)[, *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997)]. . . . Respondents were given a warning in 1993 about a failure to allow an inspection [(CX 1)]. . . . [Respondents were given a warning in 1994 about a failure to provide sufficient space for two lions and a failure to clean food and water receptacles and a cage (CX 2)].

Complainant [originally sought] a [civil] penalty of $36,000 and a 5-year license disqualification [(Complainant's Brief at 26), but later changed its recommendation to a civil penalty of $22,500 and a 2-year license disqualification).]

. . . .

. . . Respondents' refusal . . . to allow APHIS [officials] to conduct an inspection at a time when they had the legal authority . . . to conduct inspections was serious for the reason that it frustrates the purpose of the Animal Welfare Act to insure that regulated animals are given humane care.

Findings of Fact

1. [Respondents,] Richard Lawson, Stanley Curtis [(formerly known as Stanley Creighton) (Tr. 440, 504)], and John Curtis (formerly known as John Disken) [(Tr. 447-51)], doing business as Noah's Ark's Zoo, . . . are individuals who direct, manage, and control Noah's Ark Zoo [(Tr. 340; CX 1, 3, 4, 7, 15, 20, 21)].

2. Richard Lawson [was licensed] as an exhibitor [doing business as] Noah's Ark Zoo until January 17, 1996, when [he terminated] the license . . . [(CX 4, 18)].

3. John Curtis refused an inspection of Noah's Ark Zoo by an APHIS inspector on January 17, 1996, before the license was [terminated (CX 20 at 2)].

4. On January 25, 1996, APHIS officials conducted an inspection of Noah's Ark Zoo [(CX 14)]. They found that three lions were not receiving proper veterinary care [(CX 14 at 4, item 7, IV, item 48)]; three dogs had inadequate

records and identification [(CX 14 at 4, item 7, III, items 45, 46)]; food was not stored and refrigerated properly [(CX 14 at 2, item 7, III, item 13)]; an animal barn was not properly ventilated [(CX 14 at 3, item 7, III, item 15)]; polar bears did not have adequate space or water [(CX 14 at 3, item 7, III, items 29, 35)]; trash was scattered around the facility [(CX 14 at 3, item 7, III, item 37)]; the llama enclosure had an excessive accumulation of feces [(CX 14 at 4, item 7, IV, item 36(3); backed-up waste material was in the tiger cage due to a clogged drain (CX 14 at 2, item 7, III, item 14);] and water was not properly drained [(CX 14 at 3, item 7, III, item 24)].

5. On January 25 [and 26], 1996, Respondents failed to allow an inspection of a quonset hut called "site 2" or the "Hunters Ridge Property[,]" where animals destined for the Noah's Ark Zoo were located [(CX 13 at 2, item 7, III, item 51: January 25, 1996; Tr. 314-15: January 26, 1996)].

6. Since January 17, 1996, Respondents have not shown or exhibited animals.

Conclusions of Law

1. On January 17, . . . January 25, [and January 26,] 1996, Respondents [failed] to allow APHIS [officials] to inspect their animals[, records,] and facilities, in [willful] violation of section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and section 2.126 of the Regulations (9 C.F.R. § 2.126).

2. On January 25, 1996, Respondents failed [both properly to identify animals and properly] to maintain records, in [willful] violation of sections 10 and 11 of the Animal Welfare Act (7 U.S.C. §§ 2140, 2141) and sections 2.50 and 2.75 of the Regulations (9 C.F.R. §§ 2.50, .75).

3. On January 25, 1996, Respondents failed to provide adequate veterinary care, in [willful] violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

4. On January 25, 1996, Respondents did not provide for the adequate removal of animal wastes, in [willful] violation of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

5. On January 25, 1996, Respondents failed to properly store and refrigerate food items, in [willful] violation of sections 3.1(e) and 3.125(c) of the Standards (9 C.F.R. §§ 3.1(e), .125(c)).

6. On January 25, 1996, Respondents failed to provide adequate ventilation, in [willful] violation of section 3.126(b) of the Standards (9 C.F.R. § 3.126(b)).

7. On January 25, 1996, Respondents [failed to] provide for the adequate elimination of excess water, in [willful] violation of section 3.127(c) of the Standards (9 C.F.R. § 3.127(c)).

8. On January 25, 1996, Respondents [failed to] provide adequate space [and

water] for polar bears, in [willful] violation of section 3.104[(a) and (e)] of the Standards (9 C.F.R. § 3.104[(a), (e)]).

9. On January 25, 1996, Respondents did not keep the area clean[, in good repair,] and free of accumulations of trash, in [willful] violation of section 3.131(c) [of the Standards] (9 C.F.R. § 3.131(c)).

[10. On January 25, 1996, Respondents did not keep primary enclosures clean, in willful violation of sections 3.107(a)(1) and 3.131(a) of the Standards (9 C.F.R. §§ 3.107(a)(1), .131(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.[5] The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence.[6] Complainant made a list of the violations alleged in the Complaint, reproduced below; I matched

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[5]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981).

[6]*In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal docketed*, No. 98-60463 (5th Cir. July 23, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 149 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *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. 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 paragraph numbers in the Complaint to Complainant's enumeration for ease of location, as follows:

> The number of the violations [alleged] in the [C]omplaint [is] 21. Those [alleged] violations are as follows:
>
> 1. 1 violation of 9 C.F.R. § 2.40 [¶ IV(B)].
> 2. 1 violation of 9 C.F.R. § 2.75 [¶ IV(C)].
> 3. 1 violation of 9 C.F.R. § 2.50 [¶ IV(D)].
> 4. 1 violation of 9 C.F.R. § 3.125(d) [¶ IV(E)(1)].
> 5. 1 violation of 9 C.F.R. § 3.1(e) [¶ IV(E)(2)].
> 6. 1 violation of 9 C.F.R. § 3.101(d) [¶ IV(E)(2)].
> 7. 1 violation of 9 C.F.R. § 3.125(c) [¶ IV(E)(2)].
> 8. 1 violation of 9 C.F.R. § 3.126(b) [¶ IV(E)(3)].
> 9. 1 violation of 9 C.F.R. § 3.127(c) [¶ IV(E)(4)].
> 10. 1 violation of 9 C.F.R. § 3.104(a) [¶ IV(E)(5)].
> 11. 1 violation of 9 C.F.R. § 3.106 [¶ IV(E)(6)].
> 12. 1 violation of 9 C.F.R. § 3.131(c) [¶ IV(E)(7)].
> 13. 1 violation of 9 C.F.R. § 3.107(a)(1) [¶ IV(E)(8)].
> 14. 1 violation of 9 C.F.R. § 3.131(a) & (b) [¶ IV(E)(8)].
> 15. 3 violations of 9 C.F.R. § 2.126 [¶¶ III, IV(A), V].
> 16. 4 violations of [s]ection 4 of the [Animal Welfare] Act [7 U.S.C. § 2134] and 9 C.F.R. § 2.1 for a) negotiating the purchase; b) buying; c) selling; and d) transporting animals without a license [¶ II].

Complainant's Brief at 26 n.20.

An examination of the record reveals that the ALJ found that Complainant proved 15 of the 21 alleged violations: paragraphs IV(A), IV(B), IV(C), IV(D),

IV(E)(1), IV(E)(2),[7] IV(E)(3), IV(E)(4), IV(E)(5),[8] IV(E)(6),[9] IV(E)(7), IV(E)(8),[10] and V of the Complaint.

I agree with the ALJ that Complainant proved the violations alleged in paragraphs IV and V of the Complaint, except the violation of 9 C.F.R. § 3.101(d),

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[7]Paragraph IV(E)(2) of the Complaint alleges that Respondents violated sections 3.1(e), 3.101(d), and 3.125(c) of the Standards (9 C.F.R. §§ 3.1(e), .101(d), .125(c)). The ALJ concluded that Respondents violated 9 C.F.R. §§ 3.1(e) and 3.125(c), but did not violate 9 C.F.R. § 3.101(d) (Initial Decision and Order at 23). I agree with the ALJ's conclusion that Respondents violated 9 C.F.R. §§ 3.1(e) and 3.125(c), but did not violate 9 C.F.R. § 3.101(d).

[8]Paragraph IV(E)(5) of the Complaint alleges that Respondents failed to provide adequate space for polar bears, in violation of section 3.104(a) of the Standards (9 C.F.R. § 3.104(a)). The ALJ concluded that Respondents did not provide adequate space for polar bears, but concluded that the failure to provide adequate space for polar bears constitutes a violation of 9 C.F.R. § 3.104(e) (Initial Decision and Order at 24). I agree with the ALJ's conclusion that Respondents failed to provide adequate space for polar bears, but conclude that Respondents violated 9 C.F.R. § 3.104(a) and (e).

[9]Paragraph IV(E)(6) of the Complaint alleges that polar bears were not provided with adequate water on a continuing basis, in violation of section 3.106 of the Standards (9 C.F.R. § 3.106). However, 9 C.F.R. § 3.106 concerns water quality, and it appears that the reference to 9 C.F.R. § 3.106 in paragraph IV(E)(6) of the Complaint is error. The ALJ found in his discussion that Respondents failed to provide polar bears with adequate water and that this failure "did not meet the requirements of section 3.104(e)" (Initial Decision and Order at 17-18). Further, the ALJ found in the Findings of Fact that polar bears did not have adequate water (Initial Decision and Order at 22). However, the ALJ did not conclude that the Respondents' failure to provide polar bears with adequate water constitutes a violation of 9 C.F.R. § 3.104(e). Instead, the ALJ concluded that Respondents did not provide adequate space for polar bears, in violation of 9 C.F.R. § 3.104(e) (Initial Decision and Order at 24). I find that the ALJ's failure to include a reference to Respondents' failure to provide adequate water to polar bears in his Conclusions of Law was inadvertent error. I agree with the ALJ's finding that Respondents did not provide polar bears with adequate water, and I conclude that Respondents failed to provide adequate water to polar bears, in violation of 9 C.F.R. § 3.104(a) and (e).

[10]Paragraph IV(E)(8) of the Complaint alleges that primary enclosures were not kept clean and sanitized, in violation of sections 3.107(a)(1) and 3.131(a) and (b) of the Standards (9 C.F.R. §§ 3.107(a)(1), .131(a)-(b)). The ALJ found in his discussion that Respondents' "failure to keep the facility clean of standing water, excessive trash and animal wastes constitutes a violation of 3.125(d), 3.131(a), (b) and (c), 3.107(a) and 3.127(c)" (Initial Decision and Order at 18). Further, the ALJ found in the Findings of Fact that "the llama enclosure had an excessive accumulation of feces" (Initial Decision and Order at 23). However, the ALJ did not include in his Conclusions of Law a conclusion that Respondents failed to keep primary enclosures clean and sanitized, as alleged in paragraph IV(E)(8) of the Complaint. I find that the ALJ's failure to include a reference to Respondents' failure to keep primary enclosures clean was inadvertent error. I agree with the ALJ's finding that Respondents violated 9 C.F.R. §§ 3.107(a) and 3.131(a) and have included references to those violations in the Conclusions of Law.

by a preponderance of the evidence. Moreover, neither Respondents nor Complainant appealed the ALJ's findings of the violations alleged in paragraphs IV and V of the Complaint, and Complainant did not appeal the violation of 9 C.F.R. § 3.101(d) alleged in paragraph IV(E)(2) of the Complaint not found by the ALJ. Therefore, the ALJ is affirmed as to his findings in paragraphs IV and V of the Complaint.

Regarding paragraph II of the Complaint, at almost the end of the hearing, the ALJ granted Complainant's motion to conform the Complaint to the evidence presented, to the effect that Stanley Curtis and John Curtis are charged "with operating without a license from January 1, 1993 through the present" (Tr. 626-29). Stanley Curtis and John Curtis are already named Respondents in paragraph II of the Complaint. It is not entirely clear why Richard Lawson is not included in the expanded time period sought in Complainant's motion to amend the Complaint, but Complainant sought only charges against Stanley Curtis and John Curtis. The motion, as granted, changes the period of time covered from February 1, 1996, through May 6, 1996, to the period from January 1, 1993, to the day of the hearing motion on September 17, 1997. For reasons explained in this Decision and Order, *infra*, I find that Complainant did not prove the allegation in paragraph II of the Complaint or the Amended Complaint. Since the ALJ found no violation as alleged in paragraph II of the Complaint, his conclusion is not disturbed.

Regarding paragraph III of the Complaint, Complainant proved by a preponderance of the evidence that Respondents refused to allow APHIS officials to inspect their animals, facilities, and records. Therefore, the ALJ is reversed as to paragraph III of the Complaint, as explained in this Decision and Order, *infra*.

In summary, of the 21 violations charged, I affirm the ALJ on the 15 violations he found, and I add the one violation alleged in paragraph III of the Complaint, for a total of 16 violations, leaving unproven only the four violations alleged in paragraph II of the Complaint and one of the three violations alleged in paragraph IV(E)(2) of the Complaint.

Complainant raises four issues on appeal. The first issue concerns the ALJ's reasoning vis-a-vis the effective date of Respondents' voluntary license termination, as follows:

> I. The reasoning employed by the ALJ in the Decision to determine when the Respondents' license was terminated is inconsistent with the language in the regulations.

Complainant's Appeal at 3. Should Complainant prevail in this argument, then both the January 25 and 26, 1996, inspections would be duly conducted inspections

of a licensee, rather than inspections of a voluntarily-terminated licensee, pursuant to the ALJ's theory of equitable estoppel (Initial Decision and Order at 17). However, I agree with the ALJ.

Complainant quotes the ALJ's allegedly inconsistent reasoning (Complainant's Appeal at 3), which I reproduce directly from the Initial Decision and Order, as follows:

> As for the inspections on January 25 and 26, 1996, Complainant contends that its inspectors could still conduct an inspection at that time because the cancellation did not take effect until January 31[, 1996. Richard] Lawson, however, had followed exactly the regulations and [VMO Dr.] Guedron's advice to cancel the license. As a general principal of law, the cancellation became effective when [Richard] Lawson served notice of the cancellation on APHIS. (See e.g. 66 C.J.S. *Notice* § 18.) Moreover, even [APHIS sector supervisor] Watkins' letter gives January 17[, 1996,] as the cancellation date. Accordingly, I find that the license was canceled on January 17, 1996, but after [VMO Dr.] Guedron had attempted his inspection.

Initial Decision and Order at 16.

The facts are that, following the advice of VMO Dr. Guedron and the plain words of section 2.5(a)(2) of the Regulations (9 C.F.R. § 2.5(a)(2)), Respondents requested of APHIS, REAC, in writing, both by Mailgram and by Voluntary Surrender Affidavit, both of January 17, 1996, that Respondents' license be terminated (Tr. 24; CX 9, 10, 20 at 2). I find that Respondents fulfilled the requirements of 9 C.F.R. § 2.5(a)(2) and Respondents terminated the license as of January 17, 1996.

Section 2.5(a)(2) of the Regulations establishes a procedure for a licensee to voluntarily terminate a license: "[a] license issued under this part shall be valid and effective unless: . . . (2) The license is voluntarily terminated upon request of the licensee, in writing, to the APHIS, REAC Sector Supervisor" (9 C.F.R. § 2.5(a)(2)). In the case, *sub judice*, it is not necessary to determine when Respondents made their request to the APHIS, REAC sector supervisor, because sector supervisor Richard Watkins acknowledged receipt of Respondents' voluntary license termination request in his letter of January 31, 1996, in which letter sector supervisor Watkins wrote that the cancellation date is January 17, 1996 (CX 18).

Moreover, I find this voluntary license termination controversy irrelevant. Respondents' voluntary termination of their license, whether occurring on January 17, 1996, or later, does not permit Respondents to refuse to allow APHIS officials

to inspect their facilities, property, animals, and records on January 17, 1996, because (1) the attempted inspection occurred while Respondents were licensed, and (2) the attempted inspection occurred prior to any possible time of Respondents' license termination.

APHIS officials were acting under color of law under the theory of equitable estoppel on January 25 and 26, 1996, when they inspected and sought to inspect Respondents' two facilities: site 2 and Noah's Ark Zoo. The legal concept of equitable estoppel in USDA regulatory proceedings was set forth in the *Big Bear* case, 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.

In re Big Bear Farm, Inc., 55 Agric. Dec. 107, 129 (1996). I find that there is no question but that APHIS' position to enforce the Animal Welfare Act was changed for the worse, when APHIS officials sought to inspect Respondents' licensed facilities on January 17, 1996, but were refused, because Respondents attempted to terminate Respondents' license rather than submit to a lawful inspection.

Therefore, the ALJ is correct that Respondents are equitably estopped from preventing inspection by voluntarily terminating Respondents' license. I find that APHIS officials may lawfully make such inspections as are necessary and reasonable to ensure that a licensee is in compliance with the Animal Welfare Act and the Regulations and Standards, and may continue such reasonable and necessary inspections, even after a licensee voluntarily terminates the license, if the attempted inspection occurs before the license is terminated.

Complainant makes several arguments concerning the determination of the termination date. Complainant argues that "[t]he general rule regarding license termination is not applicable to the procedure for canceling a license pursuant to the [Animal Welfare Act]" (Complainant's Appeal at 3). I agree with Complainant

that a general rule taken from a legal encyclopedia does not control a duly promulgated regulation, such as 9 C.F.R. § 2.5(a)(2). Therefore, the part of the ALJ's reasoning based upon a general rule of law is not adopted in this Decision and Order.

Moreover, Complainant argues that APHIS procedure requires that the sector supervisor respond to the licensee and list the date that the license was terminated by the Sector Office, and that sector supervisor Watkins testified (Tr. 58, 60, 63) that the date of termination was actually the date that the termination was entered into the computer, January 31, 1996 (Complainant's Appeal at 4-5). Also, Complainant argues that APHIS would not be able to carry out its "statutory" responsibilities to publish licensees' names in the Federal Register, as required in 9 C.F.R. § 2.127, if APHIS is not allowed to use the date that the license termination is entered into the computer as the actual termination date (Complainant's Appeal at 4-5). These arguments are rejected because the implied requirements underlying Complainant's arguments form no part of the requirements for license termination in accordance with 9 C.F.R. § 2.5(a)(2).

Complainant argues that the ALJ may have been "confused," because January 17, 1996, cannot be the termination date, because 9 C.F.R. § 2.5(a)(2) requires that the termination request be in writing and "sent" to the Sector Office (Complainant's Appeal at 5). While Complainant's argument is one possible interpretation of 9 C.F.R. § 2.5(a)(2), the word "sent" does not appear in this regulation. Moreover, it appears that Respondents did send their written requests for termination of their Animal Welfare Act license to the sector supervisor, APHIS, REAC, on January 17, 1996 (CX 9, 10).

Complainant argues that sector supervisor Dr. Richard Watkins' testimony (Tr. 58, 60, 63) is that the termination date in these kinds of circumstances is the date on which the termination is entered into the APHIS Sector Office's computer, and that irrespective of the ALJ's erroneous finding of a termination date of January 17, 1996, Dr. Watkins testified that the termination date is the date of computer entry and simultaneous letter announcing termination, which both occurred on January 31, 1996 (Complainant's Appeal at 5-6). However, I find that Dr. Richard Watkins' testimony contradicts the plain words of his January 31, 1996, letter (CX 18) that the cancellation date is January 17, 1996. Therefore this argument, based upon sector supervisor Watkins' contradictory testimony, is rejected.

Complainant argues that Respondents were still licensed on January 25 and 26, 1996, and asks that the ALJ's equitable estoppel reasoning be reversed (Complainant's Appeal at 6). The adoption of Complainant's reasoning would mean that Respondents were subject to unannounced inspections on January 25 and 26, 1996, which Complainant argues is crucial to enforcement of the Animal

Welfare Act (Complainant's Appeal at 6-7).

Respondents argue that the ALJ's reasoning is consistent with the language in the Regulations, submit a chronology of the facts and events upon which the ALJ based his decision that January 17, 1996, was the termination date, and urge that the ALJ be affirmed (Respondents' Reply at 2-3).

While I agree with Complainant that inspection authority is crucial to enforcement of the Animal Welfare Act, the requirements of 9 C.F.R. § 2.5(a)(2) are clear and those requirements were clearly met by Respondents on January 17, 1996. Therefore, Complainant's argument is rejected.

Complainant contends that the ALJ's decision in this case would encourage licensees to terminate their licenses to avoid imminent inspections (Complainant's Appeal at 6-8). Complainant argues that the ALJ's decision "should be changed to note that a request for license cancellation becomes effective when APHIS grants the cancellation not when requested" (Complainant's Appeal at 8). The argument is rejected for the reason that the plain words of 9 C.F.R. § 2.5(a)(2) clearly state that the termination of an Animal Welfare Act license is effective upon request of the licensee; termination of an Animal Welfare Act license in accordance with section 2.5(a)(2) of the Regulations (9 C.F.R. § 2.5(a)(2)) is not dependent upon APHIS' granting a licensee's request for termination.

Complainant's second issue concerns the ALJ's conclusion (Initial Decision and Order at 19) that Respondents did not violate the Animal Welfare Act when Stanley Curtis acquired a chimpanzee for the personal enjoyment of John Curtis, as follows:

> II. Anyone engaging in an activity that requires a license under the AWA must be licensed, even if the covered activity occurred only once.

The AWA requires that people who act as dealers of animals be licensed. The Act defines a dealer as:

> *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 * * * * 9 C.F.R. § 1.1 (emphasis added [by Complainant]).

The regulations provide for several exemptions from the licensing requirements. One of these exemptions as noted in the Decision is an

exemption that provides:

> Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license. 9 C.F.R. § 2.1(a)(3)(viii).

Complainant's Appeal at 8-9.

Complainant argues that Respondents negotiated the trade of a white lion for the chimpanzee in October 1996, based upon the testimony of Ty Sutherlin (Tr. 559-73) and documents detailing the exchange (CX 39) of the chimpanzee for a white lion (Complainant's Appeal at 9). I agree with the ALJ's conclusion not to find a violation of 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), as alleged in paragraph II of the Complaint.

Paragraph II of the Complaint reads in pertinent part "[s]ince February 1, 1996, and continuing to the present, the respondents have operated as an exhibitor and dealer . . . ." The Complaint was filed on May 6, 1996, but the activity complained of occurred in October 1996. I find that the activity complained of occurred well after the date of the Complaint, and thus the activity of October 1996 may form no basis for a violation in the Complaint of May 6, 1996. However, only Richard Lawson is exculpated from a violation of paragraph II of the May 6, 1996, Complaint.

At almost the end of the hearing, Complainant moved to conform the Complaint to the evidence presented, because it was apparent to Complainant that Respondents had claimed that Respondents Stanley Curtis and John Curtis were operating separately from Respondent Richard Lawson, such that Complainant deemed it necessary to charge Stanley Curtis and John Curtis "with operating without a license from January 1, 1993, through the present" (Tr. 626). The ALJ granted Complainant's motion to conform the Complaint to the evidence presented (Tr. 628-29). I have carefully examined Complainant's argument (Complainant's Appeal at 8-10), which essentially is that Respondents Stanley Curtis and John Curtis negotiated for the sale of a white lion, which Complainant argues is all that is necessary to deem them dealers under the definition of *dealer* in the Animal Welfare Act (7 U.S.C. § 2132(f)) and the Regulations (9 C.F.R. § 1.1). However, Complainant ignores the provision in the definition of *dealer*, which states that the covered activities must be "for compensation or profit . . ." (9 C.F.R. § 1.1; 7 U.S.C. § 2132(f)). Nowhere in Complainant's argument is there discussion, accusation, or evidence that Respondents Stanley Curtis and John Curtis negotiated for the sale of animals *for compensation or profit*. Therefore, Complainant's argument fails, and I find that the ALJ is correct that the activity described by

Complainant as requiring a license is specifically exempted by 9 C.F.R. § 2.1(a)(3)(viii).

The third issue raised by Complainant is that the ALJ erred by not finding a violation when Respondents denied APHIS officials access to their facilities on January 26, 1996, as follows:

> III. The ALJ erred to fail to find that the Respondents violated the regulations by denying APHIS personnel access to their facilities on January 26, 1996.

In the Decision, the ALJ found that the Respondents twice failed to allow APHIS access to their facility on January 17, and January 25, 1996. The Decision states the following reasons for not finding that the Respondents refused to allow access on January 26, 1996:

> Complainant contends that Respondents refused an inspection of the quonset hut on January 25 and 26. John Curtis' conduct constituted a refusal to allow an inspection on January 25. However, the inspectors did not ask to inspect the site on January 26. Without a request, there could hardly be a refusal. Decision, p. 19.

According to the testimony [inspector] Terry Groce asked the Respondents for access to the King Kong Zoo site on January 26th. Mr. Groce testified that:

> [BY MS. DESKINS:]
>
> Q. On the 26th, did you ask either of the Curtis' [sic] about going to Site Number Two? [Footnote omitted.]
>
> [BY MR. GROCE:]
>
> A. I again asked them that we needed to gain access to it, asked John, and he said, "I haven't changed my mind, I'm not going to go." TR. 314-315 [Groce].

This evidence established that APHIS did request access to the King Kong Zoo Site (Site Two) on January 26, 1996. [Footnote omitted.] Since the ALJ stated that a request by APHIS for access is necessary to find a

violation of Section 2.126 [9 C.F.R. § 2.126], the testimony then proves that such a request was made, and is sufficient reason for modifying the Decision to include the 26th of January as the third time the Respondents denied APHIS access.

Complainant's Appeal at 10-11.

I agree with Complainant's argument. The ALJ's criterion, that APHIS officials must actually request access to inspect Respondents' facilities before there can be a denial of access by Respondents, is met for both January 25 and 26, 1996. Therefore, I find that Respondents refused to allow APHIS officials to inspect their animals, facilities, and records on January 26, 1996, as alleged in paragraph III of the Complaint.

The fourth issue raised by Complainant concerns the sanctions imposed by the ALJ, as follows:

IV. The sanctions assessed by the ALJ should be increased because the evidence does not support the ALJ's conclusions.

Complainant's Appeal at 11. Complainant makes six discrete arguments in support of Complainant's contention that the ALJ failed to follow the Department's sanction policy, as follows:

> 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 ALJ failed to follow this policy in assessing sanctions in this case.

Complainant's Appeal at 11-12.

Complainant correctly cites the Department's sanction policy, and I have examined Complainant's six arguments to determine if the ALJ did not follow the sanction policy, such that the sanction should be increased. Complainant styles the first argument as follows:

A. The Complainant can submit exhibits that it believes are relevant to the assessment of sanctions.

First, the Decision states in regards to sanctions:

> However, Complainant elected to pick-and-cho[o]se what inspections and other background materials should be considered. Decision, p. 20.

Complainant's Appeal at 12. Complainant argues that Respondents were represented by counsel at the hearing; that Respondents could have presented documents or arguments to rebut evidence of previous warning notices; that Complainant has a right under the Rules of Practice (*see* 7 C.F.R. § 1.141(h)) to submit as evidence documents it perceives as relevant evidence; that Complainant's choice of which documents to submit as evidence is no basis for the ALJ not to impose the appropriate sanction; and that for the most part Complainant did not "pick-and-choose" the documents, but rather, the documents were in response to issues raised by Respondents' counsel (Complainant's Appeal at 12-13).

Respondents admit that Respondents were given a warning in 1993 for failure to allow an inspection, but argue that the ALJ is correct to assume that Respondents were in compliance between 1993 and 1996, because Complainant did not introduce reports of all the inspections from those years (Respondents' Reply at 3).

I agree with Complainant because it is axiomatic that a litigant will pick and choose the evidence best to support his or her case. In our adversary legal system, it is the other litigant's job, and opportunity, to rebut that evidence. Therefore, I find it is error for the ALJ to assume that Respondents were in compliance during the period 1993 through 1996, on the basis that Complainant did not introduce inspection reports from that epoch. A failure to introduce into evidence all inspection reports for the period 1993 through 1996 militates neither for compliance nor for non-compliance during 1993 through 1996. Further, Complainant did introduce other evidence of violations occurring in 1993 and 1994 (CX 1, 2, 37).

Complainant's second argument regarding the sanctions imposed by the ALJ is as follows:

B. The ALJ misconstrued the facts regarding a raid on the Respondents['] facilities in 1992.

In the Decision, the ALJ states:

> Complainant's reference to a "raid" on King Kong Zoo in 1992 connotes some sort of mischief by Respondents, but, so far as the record shows, the only information about the incident indicates that APHIS had no basis for conducting the raid [(Initial Decision and Order at 21)].

Complainant's Appeal at 13.

Complainant persuasively argues that the context of this item about a "raid" in 1992 is that Complainant's witness, investigator Terry Groce, only broached the subject of the 1992 raid to establish the joint ownership of King Kong Zoo and Noah's Ark Zoo; and that the "raid" was a United States Fish and Wildlife Service venture (Tr. 289) in which APHIS joined (Complainant's Appeal at 13-14). Thus, I find that the ALJ can neither correctly characterize the Complainant's discussion of the raid as connoting Respondents' "mischief," nor can the ALJ correctly claim that there was no basis for the raid.

Complainant's third argument regarding the sanctions imposed by the ALJ is as follows:

C. The ALJ erred to find that OIG agents claimed they were FBI agents.

Complainant's Appeal at 15. Complainant argues that the ALJ should have believed the testimony of inspector Terry Groce, rather than Respondent John Curtis, that agents from USDA's OIG did not misidentify themselves as agents of the FBI (Complainant's Appeal at 16).

Respondents reply that two OIG agents claimed to be FBI agents and that there was no explanation why a large and intimidating force of APHIS employees and state and local law enforcement officers were needed to conduct the inspection (Respondents' Reply at 3-4).

It is not apparent from the record what significance there is in the allegation, if true, that the OIG agents misidentified themselves as FBI agents. In any event, I do not find that the record has a preponderance of evidence that the OIG agents misidentified themselves as FBI agents. Respondent John Curtis testified (Tr. 491-93) that the OIG agents misidentified themselves, but inspector Terry Groce testified (Tr. 353-54) that the OIG agents did not misidentify themselves. Thus, I

find that the ALJ erred by finding as he did, since there is no preponderance of the evidence that the OIG agents either did or did not misidentify themselves. But, even if they had misidentified themselves, the misidentification would not be a reason to reduce the sanction that would otherwise be imposed.

Complainant's fourth argument regarding the sanctions imposed by the ALJ is as follows:

> D. APHIS does not have to obtain a search warrant in order to perform an inspection.
>
> The ALJ [made] the following claim in the Decision:
>
> > It would seem that if there was a genuine concern about gaining peaceful access, a search warrant could have been obtained at far less expense to the government or risk to all the parties involved. Decision, p. 21.
>
> Warrantless searches are permitted under the Animal Welfare Act. *Lesser v. Espy,* 34 F.3d 1301 (7th Cir. 1994). The ALJ's claim that a warrant should have been sought in order to conduct an inspection of the facility indicates a misunderstanding of the inspection authority of APHIS. [Footnote omitted.] Moreover, this misunderstanding formed a basis for the ALJ to reduce the sanctions requested which is a sound reason for the Judicial Officer to increase the sanctions.

Complainant's Appeal at 16-17.

I agree with Complainant. Section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) specifically provides that the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and records required to be kept of any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. Further, the United States Court of Appeals for the Seventh Circuit specifically found that warrantless searches are permitted under the Animal Welfare Act. *Lesser v. Espy*, 34 F.3d 1301, 1306 (7th Cir. 1994).

Complainant's fifth argument regarding the sanctions imposed by the ALJ is as follows:

> E. APHIS had authority to confiscate the Respondents' animals that were found in the Respondents' facilities in May of 1996.

> The ALJ misinterpreted the facts surrounding a May 1996 search of the Respondents' facilities that did not form a part of the [C]omplaint.

Complainant's Appeal at 17.

An inspection or search occurring after a complaint is filed and which is not part of an amended complaint is virtually always irrelevant. The May 1996 search of Respondents' facilities forms no part of the Complaint or Amended Complaint; therefore, the May 1996 search is irrelevant to this proceeding.

Complainant's sixth and final argument regarding the sanctions imposed by the ALJ is as follows:

> F. The civil penalty against the Respondents should be increased and a disqualification period imposed since the ALJ's sanction determination was based on a misapprehension of the facts.
>
> The ALJ failed to understand the facts and the laws of this case in determining the sanctions. This misapprehension resulted in the ALJ not giving appropriate consideration to the sanction recommendation of the Complainant. The sanctions must be change[d] to be in accordance with the facts of this case.

Complainant's Appeal at 19.

Complainant argues that Respondents committed three extremely serious violations of the Regulations (9 C.F.R. § 2.126) by denying Complainant access to Respondents' facilities on three separate occasions and urges that Respondents be assessed the maximum civil penalty of $2,500 per violation, for a total of $7,500 (Complainant's Appeal at 19). I agree.

Complainant urges that the violations of the Regulations and Standards the ALJ found on January 25, 1996, after Respondents refused inspection on January 17, 1996, be assessed at or near the maximum amount of $2,500, as provided in the Animal Welfare Act (7 U.S.C. § 2149(b)), because the refusal prevented Complainant from finding the violations earlier and could have prevented the inspectors from finding even more serious violations which may have existed on January 17, 1996 (Complainant's Appeal at 19-20). I disagree with Complainant. I am assessing Respondents the maximum civil penalty for their refusal to allow APHIS officials to inspect their business premises. Respondents' refusal to allow inspection is not a basis to assess the maximum civil penalty for each violation of the Regulations and Standards which was found once Respondents allowed inspection. Therefore, I am assessing Respondents a civil penalty of $6,000 for

their violations of 7 U.S.C. §§ 2140 and 2141 and 9 C.F.R. §§ 2.40, 2.50, 2.75, 3.1(e), 3.104(a) and (e), 3.107(a)(1), 3.125(c), 3.126(b), 3.127(c), and 3.131(a) and (c).[11]

Complainant argues that Respondents should be assessed a civil penalty for negotiating the sale of animals after surrendering their license (Complainant's Appeal at 20). However, I have already concluded that Respondents' negotiation of the trade for a chimpanzee did not constitute a violation of the Animal Welfare Act or the Regulations and Standards. Therefore, Respondents' negotiation for a chimpanzee in October 1996 forms no part of the sanction in this Decision and Order.

Complainant seeks Respondents' disqualification from becoming licensed under the Animal Welfare Act for a period of 2 years, based upon Respondents' refusal to allow APHIS officials to inspect Respondents' place of business and USDA policy (Complainant's Appeal at 21). Since Respondents have a history of refusing inspection (CX 1), and since this proceeding includes three separate violations of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126 of the Regulations (9 C.F.R. § 2.126) for refusing to allow inspection, I agree with Complainant that a 2-year disqualification is appropriate.

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.

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[11]As discussed in this Decision and Order, *supra*, I am not assessing Respondents a civil penalty for their violation of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

(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.[12]

Complainant originally sought: (1) a 5-year disqualification from applying for an Animal Welfare Act license for all named Respondents jointly and severally; (2) a civil penalty of $36,000; and (3) a cease and desist order (Complainant's Brief at 26-29). In Complainant's Brief, Complainant addresses the sanction criteria in 7 U.S.C. § 2149(b), arguing that Respondents' business is large because it has two locations and Respondents have spent $300,000 on construction at Noah's Ark Zoo (Tr. 455-56); and that Respondents have not acted in good faith because Respondents committed serious violations after receiving warning notices (CX 1, 2, 37) for previous violations in 1993 and 1994 (Complainant's Brief at 23-24).

In Complainant's Appeal, Complainant reduces the recommended sanction to a civil penalty of $22,500, a 2-year disqualification from applying for an Animal Welfare Act license, and, although a cease and desist order is not specifically mentioned, I infer from Complainant's proposed order in Complainant's Brief (Complainant's Brief at 27-28) that Complainant still seeks a cease and desist order, as well (Complainant's Appeal at 21).

Complainant argues that the ALJ's imposition of only a $4,000 civil penalty and no disqualification from applying for an Animal Welfare Act license is based on the ALJ's misapprehension of both the facts and law (Complainant's Appeal at 22). Complainant argues that Respondents' three refusals to allow inspections are extremely serious violations (Complainant's Appeal at 19). Complainant argues that the violations of the Regulations and Standards found by the ALJ are particularly serious and deserving of the maximum civil penalty because of possibly more serious violations not found because of Respondents' refusal to allow inspections (Complainant's Appeal at 21). Complainant argues that the requested civil penalty and disqualification period should fulfill the purposes of the Animal Welfare Act to ensure that animals receive the minimum care required under the Animal Welfare Act and deter others from refusing to allow access (Complainant's Appeal at 21).

Complainant's sanction recommendation is well within the range of sanctions in these kinds of cases. USDA consistently imposes significant sanctions for

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[12]*In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Mar. 30, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (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).

violations of the Animal Welfare Act and the Regulations and Standards.[13] USDA

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[13]*See, e.g., In re Marilyn Shepherd*, 57 Agric Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189 (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), *appeal docketed*, No. 98-60463 (5th Cir. July 23, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127 (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. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *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 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 (continued...)

in the past has permanently disqualified persons from becoming licensed or revoked dealers' and exhibitors' licenses for the kind of violations that are found in this proceeding.[14] As to the civil penalty, the Animal Welfare Act authorizes up to $2,500 *per violation per day*. I find that Respondents committed 16 violations of the Animal Welfare Act and the Regulations and Standards. Complainant could have recommended, and Respondents could be assessed, a maximum civil penalty of $40,000.

Although not addressed specifically by the ALJ in the Initial Decision and Order, the Complaint alleges that each alleged violation was willful and Complainant argues willfulness in Complainant's Brief (Complainant's Brief at 8-9). 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.[15] I find that Respondents' violations

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[13](...continued)
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).

[14]*See, e.g., In re John D. Davenport*, 57 Agric. Dec. 189 (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), *appeal docketed*, No. 98-60463 (5th Cir. July 23, 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 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).

[15]*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 Marilyn Shepherd*, 57 Agric. Dec. 242, 286-87 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219-20 (1998), *appeal docketed*, No. 98-60463 (5th Cir. July 23, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 167-68 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 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
(continued...)

were willful.

Respondents reply, as follows:

> The penalty assessed is appropriate because Respondents have incurred ongoing financial loss during the pendency of this action because they have been prevented from obtaining a license because of this proceeding. Respondents should not be further penalized with an additional disqualification period.

Respondents' Reply at 4.

The record does not establish, as Respondents contend, that they have been prevented from obtaining a license because of this proceeding. Instead, the record establishes that Respondents voluntarily terminated their license to escape inspection (CX 9, 10).

Based on the Complainant's evidence that Respondents owned and kept many large, expensive, exotic animals, including polar bears, lions, leopards, tigers, and chimpanzees, as well as many other animals (CX 6, 7, 15, 16, 25), at two locations, one location of which had undergone over $300,000 in new construction (Tr. 455-56), I find that Respondents operate a large facility. On the criteria of good faith

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[15](...continued)
(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 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 would still be found willful.

and history of previous violations, Respondents did not exercise good faith, in that Respondents received warning letters (CX 1, 2, 37) in 1993 and 1994 for previous alleged violations, but, nevertheless, committed the same and similar violations in 1996.

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 recommendations of the administrative officials, I conclude that a $13,500 civil penalty, a cease and desist order, and a 2-year disqualification period before Respondents may apply for an Animal Welfare Act license, are appropriate.

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

Order

1. Respondents, Richard Lawson, Stanley Curtis, and John M. Curtis, jointly and severally, are assessed a civil penalty of $13,500. 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 Respondents. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0047.

2. Respondents, their 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 allow APHIS officials access to Respondents' place of business to inspect Respondents' records, facilities, property, and animals;

(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 failing to provide veterinary care

to animals in need of care;

(c) Failing to maintain complete records showing the acquisition, disposition, description, and identification of all animals on the premises, including personal pets;

(d) Failing to properly identify all animals on the premises;

(e) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, to minimize vermin infestation, odors, and disease hazards;

(f) Failing to store supplies of food so as to adequately protect them against deterioration due to lack of refrigeration for perishable food items, molding, or contamination by vermin;

(g) Failing to construct and maintain indoor housing facilities for animals so that they are adequately ventilated;

(h) Failing to provide a suitable method for the rapid elimination of excess water from housing facilities for animals;

(i) Failing to construct primary enclosures for polar bears so as to provide sufficient space for each animal to make normal postural and social adjustments with adequate freedom of movement in or out of the water;

(j) Failing to provide polar bears with adequate water;

(k) Failing to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash from designated areas; and

(*l*) Failing to keep primary enclosures for animals clean of animal and food waste.

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

3. Respondents, Richard Lawson, Stanley Curtis, and John M. Curtis, jointly and severally, are disqualified from becoming licensed under the Animal Welfare Act for 2 years. The Animal Welfare Act license disqualification provisions in this Order shall become effective on the day after service of this Order on Respondents, for a period of 2 years, and continuing thereafter, until Respondents demonstrate by license application to the Animal and Plant Health Inspection Service that Respondents are 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.

In re: DAVID M. ZIMMERMAN.
AWA Docket No. 98-0005.
Decision and Order filed November 18, 1998.

Dealer — Failing to obtain license — Actual notice of regulations — Constructive notice of regulations — Willful — Burden of proof — Standard of proof — Preponderance of the evidence — ALJ credibility determinations — Hearsay evidence — Sanction policy — Revocation of license — Disqualification from obtaining license — Cease and desist order — Civil penalty.

The Judicial Officer affirmed Chief Administrative Law Judge Palmer's (Chief ALJ) decision. The Judicial Officer found that Complainant proved by a preponderance of the evidence that Respondent operated as a dealer without a license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1. The Judicial Officer found that Respondent's violations were willful because, at the very least, Respondent carelessly disregarded statutory and regulatory requirements. The Judicial Officer stated that he is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility. 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 there was no basis for finding that the Chief ALJ's credibility determinations were error. The Judicial Officer found that even if Respondent understood a USDA employee's statements in breeder meetings to mean that a person could sell dogs without a license, 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. The Judicial Officer held that hearsay evidence was properly admitted into evidence. The Judicial Officer found that the $20,000 civil penalty assessed by the Chief ALJ was in accord with the Animal Welfare Act, the Department's sanction policy, and consistent with the sanctions imposed in other Animal Welfare Act cases. The Judicial Officer held that, while there is no provision in the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, 7 U.S.C. § 2151 authorizes orders disqualifying unlicensed persons from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards.

Brian T. Hill and Frank Martin, Jr., for Complainant.
Eugene R. Campbell, York, PA, 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 issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [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 December 9, 1997.

The Complaint alleges that on or about May 13, 1997, through October 14, 1997, David M. Zimmerman [hereinafter Respondent] operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of 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). On December 29, 1997, Respondent filed an Answer denying the material allegations of the Complaint and requesting a hearing.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on August 25, 1998, in Lancaster, Pennsylvania. Brian T. Hill and Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Eugene R. Campbell of York, Pennsylvania, represented Respondent. During the hearing, Complainant submitted Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Pre-hearing Brief in Support Thereof and a Proposed Decision and Order. On September 2, 1998, Complainant filed Complainant's Supplemental Brief, and on September 10, 1998, Respondent filed Respondent's Supplemental Brief.

On September 16, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that from May 13, 1997, through October 14, 1997, Respondent operated as a dealer, as defined by the Animal Welfare Act and the Regulations, when he was not licensed, in willful violation of 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); (2) assessed Respondent a civil penalty of $20,000; (3) revoked Respondent's Animal Welfare Act license; and (4) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations. (Initial Decision and Order at 2, 9.)

On October 14, 1998, Respondent 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 October 23, 1998, Complainant filed Complainant's Memorandum in Opposition to Respondent's Appeal and Complainant's Cross-Appeal. On November 13, 1998, Respondent filed Respondent's Response to Complainant's Cross-Appeal, and on November 16, 1998, the Hearing Clerk transmitted the

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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)).

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 Chief ALJ that Respondent willfully 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), as alleged in the Complaint. Therefore, pursuant to section 1.145(i) of 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 Chief ALJ's discussion.

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."

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

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[.]

. . . .

§ 2134. Valid license for dealers and exhibitors required

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

. . . .

§ 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), 2134, 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 A—LICENSING

§ 2.1 Requirements and application.

(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. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the APHIS, REAC Sector Supervisor in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the APHIS, REAC Sector Supervisor.

(2) If an applicant for a license or license renewal operates in more than one State, he or she shall apply in the State in which he or she has his or her principal place of business. All premises, facilities, or sites where such person operates or keeps animals shall be indicated on the application form or on a separate sheet attached to it. The completed application form, along with the application fee indicated in paragraph (d) of this section, and the annual license fee indicated in table 1 or 2 of § 2.6 shall be filed with the APHIS, REAC Sector Supervisor.

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

(i) Retail pet stores which sell non-dangerous, pet-type animals, such as dogs, cats, birds, rabbits, hamsters, guinea pigs, gophers, domestic ferrets, chinchilla, rats, and mice, for pets, at retail only: *Provided, That*, Anyone wholesaling any animals, selling any animals for research or exhibition, or selling any wild, exotic, or nonpet animals retail, must have a license;

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

(iii) Any person who maintains a total of three (3) or fewer breeding female dogs and/or cats and who sells only the offspring of these dogs or cats, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license;

(iv) Any person who sells fewer than 25 dogs and/or cats per year which were born and raised on his or her premises, for research, teaching, or testing purposes or to any research facility and is not otherwise required to obtain a license. The sale of any dog or cat not born and raised on the premises for research purposes requires a license;

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

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

(vii) Any person who breeds and raises domestic pet animals for direct retail sales to another person for the buyer's own use and who buys no animals for resale and who sells no animals to a research facility, an exhibitor, a dealer, or a pet store (e.g. a purebred dog or cat fancier) and is not otherwise required to have a license; [and]

(viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license[.]

. . . .

(d) A license will be issued to any applicant, except as provided in §§ 2.10 and 2.11, when the applicant:

(1) Has met the requirements of this section and of §§ 2.2 and 2.3; and

(2) Has paid the application fee of $10 and the annual license fee indicated in § 2.6 to the APHIS, REAC Sector Supervisor and the payment has cleared normal banking procedures.

. . . .

(f) The failure of any person to comply with any provision of the Act, or any of the provisions of the regulations or standards in this

subchapter, shall constitute grounds for denial of a license; or for its suspension or revocation by the Secretary, as provided in the Act.

9 C.F.R. §§ 1.1; 2.1(a), (d), (f).

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

. . . .

Findings of Fact

1. David M. Zimmerman . . . is an individual whose address is 951 East Main Street, Ephrata, Pennsylvania 17522 (Answer ¶ I(A)).

2. At all times material [to this proceeding], Respondent was operating as a dealer, as defined in the [Animal Welfare] Act and the Regulations. Respondent . . . voluntarily terminated [his Animal Welfare Act license] on May 5, 1997. (CX 1, CX 2, CX 3, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10, CX 13, CX 14, CX 15.)

3. From May 13, 1997, through October 14, 1997, Respondent operated as a dealer, as defined in the [Animal Welfare] Act and the Regulations, when he was no longer licensed, and sold, in commerce, 33 dogs for resale for use as pets (CX 1, CX 2, CX 3, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10). The sale of each dog constitutes a separate violation [of the Animal Welfare Act and the Regulations].

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent was a dealer, as defined in the [Animal Welfare] Act and the Regulations, who, from May 13, 1997, through October 14, 1997, willfully violated section 4 of the [Animal Welfare] Act (7 U.S.C. § 2134) and section 2.1 of the [R]egulations (9 C.F.R. § 2.1) by selling 33 dogs in commerce, for resale for use as pets, without being licensed. The sale of each dog constitutes a separate violation [of the Animal Welfare Act and the Regulations].

3. The appropriate sanctions in this case are the issuance of a cease and desist order, the assessment of a $20,000 civil penalty, and [Respondent's permanent disqualification from obtaining an Animal Welfare Act] license.

Discussion

1. Jurisdiction

[On May 5, 1997,] Respondent . . . voluntarily [terminated] his [Animal Welfare Act dealer's] license. . . . Respondent was notified by USDA on two separate occasions that his [Animal Welfare Act] license was terminated and advised that he could no longer continue to operate as a dealer. (CX 13, CX 14, CX 15.) However, after voluntarily [terminating] his license, [Respondent] continued to engage in activities for which an [Animal Welfare Act] license [is] required. Respondent sold, in commerce, . . . 33 dogs for resale for use as pets (CX 1, CX 2, CX 3, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10).

2. Dealing Without a License

The testimony of USDA investigators William Swartz and James Finn that they obtained records from three different pet stores and a [dealer] licensed [under the Animal Welfare Act] showing that Respondent was the source for dogs, proved that Respondent was selling dogs as a dealer, as defined in the [Animal Welfare] Act and Regulations, after he voluntarily [terminated] his [Animal Welfare Act] license [(Tr. 44-52, 54-88)]. The pet store and dealer records were required to be kept by state and federal law and were created at the time the animals were acquired by the pet stores and dealer [(Tr. 55, 130-31, 146)]. This evidence is both substantial and probative and is accorded great weight.

Respondent attempted to rebut this evidence by offering the testimony of his friend and business associate, Ronald Kreider, who owns the pet stores to which most of the dogs were sold [(Tr. 134-40)]. Mr. Kreider's testimony must be viewed in the context of his relationship with Respondent and his economic reliance on Respondent. The cross-examination of Mr. Kreider clearly demonstrated that he was not a credible witness.

Mr. Kreider relied on Respondent since 1986 for dogs which he sold in his pet stores (Tr. 119, 134). He also purchased dog food from Respondent on credit [(Tr. 136-39)]. In fact, Mr. Kreider still owes Respondent money . . . [(Tr. 139)]. Mr. Kreider testified that . . . after Respondent stopped selling him dogs, he obtained the dogs needed to operate his pet stores from Respondent's children [(Tr. 134-35)]. He testified that he had to beg Respondent's sons to [sell him dogs] (Tr. 125). It is against this background that Mr. Kreider's credibility and his attempts to refute his business records must be considered.

Mr. Kreider testified that each time Respondent's name appeared in his pet store

records, which he is required by the [Commonwealth] of Pennsylvania to accurately keep and maintain, the name was recorded in error (Tr. 140[-]45). During cross-examination, Mr. Kreider's testimony kept changing. At first, [Mr. Kreider] testified that only the entries after Respondent had given up his license were inaccurate (Tr. 119). Then [Mr. Kreider] asserted that all the entries showing Respondent's name could be inaccurate (Tr. 16[0-]61, 165). This testimony is inconsistent with his testimony that he relied on Respondent for dogs while Respondent was licensed. Finally, Mr. Kreider asserted that most, if not all, of the entries in his records were inaccurate. Mr. Kreider's credibility is seriously damaged by the obvious differences between his affidavit (CX 4) and his inconsistent statements at the hearing.

Mr. Kreider testified that the dogs his records show he acquired from Respondent actually came from people who had them at Respondent's kennel for Mr. Kreider to pick up [(Tr. 235-37)]. He testified that they were mixed breeds for which he did not pay [(Tr. 236-37)]. However, [Mr. Kreider's] affidavit states that he gave money to Respondent to pay the owners of these dogs [(CX 4)]. On cross-examination, [Mr. Kreider] was at first evasive in an apparent effort to support Respondent's testimony that Mr. Kreider never gave Respondent money (Tr. [226-]28), but upon being confronted by the statements in his affidavit, he again stated that he gave Respondent money to pay the dogs' owners (Tr. 232-33). Mr. Kreider first testified that when people would bring dogs to Respondent's kennel, the dogs would be in . . . cars or trucks (Tr. 158-59). When questioned why he did not get [the names of the owners of the dogs] for his records, [Mr. Kreider] changed his [testimony] and said that people would leave the dogs at Respondent's kennel in transport enclosures (Tr. 236-37). Mr. Kreider was unable to explain the entries for purebred dogs in his records that indicate Respondent is the source (Tr. 141-43).

Respondent next introduced the testimony of his son[, Ervin S. Zimmerman,] to explain one of the entries in [CX 3 at 12. Ervin S. Zimmerman] testified that he sold the dog[, an eskipoo,] that the pet store recorded as being sold by his father [(CX 3 at 12; Tr. 217). Ervin S. Zimmerman] is a [dealer licensed under the Animal Welfare Act] and is required to keep records [of the acquisition and disposition of dogs, in accordance with section 2.75(a)(1) of the Regulations] (9 C.F.R. § 2.75(a)(1)). . . . When asked on cross-examination if he had his records to prove that he sold the dog, [Ervin S. Zimmerman] stated that he did not have his records with him [(Tr. 217)]. For these reasons, [Ervin S. Zimmerman's] testimony . . . that he[, rather than Respondent, sold the eskipoo listed on CX 3 at 12,] . . . is rejected as untrustworthy and lacking in credibility.

As a separate defense, Respondent and his brother[, Amos M. Zimmerman,]

testified that Mr. Markmann[**] and Dr. Binkley[***] told them at a meeting in 1993 that they could sell 24 dogs without having to obtain a[n Animal Welfare Act] license [(Tr. 167-68, 173, 201-04)]. Respondent argues that this statement caused confusion and if he did subsequently sell some dogs, . . . he must be construed to have acted in good faith and should not be sanctioned [(Respondent's Supplemental Brief ¶ 5[****])]. However, Mr. Markmann testified that he would not have made that . . . statement and explained that, under 9 C.F.R. § 2.1(a)(3)(iii), only a person who has three or fewer breeding female dogs can sell the offspring of those dogs, which were born on the premises, to the wholesale pet trade without having a license [(Tr. 246-47)]. Mr. Markmann explained further that he uses the number "24" as a guideline because three breeding females, producing an average of eight puppies a year, would [produce] 24 [puppies (Tr. 248-54)]. Mr. Markmann explained that, under . . . section [2.1(a)(3)(iv) of the Regulations] (9 C.F.R. § 2.1(a)(3)(iv)), a person [without a license] can sell up to 24 dogs, which were born on the premises, for research, teaching, or testing purposes, if [he or she is] not otherwise required to obtain a license [(Tr. 254)]. Dr. Binkley's testimony corroborated Mr. Markmann's testimony [(Tr. 258-63)].

Moreover, Respondent was instructed at the time he voluntarily [terminated his] license that he could not engage in regulated activities without getting a new license [(CX 13, CX 14, CX 15)]. Even assuming, *arguendo*, that Respondent believed he could sell up to 24 dogs while unlicensed, the record reveals that he sold more than 24 dogs. Respondent also testified that he always had more than three breeding females [(Tr. 256)]. Therefore, he would not be eligible for the exemption in 9 C.F.R. § 2.1(a)(3)(iii), for sales to pet stores. He would also not be eligible for the exemption in 9 C.F.R. § 2.1(a)(3)(iv), for sales to research facilities because he was required to be licensed for his wholesale activities. Both Respondent and his brother[, Amos M. Zimmerman,] testified that they were licensed for years and that they received copies of the Regulations and read them. They admitted that they bore personal responsibility for compliance with the Regulations. [(Tr. 169-73, 193-94, 203.)] "[I]t is the Respondent's duty to be in compliance with the Animal Welfare Act, and the Regulations and the Standards

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[**][Mr. Robert Gerard Markmann is an animal care inspector employed by USDA (Tr. 8).]

[***][Dr. Francis Miava Binkley is a supervisory animal care specialist (Tr. 257-58). I infer from Dr. Binkley's testimony that she is employed in this capacity by USDA.]

[****][Respondent's Supplemental Brief contains two paragraphs identified as "5." The reference here is to the paragraph identified as "5. GOOD FAITH".]

[set forth in 9 C.F.R. §§ 3.1-.142 [hereinafter the Standards]] at all times. It is not the duty of [Animal and Plant Health Inspection Service] inspectors to instruct licensees as to the details of meeting those requirements." *In re John D. Davenport*, [57 Agric. Dec. 189, 209 (1998)[, *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998)]. "[I]t is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice, findings, or compliance determinations of federal employees." *See id.* at 227; *See also FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re C.C. Baird*, 57 Agric. Dec. 127, 171-72 (1998)[, *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998)]; *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988).

3. The Appropriate Sanctions

The term "willful 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. 29[3, 306] (1978), *aff'd [mem.,]* 582 F.2d 39 (5th Cir. 1978).

Respondent's behavior over the [5]-month period in question constitutes, at the very least, a careless disregard of the statutory and regulatory requirements and must be construed as willful.

It is therefore appropriate to issue a cease and desist order[, to permanently disqualify Respondent from obtaining an Animal Welfare Act license,] and to [assess a] civil penalt[y,] as provided in section 19(b) of the [Animal Welfare] Act (7 U.S.C. § 2149(b)).

When assessing [a] civil penalt[y], which may be as much as $2,500 [for each] violation, [section 19(b) of] the [Animal Welfare] Act states:

> 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]

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[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 [the] civil penalt[y]. *In re Jerome A. Johnson*, [51 Agric. Dec. 209, 216 (1992)].

[7 U.S.C. § 2149(b).]

With regard to the size of Respondent's business, I find that Respondent has a substantial business. His facility generally houses between 200 and 300 dogs [(Tr. 15-16, 105)].

The gravity of the violations is clearly evident from the record. The failure to obtain a license undercuts the ability of the Animal and Plant Health Inspection Service to monitor and enforce all other provisions of the Animal Welfare Act and the Regulations [and the Standards] . . . and is very serious [(Tr. 104).] Respondent did not display good faith. After voluntarily giving up his license, he continued to engage in activities for which a license [is] required. Respondent's conduct over a period of [5] months reveals consistent disregard for and unwillingness to abide by the requirements of the [Animal Welfare] Act and the [R]egulations.

An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the [Animal Welfare] Act. It is appropriate to view the evidence . . . as establishing prior violations in determining the appropriate level of the civil penalty. The record in this proceeding establishes that Respondent violated the [Animal Welfare] Act and the [R]egulations . . . 33 [times] (CX 1, CX 2, CX 3, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10). [Moreover, Respondent has a history of violations previous to those that are the subject of the instant proceeding. Specifically, Respondent committed 75 violations of the Animal Welfare Act and the Regulations and the Standards during the period August 3, 1993, through October 31, 1995. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997), *aff'd*, 156 F.3d 1227] (3d Cir. 1998) (Table). The $20,000 civil penalty requested in Complainant's Proposed Decision and Order is commensurate with the nature and extent of the [33] violations [proven in the instant proceeding] and is consistent with USDA's established sanction policy.[2]

This case involves serious violations. The failure to obtain a license undercuts the ability of the Animal and Plant Health Inspections Service to enforce the Animal Welfare Act [and the Regulations and the Standards]. During fiscal year 1997, 4,043 dealers held Animal Welfare Act licenses. *See Animal Welfare Report, Fiscal Year 1997, Report of the Secretary of Agriculture to the President of the*

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[2]The Department's sanction policy states 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." See *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 4[97] (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)].

Senate and the Speaker of the House of Representatives, at 10 (APHIS 41-35-054, May 1998). The Department has a limited number of resources available to it in its enforcement efforts, and therefore relies heavily on the deterrent effect disciplinary proceedings and sanctions have on regulated individuals. In light of the fact that the [Animal Welfare] Act authorizes a maximum penalty of $2,500 per violation, the civil penalty requested by Complainant is not excessive. . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises 12 issues in Respondent's Appeal Petition. First, Respondent contends that the Chief ALJ erred in finding that Respondent operated as a dealer who sold 33 dogs improperly (Respondent's Appeal Pet. ¶¶ 1, 7).

I disagree with Respondent's contention that the Chief ALJ erred in finding that Respondent operated as a dealer who sold 33 dogs improperly. 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 Chief ALJ set

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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 Richard Lawson*, 57 Agric. Dec. ___, slip op. at 45-46 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 149 (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *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*, 156 F.3d 1227 (3d Cir. 1998) (Table); *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); (continued...)

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).[5] The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

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[5]*See also In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 48 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *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. 640, 687-88 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (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), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (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) (stating that the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating that agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating that while considerable deference is owed to credibility findings by an administrative law judge, 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) (stating that the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating that 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) (stating that 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).

forth the basis for his conclusion that Respondent acted as a dealer after Respondent voluntarily terminated his license. I have thoroughly reviewed the record, and I agree with the Chief ALJ that Complainant proved by a preponderance of the evidence that "Respondent operated as a dealer who sold 33 dogs improperly[,]" in violation of 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).

Second, Respondent contends that the Chief ALJ "erred in accepting the records of pet shop owners as creditable evidence where other evidence refuted their accuracy" (Respondent's Appeal Pet. ¶ 2).

I disagree with Respondent's contention that the Chief ALJ erred in accepting records of pet store owners as creditable evidence. The Chief ALJ found that records from three different pet stores, which indicate that Respondent sold dogs to those pet stores, were required to be kept by state and federal law and were created at the time that the dogs were acquired by the pet stores (Initial Decision and Order at 3). The Chief ALJ thoroughly discussed the evidence introduced by Respondent to rebut the accuracy of these pet store records and found that Respondent's rebuttal evidence was not credible (Initial Decision and Order at 3-5). Instead, the Chief ALJ found the pet store records to be substantial and probative evidence, and the Chief ALJ accorded the pet store records great weight (Initial Decision and Order at 3). I have closely examined the pet store records and Respondent's rebuttal evidence. I find that the Chief ALJ did not err when he found that Respondent's rebuttal evidence was not credible, found that the pet store records are substantial and probative evidence, and gave the pet store records great weight.

Third, Respondent contends that the Chief ALJ "erred in finding the testimony of Ron Kreider not to be creditable when he testified that his records were in error and that he had not bought any dogs from Respondent after he turned in his USDA license" (Respondent's Appeal Pet. ¶ 3).

I disagree with Respondent's contention that the Chief ALJ erred in finding that Mr. Kreider's testimony was not credible. The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate

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[4](...continued)
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).

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

. . . .

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

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.[6] The Chief ALJ explained in great detail his reasons for concluding that Mr. Kreider's testimony regarding the inaccuracy of his pet store records is not credible (Initial Decision and Order at 3-5). The record supports the Chief ALJ's credibility determination with respect to Mr. Kreider, and I do not find that the Chief ALJ erred.

Fourth, Respondent contends that the Chief ALJ "erred in failing to consider the conflicting and contradictory testimony of Mr. Markman[n] as to what he told breeders regarding how many dogs they could breed without obtaining a USDA wholesale license" (Respondent's Appeal Pet. ¶ 4). Respondent further contends that the Chief ALJ disregarded "the testimony of Respondent's brother" regarding "statements made to breeders by USDA representatives concerning the number of dogs that could be bred without a license" (Respondent's Appeal Pet. ¶ 6).

As an initial matter, the Animal Welfare Act does not require persons who merely breed dogs to obtain a license, and the record does not indicate that Mr. Markmann or other USDA representatives testified that they discussed with breeders the number of dogs they could breed without an Animal Welfare Act license.

However, Mr. Markmann did testify that he told breeders that, under section 2.1(a)(3)(iii) of the Regulations (9 C.F.R. § 2.1(a)(3)(iii)), a person with three or fewer breeding female dogs can sell the offspring, which were born and raised on the person's premises, for pets without obtaining a license (Tr. 246-48). Despite the absence, in 9 C.F.R. § 2.1(a)(3)(iii), of any limitation on the number of

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[6]*In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 47 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *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. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (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), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *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).

offspring that a person can sell for pets without a license, Mr. Markmann admitted that he uses the number "24" as a guideline for the number of offspring that a breeder may sell without a license in accordance with 9 C.F.R. § 2.1(a)(3)(iii), because three breeding female dogs generally can produce an average of 24 puppies per year (Tr. 248-54). The information Mr. Markmann admits he provides to breeders regarding 9 C.F.R. § 2.1(a)(3)(iii) may not be entirely clear to all breeders, because some breeders may incorrectly interpret Mr. Markmann's statements to mean that, in addition to the limitation on the number of breeding female dogs that one may maintain, there is a limitation on the number of offspring that may be sold under 9 C.F.R. § 2.1(a)(3)(iii). However, the Chief ALJ did not describe Mr. Markmann's testimony regarding what he tells breeders as "conflicting and contradictory." I have carefully reviewed Mr. Markmann's testimony, and I do not find it "conflicting and contradictory."

Further, Mr. Markmann's statements to dog breeders are not relevant to this proceeding. Respondent admits that, at the time of the hearing, he had approximately 100 breeding female dogs and that at all times material to this proceeding, he maintained more than three breeding female dogs (Tr. 256). Based on Respondent's admission alone, there is no basis for finding that Respondent qualifies for the exemption under section 2.1(a)(3)(iii) of the Regulations (9 C.F.R. § 2.1(a)(3)(iii)) from having to obtain an Animal Welfare Act license.

Moreover, even if Respondent understood Mr. Markmann's statements in breeder meetings to mean that a person could sell up to 24 dogs, without any reference to the number of breeding female dogs maintained by that person, Mr. Markmann's statements would not operate as a defense. First, the evidence establishes that Respondent sold more than 24 dogs. Second, even if Respondent sold less than 25 dogs, Respondent was licensed under the Animal Welfare Act for 25 or 26 years and, therefore, had actual notice of the Animal Welfare Act licensing requirements because each year during that period Respondent received a copy of the Regulations and the Standards and agreed to abide by the Regulations and the Standards (Tr. 193-94).[7] Moreover, the Regulations and the Standards are published in the *Federal Register*; thereby constructively notifying Respondent of the Regulations and the Standards.[8]

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[7]Section 2.1(a)(3)(iii) of the Regulations (9 C.F.R. § 2.1(a)(3)(iii)) became effective on October 30, 1989, and has not been amended since that time (54 Fed. Reg. 36,123 (1989)).

[8]*FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, (continued...)

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.[9] Therefore, even if Respondent could show that he sold less than 25 dogs and that Mr. Markmann stated that no license was required for the sale of less than 25 dogs for pets, Mr. Markmann's statements would not operate as a defense.

I infer that Respondent contends that the Secretary of Agriculture is estopped from imposing a sanction against Respondent because of Mr. Markmann's statements to Respondent and other dog breeders. 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.[10] 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 or her position for the worse.[11] Mr. Markmann did nothing to lead Respondent to believe that he could sell 33 dogs for resale as pets without obtaining an Animal Welfare Act license. This record does not support a finding that Mr. Markmann's statements caused Respondent to violate 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), and I do not find any statements made by Mr. Markmann upon which Respondent could have reasonably relied for his failure to comply with 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).

Further, even if Respondent had acted to his detriment based on Mr.

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[8](...continued)
1405 (10th Cir. 1976).

[9]*See FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re John D. Davenport*, 57 Agric. Dec. 189, 226-27 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 172 (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988).

[10]*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).

[11]*Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, 965 F.2d 413, 418 (7th Cir. 1992).

Markmann's statements, it is well settled that the government may not be estopped on the same terms as any other litigant.[12] 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.[13] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[14] as it was doing in this case,[15] 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.[16] Respondent bears a heavy burden when asserting estoppel against the government, and he has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Fifth, Respondent contends that the Chief ALJ "erred in finding that Respondent had a `substantial' business, consisting of between 200 and 300 dogs" and "disregarded the testimony of Respondent's brother as to the relative size of Respondent's operation" (Respondent's Appeal Pet. ¶¶ 5, 6).

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[12]*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

[13]*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).

[14]*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

[15]*See In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act). *Cf. In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *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) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[16]*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); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

I disagree with Respondent's contention that the Chief ALJ erred in finding that Respondent had a "substantial" business, consisting of between 200 and 300 dogs. Mr. Markmann testified that he had been inspecting Respondent's facility since 1986 and that the last time he inspected the facility, on September 17, 1996, Respondent had 278 dogs (Tr. 15-16). Mr. Swartz testified that he was familiar with Respondent's facility and that prior to the hearing, he had last been to the facility during the summer of 1997. Mr. Swartz characterized Respondent's facility as "a large kennel" (Tr. 53-54). Dr. Goldentyer, Eastern Director for Animal Care, Animal and Plant Health Inspection Service, USDA, testified that Mr. Markmann's inspection reports show that Respondent consistently had in the range of 270 dogs, that Respondent reported gross income from his facility of $39,000 in 1997, and that most of the kennels licensed under the Animal Welfare Act maintain between 30 and 40 dogs (Tr. 105, 108). Dr. Goldentyer also characterized Respondent's facility as "a large dog kennel" (Tr. 105, 108). This evidence regarding the size of Respondent's business supports the Chief ALJ's finding that Respondent "has a substantial business," and I do not find that the Chief ALJ's finding regarding the size of Respondent's facility is error.

Amos M. Zimmerman, Respondent's brother, did testify that he knows of two breeders in the Lancaster County, Pennsylvania, area that maintain around 700 dogs, that he "would think" there are more than 12 facilities in Pennsylvania that maintain more than 250 dogs, and that "out in the midwest they're a lot bigger yet" (Tr. 166, 168). I do not find that Amos M. Zimmerman's testimony regarding the number of dogs in other dog breeding facilities rebuts the evidence that Respondent has a large facility.

Sixth, Respondent contends that the Chief ALJ "erred in considering dogs that were left at Respondent's property, but which were not bred by him" (Respondent's Appeal Pet. ¶ 8).

As an initial matter, the Chief ALJ concluded that Respondent operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of 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), based upon Respondent's sale of 33 dogs in commerce, for resale for use as pets. The identity of the person who bred the dogs which Respondent sold in commerce for resale for use as pets is not relevant to this proceeding.

Mr. Kreider testified that his pet store records, which show that he acquired dogs from Respondent, are inaccurate and that he actually acquired these dogs from people who left the dogs at Respondent's kennel for Mr. Kreider (Tr. 235-37). The Chief ALJ rejected this evidence and fully discussed his reasons for rejecting this evidence and for his determination that Mr. Kreider was not a credible witness

(Initial Decision and Order at 3-5). I have thoroughly reviewed the record, and the record supports the Chief ALJ's rejection of this evidence and the Chief ALJ's finding that Mr. Kreider was not a credible witness with respect to the persons from whom he acquired the dogs identified on his pet store records.

Seventh, Respondent contends that the Chief ALJ "erred in finding that Respondent was acting in bad faith and that any violations were willful" (Respondent's Appeal Pet. ¶ 9).

The Chief ALJ did not find, as Respondent contends, that Respondent acted in bad faith. Instead, the Chief ALJ found that "Respondent did not display good faith" and cited, as support for this finding, Respondent's 5-month disregard for and unwillingness to abide by the requirements of the Animal Welfare Act and the Regulations (Initial Decision and Order at 7). The record supports the Chief ALJ's finding that Respondent did not display good faith.

I disagree with Respondent's contention that the Chief ALJ erred by concluding that Respondent's violations of 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) 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.[17] The Chief ALJ found that Respondent's sale

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[17] *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 Richard Lawson*, 57 Agric. Dec. ___, slip op. at 71-72 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 287, (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 10, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 219, (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 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*, 156 F.3d 1227 (3d Cir. 1998) (Table); *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 (continued...)

of dogs to pet stores and a dealer without a license over a 5-month period "constituted, at the very least, a careless disregard of the statutory and regulatory requirements and must be construed as wilful" (Initial Decision and Order at 7). I agree with the Chief ALJ.

Eighth, Respondent contends that "[t]he amount of the civil penalty is excessive" (Respondent's Appeal Pet. ¶ 10).

I disagree with Respondent's contention that the civil penalty assessed by the Chief ALJ is excessive. This case involves extremely serious willful violations of the Animal Welfare Act and the Regulations by a Respondent who has not displayed good faith. Moreover, Respondent has a history of previous violations of the Animal Welfare Act, the Regulations, and the Standards.[18]

A dealer or exhibitor who fails to obtain an Animal Welfare Act license in violation of the Animal Welfare Act and the Regulations thwarts the Secretary of Agriculture's ability to monitor the dealer's or exhibitor's compliance with the Animal Welfare Act, the Regulations, and the Standards and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act, the Regulations, and the Standards. Therefore, in order to deter future violations of this gravity, a substantial civil penalty is warranted.

The Animal Welfare Act authorizes the assessment of a maximum civil penalty of $2,500 per violation per day (7 U.S.C. § 2149(b)). Respondent committed 33

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[17](...continued)
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 would still be found willful.

[18]The ongoing pattern of violations of the Animal Welfare Act and the Regulations between May 13, 1997, and October 14, 1997, evidenced by the record in this proceeding, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)). Moreover, Respondent committed 75 violations of the Animal Welfare Act, the Regulations, and the Standards between August 3, 1993, and October 31, 1995. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table).

violations of the Animal Welfare Act and the Regulations. The Chief ALJ could have assessed Respondent a maximum civil penalty of $82,500. Further, the civil penalty assessed by the Chief ALJ was recommended by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act (Tr. 104-05; Complainant's Proposed Decision and Order at 8), and is in accord with USDA's sanction policy which 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), 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.

Moreover, the $20,000 civil penalty assessed by the Chief ALJ against Respondent, is well within the range of sanctions in these kinds of cases. USDA consistently imposes significant sanctions for violations of the Animal Welfare Act and the Regulations and the Standards.[19]

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[19]*See, e.g., In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (imposing a $13,500 civil penalty and a 2-year disqualification from obtaining a license for 16 violations of the Animal Welfare Act and the Regulations and Standards); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189 (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), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127 (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), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *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 (continued...)

The purpose of an administrative sanction is deterrence of future violations by the violator and other potential violators. The $20,000 civil penalty assessed by the Chief ALJ is necessary to deter Respondent and other potential violators from committing the same or similar violations.

Ninth, Respondent contends that the Chief ALJ "erred in disregarding the testimony of Respondent's son regarding the poodle, that the puppy in question was bred by David Zimmerman, Jr." (Respondent's Appeal Pet. ¶ 11).

I disagree with Respondent's contention that the Chief ALJ erred by disregarding testimony that a puppy was bred by David Zimmerman, Jr. The Chief ALJ concluded that Respondent operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the

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[19](...continued)
$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*, 156 F.3d 1227 (3d Cir. 1998) (Table); *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).

Regulations (9 C.F.R. § 2.1), based upon Respondent's sale of 33 dogs in commerce, for resale for use as pets. The identity of the person who bred a poodle, which Respondent sold in commerce for resale for use as a pet, is not relevant to this proceeding.

Tenth, Respondent contends that the Chief ALJ erred in disregarding the testimony of Respondent that he did not raise golden retrievers or samoyeds (Respondent's Appeal Pet. ¶ 12).

I disagree with Respondent's contention that the Chief ALJ erred by disregarding testimony that Respondent did not raise golden retrievers or samoyeds. The Chief ALJ concluded that Respondent operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of 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), based upon Respondent's sale of 33 dogs in commerce, for resale for use as pets. The identity of the person who raised the golden retrievers and samoyeds that Respondent sold in commerce for resale for use as pets is not relevant to this proceeding.

Eleventh, Respondent contends that the Chief ALJ "placed an impossible burden on Respondent to bring pet store owners from distant areas to refute the records that were introduced" (Respondent's Appeal Pet. ¶ 13).

I disagree with Respondent's contention that the Chief ALJ placed an impossible burden on Respondent. The Chief ALJ did not require Respondent to call any witnesses.

Twelfth, Respondent contends that "[t]he pet store records were hearsay and were not properly authenticated" (Respondent's Appeal Pet. ¶ 14).

I do not find that the Chief ALJ erred when he admitted pet store records into evidence. Neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence. The Administrative Procedure Act provides, with respect to the admission of evidence, that:

> **§ 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).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act and may be relied upon.[20] Responsible hearsay has long been admitted in the Department's

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[20]*See, e.g., Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (stating that the only limit on hearsay evidence in an administrative context is that it bear satisfactory indicia of reliability; it is not the hearsay nature *per se* of the proffered evidence that is significant, it is the probative value, reliability, and fairness of its use that are determinative), *cert. denied*, 511 U.S. 1081 (1994); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991) (stating that hearsay statements are admissible in administrative hearings, as long as they are relevant and material); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (stating that hearsay evidence is admissible in administrative proceedings, so long as the admission of evidence meets the test of fundamental fairness and probity); *Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 846 (6th Cir. 1990) (stating that hearsay evidence is admissible in an administrative proceeding, provided it is relevant and material); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (stating that hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (stating that it is well established that hearsay evidence is admissible in administrative

(continued...)

administrative proceedings.[21]

Complainant contends that the Chief ALJ "erred in finding that the Animal Welfare Act does not provide authority to permanently disqualify a respondent from obtaining a license" (Complainant's Memorandum in Opposition to Respondent's Appeal and Complainant's Cross-Appeal ¶ II(A)). Respondent responds that if he is permanently barred from obtaining a license, he has no incentive to pay the civil penalty, and Complainant has not offered any authority to support the position that disqualification is authorized by the Animal Welfare Act (Respondent's Response to Complainant's Cross-Appeal at 1).

The Chief ALJ states that "there is no provision for [the sanction of disqualification] in the [Animal Welfare] Act"; therefore, even though Respondent voluntarily terminated his license, "it is appropriate to now revoke [Respondent's license] in order to reinforce the fact that a new license should not be issued to Respondent in the future" (Initial Decision and Order at 8).

I disagree with the Chief ALJ's holding that there is no authority under the Animal Welfare Act to disqualify a person from obtaining an Animal Welfare Act license. While there is no provision in the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, section 21 of the Animal Welfare Act (7 U.S.C. § 2151)[22]

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[20](...continued)
proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982) (stating that hearsay evidence is admissible in administrative proceedings and depending on reliability, can be substantial evidence).

[21]*In re Fred Hodgins*, 56 Agric. Dec. 1242, 1355 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *In re John T. Gray* (Decision as to Glen Edward Cole) 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

[22]Section 21 of the Animal Welfare Act provides, as follows:

§ 2151. Rules and regulations

(continued...)

authorizes the issuance of an order disqualifying an unlicensed violator from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards,[23] and there are numerous instances in which the Secretary of Agriculture has exercised the authority to disqualify unlicensed violators from becoming licensed under the Animal Welfare Act.[24]

Further, I find that the Chief ALJ erred by revoking an Animal Welfare Act license, which the Chief ALJ knew Respondent did not have at the time the Chief ALJ imposed the sanction of revocation. Under section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)), the Secretary of Agriculture may revoke the license of "any person *licensed* as a dealer, exhibitor, or operator of an auction sale" if the person "has violated or is violating" the Animal Welfare Act, the Regulations, or the Standards (emphasis added). I read section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) to mean that the Secretary of Agriculture may revoke the license of a violator who holds a license at the time the Secretary issues an order revoking the license. However, the Secretary of Agriculture cannot revoke the license of a violator who does not hold a license, even if that violator was a licensee under the Animal Welfare Act at the time he or she violated the Animal Welfare Act, the Regulations, or the Standards. My reading of section

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[22](...continued)

> The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. § 2151.

[23]*In re William Joseph Vergis*, 55 Agric. Dec. 148, 165 n.3 (1996); *In re James Petersen*, 53 Agric. Dec. 80, 86 (1994); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

[24]*See In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (disqualifying respondents from obtaining an Animal Welfare Act license for 2 years where respondents had previously voluntarily terminated their license and were not licensed on the date the disqualification order was issued); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (providing for a 7-day suspension of the respondent's Animal Welfare Act license, but stating that if the respondent is not licensed when the order is issued, the respondent is disqualified from becoming licensed under the Animal Welfare Act for 7 days); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (disqualifying the respondent from obtaining an Animal Welfare Act license for one year where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re James Petersen*, 53 Agric. Dec. 80 (1994) (prohibiting the respondents from obtaining an Animal Welfare Act license for one year where the respondents were not licensed when the violations occurred or on the date the disqualification order was issued).

19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) appears to be in accord with the common meaning of the word *revoke* which, in connection with a license, connotes "recalling" or "taking back" a license that is valid until it is revoked.[25] If

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[25] *See generally, e.g.*, Merriam Webster's Collegiate Dictionary 1003 (10th ed. 1997):

revocation . . . *n* . . . : an act or instance of revoking

. . . .

'revoke . . . *vt* . . . **1**: to annul by recalling or taking back : RESCIND < = a will> **2** : to bring or call back

Black's Law Dictionary 1321-22 (6th ed. 1990):

Revocation. . . . The withdrawal or recall of some power, authority, or thing granted, or a destroying or making void of some will, deed, or offer that had been valid until revoked. . . .

See also Abrogation; Cancel; Cancellation; Rescind.

. . . .

Revoke. To annul or make void by recalling or taking back. To cancel, rescind, repeal, or reverse, as to revoke a license or will. *See also* Revocation.

The Oxford English Dictionary Vol. XIII. 837-38 (2d ed. 1991):

revocation . . . .

1. The action of recalling; recall (of persons); a call or summons to return. . . . .

. . . .

2. The action of revoking, rescinding, or annulling; withdrawal (of a grant, etc.).

. . . .

revoke . . . .

I. . . . **1.** To recall, bring back. *to* a (right) belief, way of life, etc.

. . . .

3. To recall; to call or summon back[.] . . .

(continued...)

a violator terminates his or her license prior to the issuance of an order, as occurred in this proceeding, the violator has no license that may be revoked (recalled or

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[25](...continued)

4. To annul, repeal, rescind, cancel.

Bouvier's Law Dictionary 2955 (3d ed. 1914):

REVOCATION. The recall of a power or authority conferred, or the vacating of an instrument previously made.

See also, e.g., *Commonwealth Trust Co. of Pittsburgh v. United States*, 96 F. Supp. 712, 717 (W.D. Pa. 1951) (citing with approval the definition of *revoke* in Webster's New International Dictionary (2d ed.): to recall; to annul by recalling or taking back; to repeal; to take back; to reassume; to recover; to draw back); *State v. Ayala*, 610 A.2d 1162, 1170 (Conn. 1992) (citing with approval the definition of *revoke* in Black's Law Dictionary (6th ed. 1990): to annul or make void by recalling or taking back; to cancel, rescind, repeal, reverse, as to revoke a license or will); *Armstrong v. Butler*, 553 S.W.2d 453, 456 (Ark. 1977) (stating that, as applied to a will, *to revoke* is to recall, cancel, set aside, annul, nullify, set at naught, declare null and void); *Halfmoon v. Moore*, 291 P.2d 846, 848 (Idaho 1955) (stating that the word *revoke* is defined by Funk & Wagnalls New Standard Dictionary as meaning "[t]o annul or make void by recalling or taking back; cancel; rescind; repeal; reverse; as to revoke a license"); *In re Braun's Estate*, 56 A.2d 201, 203 (Pa. 1948) (stating that *to revoke* means to recall, to take back, to repeal); *Glenram Wine & Liquor Corp. v. O'Connell*, 67 N.E.2d 570, 572 (N.Y. 1946) (stating that *to revoke* means to recall; citing the definition of *revoke* in the Oxford Dictionary: to annul, repeal, rescind, or cancel; citing the definition of *revocation* in Bouvier's Law Dictionary: the recall of a power or authority conferred or the vacating of an instrument previously made); *In re Barrie's Will*, 65 N.E.2d 433, 435 (Ill. 1946) (stating that *to revoke* is to recall, to cancel, or to set aside); *In re Walters' Estate*, 104 P.2d 968, 971 (Nev. 1940) (holding that: revocation of a will is an act done by the party who made the will, by which the party recalls the will; stating that *to revoke* is to recall, cancel, or set aside, and a *revocation* can only be done by the grantor, licensor, or maker of an instrument granting a right or privilege); *Ford v. Greenawalt*, 126 N.E. 555, 557 (Ill. 1920) (stating that: *to revoke* is to recall, to cancel, or to set aside, and a *revocation* can only be by the grantor, licensor, or maker of an instrument granting a right or privilege; a *revocation* is the annulment or cancellation of an instrument, act, or promise by or on behalf of the party who made it); *In re Morrow's Estate*, 54 A. 342, 343 (Pa. 1903) (stating that *to revoke* means to recall, to take back, to repeal); *In re Watt's Estate*, 32 A. 42, 44 (Pa. 1895) (stating that *to revoke* means to recall, to take back, to repeal); *Mayor of City of Houston v. Houston City St. Ry. Co.*, 19 S.W. 127, 130 (Tex. 1892) (stating that *revocation* means, *inter alia*, recalling of power); *Vogulkin v. State Bd. of Education*, 15 Cal. Rptr. 335, 337 (Cal. Dist. Ct. App. 1961) (stating that *revoke* means to annul or make void by recalling or taking back); *Touli v. Santa Cruz County Title Co.*, 67 P.2d 404, 406 (Cal. Dist. Ct. App. 1937) (stating that the word *revoke* literally means to call back; it is synonymous with to rescind, to recall, and to cancel); *Bradford v. First Nat. Bank*, 164 N.E. 494, 496 (Ind. Ct. App. 1929) (stating that *to revoke* is to repeal, to annul, to withdraw, to rescind, or to cancel); *Baker v. Fifth Avenue Bank of New York*, 232 N.Y.S. 238, 241 (N.Y. App. Div. 1928) (stating that *revocation* is defined in Bouvier's Law Dictionary as "the recall of a power or authority conferred or the vacating of an instrument previously made"); *Wilmington City Ry. Co. v. Wilmington & B.S. Ry. Co.*, 46 A. 12, 16 (Del. Ch. 1900) (indicating that *revocation* means recall).

taken back) by the Secretary of Agriculture.[26]

Thus, while the Secretary of Agriculture may revoke a current licensee's Animal Welfare Act license for violations which occurred while that person was not licensed, the Secretary of Agriculture cannot revoke a person's Animal Welfare Act license if the person is not licensed at the time the order revoking the license is issued. The appropriate sanction to be imposed against a person whose license would be revoked for violations of the Animal Welfare Act, the Regulations, or the Standards, but for the violator's being unlicensed, is disqualification from becoming licensed.

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 issued under the Animal Welfare Act, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act, without being licensed, as required. 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 $20,000, 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.
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Ave., SW
Room 2014 South Building
Washington, DC 20250-1417

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[26] *But see, e.g., Marmorstein v. New York State Liquor Authority*, 144 N.Y.S.2d 275, 277-78 (N.Y. Sup. Ct. 1955) (citing with approval the definition of the word *revoke* in *Glenram Wine & Liquor Corp. v. O'Connell*, 67 N.E.2d 570, 572 (N.Y. 1946), but stating that the fact that a license had already been surrendered did not bar the board from revoking the license after a hearing); *American Employers' Ins. Co. v. Radzeweluk*, 4 N.Y.S.2d 74, 75, (N.Y. Sup. Ct. 1938) (stating that the fact that a license had already been surrendered did not exonerate defendants from a previous violation nor prevent the subsequent revocation of the license because of such previous violation).

The certified check or money order shall be forwarded to, and received by, Frank Martin, Jr., 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. 98-0005.

3. Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act. The disqualification provisions of this Order shall become effective upon service of this Order on Respondent.

In re: JUDIE HANSEN.
AWA Docket No. 96-0048.
Decision and Order filed December 14, 1998.

Cease and desist order — Civil penalty — License suspension — Failing to remove and dispose of animal and food waste — Failing to allow APHIS inspector access to facilities — Failing to provide adequate housing — Failing to provide clean and safe primary enclosures — Preponderance of the evidence — Correction dates — Willful — Sanction policy — Jury trial — Venue — License to practice law — Esquire.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to comply with the Regulations by failing to allow an APHIS inspector access to her facility and records (9 C.F.R. § 2.126); that Respondent failed to comply with the Standards of care for animals: that Respondent failed to ensure that primary enclosures for kittens had an elevated resting surface (9 C.F.R. § 3.6(b)); that Respondent failed to keep the premises clean in order to protect animals from injury and to facilitate the required husbandry practices (9 C.F.R. § 3.131(c)); that Respondent failed to provide for the removal and disposal of animal waste, so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. §§ 3.1(f), .125(d)); that Respondent failed to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement (9 C.F.R. § 3.53(c)); that Respondent failed to keep the premises where housing facilities for dogs are located clean and to control weeds (9 C.F.R. § 3.11(c)); that Respondent failed to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation (9 C.F.R. § 3.1(e)); that Respondent failed to ensure that animal areas were free of clutter, including equipment, furniture, and stored material (9 C.F.R. § 3.1(b)); that Respondent failed to design and construct housing facilities for dogs so as to be structurally sound and to maintain the facilities in good repair, to protect animals from injury (9 C.F.R. § 3.1(a)); that Respondent failed to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors (9 C.F.R. § 3.131(a)); and that Respondent failed to construct indoor and outdoor housing facilities so as to be structurally sound, and to maintain them in good repair, to protect animals from injury and to contain them (9 C.F.R. § 3.125(a)). The Judicial Officer affirmed the ALJ's finding that the violations were willful. 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 held that reliable hearsay evidence is admissible. *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971). Due process requires an impartial administrative

law judge, *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); however, the fact that the ALJ is an employee of the Department neither disqualifies the ALJ nor renders the hearing unfair. Further, the Judicial Officer held that the Department may combine investigative, adversarial, and adjudicative functions, as long as an agency employee engaged in the performance of investigative or prosecuting functions in the case does not participate in, or advise in, the decision (5 U.S.C. § 554(d)). The Judicial Officer also rejected Respondent's contention that she was entitled to a jury trial in the county in which the violations occurred under Article III, § 2 of the United States Constitution or the Sixth or Seventh Amendments. Instead, the Judicial Officer found that the place of the hearing was to be conducted with due regard for the convenience and necessity of the parties or their representatives (5 U.S.C. § 554(b)). The Department's sanction policy places great weight upon the recommendations of administrative officials who recommended an $8,000 civil penalty, a 30-day suspension, and a cease and desist order. However, the Judicial Officer modified the recommended sanction, as follows: the Judicial Officer issued a cease and desist order, assessed Respondent a civil penalty of $4,300, and suspended Respondent's license for 30 days.

Colleen A. Carroll, for Complainant.
Judie Hansen, Pro se, and Greg Bommelman, for Respondent.
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 May 6, 1996.

On July 1, 1996, Judie Hansen, d/b/a Wild Wind Petting Zoo [hereinafter Respondent], filed an Answer to the Complaint. On July 11, 1997, Complainant filed Motion to Amend Complaint requesting the addition of paragraph 8 to the Complaint. Also, on July 11, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] granted Complainant's Motion to Amend Complaint, but waived the requirement that Respondent file a pre-hearing written answer to the Amended Complaint (Order Granting Motion to Amend Complaint).

The Complaint and the Amended Complaint allege that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards.

The ALJ presided over a hearing on July 23, 1997, in Minot, North Dakota. Colleen Carroll, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Respondent represented herself, with assistance from her partner, Gregory Bommelman. On October 10, 1997, Complainant filed Complainant's Proposed Findings of Fact,

Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]. On January 30, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a $3,000 civil penalty; and suspending Respondent's Animal Welfare Act license for 30 days.

The Hearing Clerk served the Initial Decision and Order upon Respondent on February 4, 1998, by certified mail,* accompanied by the Hearing Clerk's January 30, 1998, letter advising Respondent to file any appeal within 30 days of service, or the Initial Decision and Order would be final. Respondent requested, and I granted, an extension of time to March 20, 1998, in which to file an appeal (Informal Order of March 2, 1998).

On March 24, 1998, Respondent filed Motion to Arrest the Decision [hereinafter Respondent's Appeal], which I infer to be Respondent's appeal 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).** But, since Respondent's Appeal was due March 20, 1998, it is late-filed.

On April 14, 1998, Respondent filed Motion for Dismissal. On May 8, 1998, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order, which contains Complainant's eight arguments in the nature of a cross-appeal [hereinafter Complainant's Response and Cross-Appeal], and on May 12, 1998, Complainant filed Complainant's Response to Respondent's Motion for Dismissal. On October 7, 1998, Respondent filed Respondent's Response to Complainant's Response and Cross-Appeal, and on October 15, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Dismissal and decision.

Respondent's Motion for Dismissal is dismissed. The Rules of Practice provide that "[a]ny motion will be entertained other than a motion to dismiss on the

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*See Domestic Return Receipt for Article Number P 093 041 165.

**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)).

pleading" (7 C.F.R. § 1.143(b)).*** Moreover, Respondent's Motion for Dismissal is redundant because it raises issues that Respondent raised in Respondent's Appeal and are addressed in this Decision and Order, *infra*, in response to Respondent's Appeal.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ in 20 out of the 23 violations the ALJ found out of the 33 alleged violations in the Complaint and Amended Complaint. I also agree with the ALJ that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards. 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."

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

***See *In re Lindsay Foods, Inc.*, 56 Agric. Dec. 1643, 1650 (1997) (Remand Order) (stating that 7 C.F.R. § 1.143(b)(1) prohibits administrative law judges and the judicial officer from entertaining a motion to dismiss on the pleading); *In re Far West Meats*, 55 Agric. Dec. 1045, 1049 (Clarification of Ruling on Certified Questions) (stating that 7 C.F.R. § 1.143(b)(1) prohibits an administrative law judge from entertaining a motion to dismiss on the pleading); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414 (1991) (Remand Order) (holding that the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (stating that the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and that under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading). *Cf. In re Don Van Liere*, 34 Agric. Dec. 1641 (1975) (Order of Dismissal) (stating that the purpose of 9 C.F.R. § 202.10(b), which provides that, in proceedings under the Packers and Stockyards Act, 1921, as amended and supplemented, any motion will be entertained "except a motion to dismiss on the pleadings," is to prevent a respondent from filing a motion to dismiss on the pleadings).

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[.]

. . . .

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

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.]

§ 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.

§ 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.

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, 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 regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

7 U.S.C. §§ 2132(f), (h); 2133; 2140; 2141; 2146(a).

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. . . .

. . . .

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. . . .

. . . .

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(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. . . .

. . . .

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; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

. . . .

(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.

. . . .

(c) A class "C" exhibitor shall identify all live dogs and cats under his or her control or on his or her premises, whether held, purchased, or otherwise acquired:

(1) As set forth in paragraph (b)(1) or (b)(3) of this section[.]

. . . .

(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 G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each exhibitor 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 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 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.

. . . .

(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.

(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.

. . . .

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

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

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

. . . .

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.

(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.

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, or stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

(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 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.

. . . .

§ 3.2 Indoor housing facilities.

. . . .

(d) *Interior surfaces.* The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels).

§ 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;

(ii)Outdoor floor areas in contact with the animals, when the floor areas are not exposed to the direct sun, or are made of a hard material such as wire, wood, metal, or concrete; and

(iii) All walls, boxes, houses, dens, and other surfaces 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.

. . . .

§ 3.6 Primary enclosures.

. . . .

(b) *Additional requirements for cats.*

. . . .

(4) *Resting surfaces.* Each primary enclosure housing cats must contain a resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably. The resting surfaces must be elevated, impervious to moisture, and be able to be easily cleaned and sanitized, or easily replaced when soiled or worn. Low resting surfaces that do not allow the space under them to be comfortably occupied by the animal will be counted as part of the floor space.

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 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 be 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. . . .

. . . .

§ 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 the soiling of dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. . . .

. . . .

(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.

(d) *Pest control.* An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

. . . .

SUBPART C—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT AND TRANSPORTATION OF RABBITS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.53 Primary enclosures.

All primary enclosures for rabbits shall conform to the following requirements:

. . . .

(c) *Space requirements for primary enclosures acquired on or after*

August 15, 1990.

(1) Primary enclosures shall be constructed and maintained so as to provide sufficient space for the animal to make normal postural adjustments with adequate freedom of movement.

(2) Each rabbit housed in a primary enclosure shall be provided a minimum amount of floor space, exclusive of the space taken up by food and water receptacles[.] . . .

. . . .

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

§ 3.125 Facilities, general.

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

. . . .

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. . . .

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. . . .

. . . .

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

9 C.F.R. §§ 1.1; 2.1(a)(1), .50(a), (b)(1), (b)(3), (c)(1), (d), .75(a)(1)(i)-(ix), (b)(1)(i)-(vii), .100(a), .126(a); 3.1(a)-(b), (e)-(f), .2(d), .3(e)(1)(i)-(iii), .4(b), .6(b)(4), .9(b), .11(a), (c)-(d), .53(c)(1)-(2), .125(a), (d), .131(a), (c) (footnotes omitted).

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

. . . .

Statement of the Case and Law

Respondent . . . [was] licensed by [the Animal and Plant Health Inspection Service [hereinafter APHIS]] as a [class "C"] animal exhibitor from 1992 to 1996 [(Tr. 242-45; CX 1-4, 6)]. In 1996, [Respondent] changed her license from [class "C"] exhibitor to [class "A"] dealer [(breeder)**** (Tr. 245; CX 6, 22). Respondent] does business as the Wild Wind Petting Zoo [(Tr. 26-27, 245; CX 4). Respondent] has exhibited . . . animals to the public in North Dakota, South Dakota, and Minnesota (Tr. 2[58-]59).

The APHIS inspector for [Respondent's] facility has been Mr. Donovan Borchert [(Tr. 13, 17)]. The Complaint in this proceeding alleges that [Respondent] violated the Animal Welfare Act and the Regulations and Standards for the care of animals [as revealed] at inspections conducted by [inspector] Borchert on June 19, August 8, and October 25, 1995 [(Compl. ¶¶ 1-7)]. The Amended Complaint alleges that [Respondent also] refused to allow [inspector] Borchert to inspect her facility on June 11, 1997 [(Amended Compl. ¶ 8)].

[Respondent's] alleged violations of the Regulations and Standards are based

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****The class of license held can be determined by looking at the letter designation in the license number, *viz.*, Respondent's license number as of October 1996 was 45-A-0017, indicating that Respondent was a class "A" dealer.

almost entirely on the findings contained in [inspector] Borchert's inspection reports. [Inspector Borchert] testified that he could not remember "a whole lot" about the actual inspections (Tr. 24[-25], . . ., 29).

The factual findings necessary to support the conclusion that a respondent violated the Regulations [and Standards] must be based on reliable, probative, and substantial evidence. Substantial evidence is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The findings in an APHIS inspector's report may constitute substantial evidence. *In re Fred Hodgins*, 56 Agric. Dec. [1242, 1294-95 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997)]. However, the probative value of a report depends on the extent to which the inspector documents the facts supporting [the inspector's] findings. . . .

The purpose 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[-2159]). [Animals regulated by the Animal Welfare Act] include animals [sold to or] exhibited to the public. . . .

The [Animal Welfare] Act and Regulations require that [dealers and] exhibitors be licensed (7 U.S.C. § 2133; 9 C.F.R. § 2.1[(a)(1))]. Section 2.100(a) of the Regulations provides that "[e]ach dealer [and] exhibitor . . . 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" (9 C.F.R. § 2.100(a)). Complainant can seek [civil] penalties and the suspension or revocation of a dealer's [or exhibitor's] license for a violation of the [Regulations or S]tandards. 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)].

Violations

1. Paragraph 5 of the Complaint alleges that [on October 25, 1995, Respondent] violated section 2.50(c) of the Regulations (9 C.F.R. § 2.50(c)) by failing to identify dogs under her control.[1] However, section 2.50(d) [of the Regulations (9 C.F.R. § 2.50(d)) provides that] unweaned puppies [are not required to be individually identified] while they are maintained as a litter with their dam in the same primary enclosure, provided the dam has been individually identified.

---

[1]The violations alleged in the . . . Complaint are discussed in the order in which Complainant . . . presented them in Complainant's Brief.

. . . .

[Inspector] Borchert's October 25, 1995, inspection report, on which the alleged violation of [9 C.F.R. §] 2.50 is based, [states] only that "new dogs and puppies kept back for breeding need to be identified[.] Correct by 10-30-95[.]" (CX 3 [at 2], item 7, III, #45.) It does not state whether the puppies were weaned or not.

[Respondent's] testimony regarding dog identification is as follows:

[BY MS. CARROLL:]

Q. Okay. And you do have dogs that do not always wear their tags. Is that correct?

[BY RESPONDENT:]

A. I try to put the tags on them during the day, but I -- I just can't have a collar and a tag on them at night because they -- several of them sleep on the bed and they get up and they shake and it wakes me up and I have a hard time getting back to sleep. So I'll take them off at night, sometimes I don't put them back on in the daytime.

Q. And on an inspection, during the day, Mr. Borchert found puppies that did not have collars.

A. Those were dogs . . .

Q. Is that correct?

A. Yes. Those were poodles that I had recently groomed. I hadn't washed them yet and that's when I was using those paper collars that you write on. I had taken off the old collars, groomed the puppies and I ran out of time that day so I put them back in the pen and hadn't put their tags back on them because I was going to wash them the next day. You know, there I'd just go through a whole bunch more tags. These puppies are all identified with numbers on a health card that's on the front of the pen.

Q. They weren't wearing their tags though. You agree?

A. They weren't wearing the tags, but they were identified.

Tr. 276-77.

Complainant contends that [Respondent's] testimony constitutes an admission that [Respondent] did not identify her dogs.

[Respondent's] testimony, however, is not that she failed to identify her dogs, but that their tags were temporarily removed at night, or for grooming. [While section 2.50(c) of the Regulations (9 C.F.R. § 2.50(c)) does not provide any exception from the identification requirement for dogs being groomed and it applies [during] the night as well as [during] the day, the record supports a finding that the "new dogs" referred to in inspector Borchert's report (CX 3) are puppies.] . . . [T]he record does not show, and [inspector] Borchert's report [(CX 3)] does not [state], that the[se puppies] were weaned and thereby required to be identified. Complainant has failed to meet its burden of proving that [Respondent] failed to identify her dogs, in violation of section 2.50(c) of the Regulations [(9 C.F.R. § 2.50(c))].

2. Paragraph 3 of the Complaint alleges that on June 19[, 1995,] and October 25, 1995, [Respondent] failed to [make,] keep, and maintain required records, in violation of section[] 2.75(a) and (b) of the Regulations [(9 C.F.R. § 2.75(a), (b))].

Section[] 2.75(a) and (b) [of the Regulations (9 C.F.R. § 2.75(a), (b))] requires a dealer and exhibitor to make, keep, and maintain records or forms which fully and correctly disclose information concerning animals purchased or otherwise acquired, owned, held, or otherwise in the exhibitor's or dealer's possession or under his or her control.

[Inspector] Borchert's inspection report states that on June 19, 1995, "(1) sales at pet zoo's [sic] are not being made (2) puppies must have ID numbers and item 7 and 11 and breed placed on sales records (3) add porcupine to records[.]" (CX 1 [at 3, item 7, IV,] #46.) [Inspector Borchert's] report for October 25, 1995, states that "items #7 and 9-13 old 7006 and 4A new 7006 are not being filled out[.] Correct by 10-26-95[.]" (CX 3 [at 2, item 7, III,] #46.)

[Inspector] Borchert testified that [Respondent's] reports were "not being completely filled out," but that he could not remember what he meant when he referred to items 7 and 11 (Tr. 34, 77).

[Respondent] admitted that some of her forms and reports were not always completely filled out (Answer at 11-14). [Respondent blamed her failure to complete forms and reports on the] . . . difficulty [she had] obtaining information from buyers. [Respondent] also said that [inspector] Borchert insisted that she put a buyer's telephone number on the form even though [the buyer's telephone number is] **not** required by the Regulations.

. . . .

[The record is not sufficiently clear to determine the nature of the information that Respondent failed to include in her records and whether the information that Respondent failed to include in her records was required to be kept by 9 C.F.R. § 2.75(a) and (b). Therefore, paragraph 3 of the Complaint is dismissed.]

3. Paragraph 4(c) of the Complaint alleges that on [June 19, 1995, and] October 25, 1995, [Respondent] failed to keep her facility in good repair so as to protect her animals from injury. Section 3.1(a) of the Standards requires that "[h]ousing facilities for dogs and cats must be designed and constructed so that they are structurally sound[,]" "must be kept in good repair," and "must protect the animals from injury" [(9 C.F.R. § 3.1(a)].

[Inspector] Borchert's October 25, 1995, inspection report states: "(1) ground wire along sides and fronts of runs needs to be covered or sharp points trimed [sic] off and wire put down so dogs can not become entangled[.] Correct by 11-25-95[.]" (CX 3 [at 2, item 7, III], #10.)

[Respondent] did not deny that the wire had sharp points, but contended that [the sharp points] would not injure the dogs because the wire was pushed into the ground and covered with gravel (Tr. 266).

Nevertheless, wire with sharp points, even if covered with gravel, reflects a need for repair and a potential source of injury to animals. It constitutes a violation of section 3.1(a) [of the Standards (9 C.F.R. § 3.1(a))].

4. Paragraph 4(b) of the Complaint alleges that [on June 19, 1995, and October 25, 1995, Respondent] failed to ensure that the dog areas were free of clutter, including equipment, furniture, and stored material, in violation of section 3.1(b) of the Standards [(9 C.F.R. § 3.1(b))].

. . . .

[Inspector] Borchert's June 19, 1995, [inspection] report [states:] "(1) all open feed sacks and dishes or pails setting [sic] around outside of enclosures must be placed in closed containers with lids (2) feed supply of baged [sic] feed stored on top of enclosures must not be kept in animal area[.] Correct by 6-30-95[.]" (CX 1 [at 2, item 7, III], #13.)

[Inspector] Borchert's August 8[, 1995, inspection] report . . . [also lists a violation of section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)), but Complainant did not include the August 8, 1995, violation in the Complaint or Amended Complaint.

Inspector Borchert's] October 25[, 1995, inspection] report states:

> (1) new welp [sic]/kennel area in garage or shop needs to have all machinery parts, tools and supplys [sic] removed and kept back at least 6 ft. from enclosures inside and discarded matter, old wood, scrap metal and

pickup box around outside runs.

CX 3 [at 3, item 7, IV], #11.

[Respondent] said the clutter was in the "shop area" and admitted that the area needed cleaning, but contended that it did not harm the animals (Tr. 265).

[The evidence supports a finding that on June 19, 1995, and October 25, 1995, Respondent failed] to keep the housing facility free from clutter, [in] violation of section 3.1(b) [of the Standards (9 C.F.R. § 3.1(b))].

5. Paragraph 4(a) of the Complaint alleges that on June 19[, 1995,] and October 25, 1995, [Respondent] failed to store supplies of food and bedding [in a manner that protects the supplies from spoilage, contamination, and vermin infestation, in violation of] section 3.1(e) of the Standards [(9 C.F.R. § 3.1(e))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report [states]:

> (1) All open feed sacks and dishes or pails setting [sic] around outside of enclosures must be placed in closed containers with lids (2) Feed supply of baged [sic] feed stored on top of enclosures must not be kept in animal area[.] Correct by 6-30-95[.]

CX 1 [at 2, item 7, III], #13.

[Inspector] Borchert's October [25, 1995, inspection] report states:

> (1) Bottels [sic] of bleach and toxic substances around enclosure in shop area must be stored in cabinets with doors[.] Correct by 11-25-95[.]

CX 3 [at 2, item 7, III], #13.

[Respondent] said the bottle of bleach had been diluted, but admitted that there were empty feed sacks and that a food container was left open on one occasion (Tr. 260, 274-75).

[Respondent's] failures [on June 19, 1995, and October 25, 1995,] to properly store supplies [are] violations of section 3.1(e) [of the Standards (9 C.F.R. § 3.1(e))].

6. Paragraph 6(a) of the Complaint alleges that on August 8[, 1995,] and October 25, 1995, [Respondent] failed to [provide for the regular and frequent collection, removal, and disposal of animal waste and bedding, in violation of] section 3.1(f) of the [S]tandards [(9 C.F.R. § 3.1(f))].

. . . .

[Inspector] Borchert's August 8[, 1995, inspection] report states:

(1) Sack of old soilded [sic] newspapers and soild [sic] newspapers laying down in front of enclosures must be placed in a closed container with a tight fitting lid and the container must be leakproof[.] Correct by 8-10-95[.]

CX 2 [at 2, item 7, III], #14.

[Inspector Borchert's] October 25[, 1995, inspection] report states:

(1) Open 5 gal. pail holding feces at end of dog runs must be covered or removed.

CX 3 [at 3, item 7, IV], #14.

[Respondent] testified that a worker was collecting soiled newspapers as he was cleaning the enclosures and had placed them on the ground to answer the telephone before removing them. She said they were on the ground for no more than 5 minutes (Tr. 280).

As for the open pail of feces, she said a worker was using the pail to clean the cages and had left it on the ground to accompany [inspector] Borchert on his inspection (Tr. 211[-12]).

The soiled newspapers did not constitute a violation, as they occurred as part of the regular cleaning of the facility. [Respondent], however, . . . violated [section] 3.1(f) of the [S]tandards [(9 C.F.R. § 3.1(f)) on October 25, 1995,] by leaving the pail of feces temporarily uncovered . . . . [Section 3.1(f) of t]he [S]tandards requires a container of feces to be covered "at all times." . . . .

7. Paragraph 2(a) of the Complaint alleges that [on June 19, 1995, and August 8, 1995, Respondent] failed to [ensure that the floors and walls of indoor housing facilities were] impervious to moisture, as required by sections 3.2(d) and 3.3(e) of the [S]tandards [(9 C.F.R. §§ 3.2(d), .3(e))].

[Inspector] Borchert's June [19, 1995, inspection] report states:

All raw and clawed or chewed wood throughout exposed to dogs must be sealed.

CX 1 [at 3, item 7, IV], #16 & #20.

[Inspector Borchert's] August [8, 1995, inspection] report states:

(1) All raw wood and chewed siding in enclosures on east end of house and all raw wood on enclosures and welp [sic] boxes in enclosures needs [sic] to be sealed so it is impervious to moisture. (2) Dogs in house must be moved to a facility 10-15 dogs.

CX 2 [at 3, item 7, IV], #16 & #20.

[Respondent] testified that she painted all surfaces with Thompson's Water Seal, a colorless water sealer (Tr. 211).

[Inspector] Borchert did not explain how he determined that the surfaces, even those that were clawed or chewed, were not impervious to moisture. He said that the only way to test the surface is by spraying it with water and that he did not spray water on the surface. (Tr. [119-]20, 194.) I find that Complainant has not met the burden of proving that [Respondent] violated sections 3.2(d) and 3.3(e) of the [S]tandards [(9 C.F.R. §§ 3.2(d), .3(e)), as alleged in paragraph 2(a) of the Complaint].

8. Paragraph 1(a) of the Complaint alleges that [on June 19, 1995, Respondent] did not provide sufficient space for dogs in an out[door] facility[, in violation of s]ection 3.4(b) of the [S]tandards [(9 C.F.R. § 3.4(b))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states that "2 x 4 shelter in pen #6 housing 6 poodles must be enlarged to hold all dogs comfortably and protect them[.] Correct by 6-30-95[.] Additional shelter provided 6-19-95." (CX 1 at 2, item 7, III], #23.)

[Respondent] said that the enclosure contained two dogs, but that she had allowed her four house dogs to go into the outdoor pen for "a few hours" the day of the inspection . . . [and that] the dogs could find protection under the deck and ramp, as well as in the shelter (Answer at 1).

[Complainant did not prove that the shelter structures were not large enough to allow each animal in the shelter to sit, stand, lie in a normal manner, and turn about freely, in violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b))].

[9]. Paragraph 1(b) of the Complaint alleges that [on June 19, 1995, Respondent] housed kittens in a primary enclosure that lacked an elevated resting surface[, in violation of s]ection 3.6(b) of the [S]tandards [(9 C.F.R. § 3.6(b))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states:

Enclosure housing kittens must have a[n] elevated rest area placed in the enclosure large enough to hold all animals in the enclosures[.] Correct by 6-30-95[.]

CX 1 [at 2, item 7, III,] #30.

[Respondent] said that a neighbor had given the kittens to her to find a home for them and that she had put them in a "traveling" pen. She said she was not aware of the requirement for an elevated resting [surface] for the kittens and she had found a home for them the following day. (Answer at 2.)

Whether [Respondent] was aware of the requirement or not, as an animal exhibitor, [Respondent is] charged with knowing the requirements for the care of animals. Her failure to provide the kittens with an elevated resting [surface] is a violation of section 3.6(b) [of the Standards (9 C.F.R. § 3.6(b))].

10. Paragraph 1(c) of the Complaint alleges that [on June 19, 1995, Respondent] failed to keep non-disposable food receptacles clean and sanitized[, in violation of s]ection 3.9(b) [of the Standards (9 C.F.R. § 3.9(b))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states only that "Dirty feed receptacles must be kept clean[.] Correct by 6-20-95[.]" (CX 1 [at 3, item 7, III], #34.) The report does not state that the alleged dirt was due to earth, soil, excreta, or pests.

[Respondent] said that, except for this one incident, she had never been charged with a dirty receptacle and that in this instance [inspector] Borchert was not referring to a food utensil, but to a water receptacle which, in any event, was not dirty, but which had mineral deposits caused by hard water [(Tr. 282-83; Answer at 3)].

It is not shown that mineral deposits constitute a dirty receptacle. I find that Complainant has failed to show by a preponderance of the evidence that [Respondent] violated section 3.9(b) [of the Standards (9 C.F.R. § 3.9(b))].

11. Paragraph 1[(f)] of the Complaint alleges that [on June 19, 1995, Respondent] failed to remove excreta from . . . primary enclosure[s for dogs, in violation of s]ection 3.11(a) [of the Standards (9 C.F.R. § 3.11(a))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states:

> Chicken and ducks housed in with dogs in enclosures beside dogs with large feces accumulated [sic] must be moved to prevent pest problems[.] Correct by 6-25-95[.]

CX 1 [at 3, item 7, III], #36.

[Inspector] Borchert's testimony did nothing to clarify this vague finding. He said he could not remember the matter (Tr. 153-56). [Respondent] said chickens, ducks, and dogs were not housed together and that the ducks caused their wood

chip bedding to get wet, causing it to look like feces [(Tr. 283-84). . . .

. . . .

. . . I conclude that Respondent rebutted Complainant's evidence that Respondent violated section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) on June 19, 1995, as alleged in paragraph 1(f) of the Complaint, and therefore paragraph 1(f) of the Complaint is dismissed.]

12. Paragraph 2(d) of the Complaint alleges that [on June 19, 1995, and August 8, 1995, Respondent] failed to keep the premises clean and to control weeds[, in violation of s]ection 3.11(c) of the [S]tandards [(9 C.F.R. § 3.11(c))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states:

> (1) pallets and supplys [sic] stored around dog facility must be removed from aginst [sic] house and stored neatly away to prevent pest problems. Correct by 6-25-95[.]

CX 1 [at 3, item 7, III], #37.

[Inspector Borchert's] August [8, 1995, inspection] report states:

> (1) tall weeds around enclosures on east end of house need to be mowed or removed[.] Correct by 8-15-95[.]

CX 2 [at 2, item 7, III], #37.

[Respondent] said that the pallets and other material were due to construction activities at her facility and that they were kept away from the animals so as not to be a danger to them [(Answer at 9)]. As for the weeds, she said they were only "pig weeds" which had not been cut because her mower was broken, but that she cut the weeds after the inspection [(Tr. 162; Answer at 10)].

[Respondent's] failure to keep the facility clean and her failure to cut the weeds constitute violation[s] of section 3.11(c) [of the Standards (9 C.F.R. § 3.11(c))].

13. Paragraph 1(e) of the Complaint alleges that [on June 19, 1995, Respondent] failed to maintain an effective pest control program[, in violation of] section 3.11(d) of the [S]tandards [(9 C.F.R. § 3.11(d))].

. . . .

[Respondent] said that this was the only occasion when there were "a lot of flies" during an inspection. She said she promptly removed the dogs and sprayed the enclosure with a kennel-approved spray she kept in the enclosure. She said she also uses baits and traps and has turkeys to eat flies and bugs. [(Answer at 4-5.)]

An "effective" program under section 3.11(d) [of the Standards (9 C.F.R. § 3.11(d)) does not require the complete elimination of pests, such as flies, which is probably impossible to achieve, but a program to "reduce" contamination by pests. The appearance of flies on only one occasion does not necessarily establish that [Respondent] lacked an effective pest control program. The action she took also reflects the maintenance of such a program. [Respondent] did not violate section 3.11(d) [of the Standards (9 C.F.R. § 3.11(d))].

14. Paragraph 2(c) of the Complaint alleges that [on June 19, 1995, and August 8, 1995, Respondent] failed to provide sufficient space for rabbits in their primary enclosure, as required by section 3.53(c) of the [S]tandards [(9 C.F.R. § 3.53(c)),[2] which] . . . sets forth in tables the minimum space for rabbits in inches according to the weight of the rabbits and whether they are housed in groups, as individuals, or as nursing females.

In [the] June [19, 1995,] inspection report, [inspector] Borchert found that:

> 11 rabbits, 7 small and 4 large, house[d] in an enclosure measuring 2 x 4 ft. does not provide the required space need for each animal house in the enclosure [-] small rabbits need 1.5 sq. ft. each and large rabbits 3 sq. ft. - correct by 6-25-95[.]

CX 1 [at 3, item 7, III], #30.

The appropriate table in section 3.53(c) [of the Standards (9 C.F.R. § 3.53(c))] requires that each individual small rabbit have 1.5 square feet of floor space and each larger (up to 8.8 pounds) rabbit have at least 3 square feet. An enclosure that measures 2 feet by 4 feet is too small for th[e] number [and size] of [rabbits identified on inspector Borchert's June 19, 1995, inspection report].

[Respondent] contends that [inspector] Borchert used the wrong table to calculate the space requirements. She states that the table for rabbits in groups should be used. [(Answer at 8-9.)]

Even using that table, however, the enclosure was still too small for the number of [rabbits] it contained. The [S]tandards require that a group of 11 rabbits housed together must be in an enclosure that provides at least 432 square inches of space for each [rabbit]. For this group, each of the seven small rabbits would be entitled to one square foot of space, and each of the four large rabbits would be entitled to two square feet. Therefore, the enclosure was too small for these [rabbits.

---

[2][At the hearing, the ALJ granted Complainant's motion, without objection, to substitute 9 C.F.R. § 3.53(c) in place of 9 C.F.R. § 3.53(b) in paragraph 2(c) of the Complaint (Tr. 187-89).]

Inspector] Borchert also found in his August [8, 1995, inspection] report that [Respondent] housed 8 rabbits in an 8-square foot enclosure, 5 rabbits in another 8-square foot enclosure, and 7 rabbits in a 6.25-square foot enclosure [(CX 2 at 3, item 7, IV, #30)]. These enclosures do not meet the minimum space requirements.

[Respondent] contended that some of the rabbits are not subject to the [Animal Welfare] Act because they are "meat" rabbits (Tr. 189-93). However, there was nothing to distinguish those from the exhibition or breeding rabbits housed in the enclosures.

Accordingly, I find that [Respondent] violated section 3.53(c) [of the Standards (9 C.F.R. § 3.53(c))].

15. Paragraph 7 of the Complaint alleges that [on June 19, 1995, August 8, 1995, and October 25, 1995, Respondent] failed to maintain facilities in good repair for the protection of the animals[, in violation of] section 3.125(a) of the [S]tandards [(9 C.F.R. § 3.125(a))].

. . . .

The inspection reports [for] June [19, 1995,] and August [8, 1995,] refer to a cougar. The June [19, 1995, inspection] report states:

> Cougar is now being house[d] in a school bus with no perimeter fence and the back bus door is left open so one can walk right in and up to cougar. A door to prevent this must be used.

[CX 1 at 3, item 7, IV, #10, #26.]

The August [8, 1995, inspection] report states:

> Cougar is now being house[d] in a school bus with no perimeter fence and the back door of the bus is left open so one can walk right up to the cougar on his chain. A perimeter fence must be placed around the school bus enclosure.

[CX 2 at 3, item 7, IV, #10, #26.]

The June [19, 1995,] and October [25, 1995, inspection] reports refer to enclosures for ferrets. The June [19, 1995, inspection] report states:

> (1) Floor wire in ferret enclosure is broken and rusted off leaving sharp points exposed. Also this floor wire is 1 x 1½ in holes which are to [sic] large for ferrets housed in the enclosure to walk normally[.] Correct by 6-25-95[.]

[CX 1 at 2, item 7, III, #10.]

The October [25, 1995, inspection] report states:

(1) Nails around entrance to ferret enclosure inside shelter need to be removed[.] Correct by 10-26-95[.]

[CX 3 at 2, item 7, III, #10.]

[Respondent] did not deny these allegations. [Respondent] said that the cougar had been moved at inspector Borchert's recommendation from being chained in a pen to the bus [(Answer at 18). Respondent] said the bus is normally locked but had been left open to allow a person to take pictures of the animal [(Tr. 275). Respondent] said that the ferret cage did not have nails, but had exposed heads, which she removed [(Answer at 17)].

[Respondent] violated section 3.125(a) of the [S]tandards [(9 C.F.R. § 3.125(a))] by failing to maintain the facility so as to protect the animals from injury.

16. Paragraph 2(b) of the Complaint alleges that [on June 19, 1995, and August 8, 1995, Respondent] failed to remove and dispose of animal waste, in violation of section 3.125(d) of the [S]tandards [(9 C.F.R. § 3.125(d))].

. . . .

[Inspector] Borchert's June [19, 1995,] inspection report states: "manure piles around barn need to be removed - correct by 7-19-95" (CX 1 [at 2, item 7, III,] #14), and the August [8, 1995, inspection] report states: "manure pile in front of barn needs to be removed 5-6 dump trucks full - correct by 9-8-95" (CX 2 [at 3, item 7, III], #14).

[Respondent] said this pile was horse manure and straw, which was largely decomposed, and presented no health hazard to her animals. [Respondent] also said she has moved the pile. (Answer at 8.)

Nevertheless, manure [is] animal waste [and Respondent is required by] the [S]tandards [to provide for removal and disposal of animal waste. Respondent] violated section 3.125(d) [of the Standards (9 C.F.R. § 3.125(d))] by maintaining the manure pile at the time of the [June 19, 1995, and August 8, 1995,] inspection[s].

17. Paragraph 6(b) of the Complaint alleges that [on August 8, 1995, and October 25, 1995, Respondent] violated section 3.131(a) of the [S]tandards [(9 C.F.R. § 3.131(a))] by failing to remove excreta from the ferret enclosure. . . .

. . . .

Inspector Borchert's August [8, 1995, inspection] report [states] that "ferret

enclosure needs feces accumulations removed - correct by 8-15-95" (CX 2 [at 3, item 7, III], #36) and the October [25, 1995, inspection] report likewise [states] that "ferret and enclosures needs feces accumulations removed. Item #36 corrected in my presence." (CX 3 [at 3, item 7, IV], #36.)

[Respondent] did not deny the accumulation of feces, but said this problem was due to [inspector] Borchert requiring her to put the ferrets in a pen with smaller screening [(Answer at 21). Respondent] said she had had no problem for years with the pen she had been using, but that the one required by [inspector] Borchert "proved impossible to keep clean" and that she ended up having to sell all her ferrets. (Answer at 21[-22].)

Even though [Respondent] may have been in an inspector-created dilemma, Respondent's failures to remove the accumulation of feces in the ferret enclosure were violation[s] of section 3.131(a) [of the Standards (9 C.F.R. § 3.131(a))].

18. Paragraph 1(d) of the Complaint alleges that [on June 19, 1995, Respondent] did not keep her facilities clean and in good repair, in violation of section 3.131(c) of the [S]tandards [(9 C.F.R. § 3.131(c))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report [states] that:

> Alleyway of barn needs empty feed sacks cleaned up and feed barrels straightened up and covers replaced[.] Correct by 6-20-95[.]

CX 1 [at 3, item 7, III], #37 housekeeping 3.131(c).

[Respondent] protested in her Answer that:

> d. This is not correct - the premises was <u>not</u> dirty - there were <u>empty</u> feed sacks chicken feed, hog pellets etc. in the alleyway of the barn - it needed sweepin [sic] - water pails stacked, hatters hung up - but there was <u>nothing</u> that could <u>injure</u> an animal (besides they arn't [sic] loose in the alleyway) - The feed bags were removed and burned - I certainly can't imagine a less than perfect barn alleyway is reason for a fine. I need to stress that my petting zoo was a <u>traveling</u> zoo - No one came to the farm to view the animals. I didn't feel my barn had to be spotless - I'd sure like it to be but sometimes something comes up & there isn't time to do it all - I do not feel I deserve a fine for a cluttered alleyway.

Answer at 3-4.

[Inspector] Borchert's finding appears to be a minimal violation. Nevertheless,

[Respondent's] . . . failure to keep the [premises] clean [is a violation of] section 3.131(c) [of the Standards (9 C.F.R. § 3.131(c))].

19. Paragraph 8 of the Amended Complaint alleges that [Respondent] violated [section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and] section 2.126 of the [R]egulations [(9 C.F.R. § 2.126)] by refusing an inspection of her facility on June 11, 1997 . . . .

. . . .

[Inspector] Borchert testified that on June 11, 1997, [Respondent] denied him and Larry Neustel, an APHIS regulatory enforcement investigator, access to her facility to conduct an inspection. He did not elaborate on the circumstances. (Tr. 19[-20].) Mr. Neustel did not testify.[3]

[Respondent's] account of the incident is as follows:

BY MR. BOMMELMAN:

Q. Okay, in regards to R-11 dated June 11, 1997. In regards to an inspection, did you refuse the inspection when Don Borchert and Larry Neustel, I don't know if I pronounced his name right, came to your facility? Did you refuse to let those guys do an inspection?

A. I refused to let Don do the inspection because we had asked the Texas office and the Maryland office . . .

* * *

MS. CARROLL: Objection; non-responsive. She's answered the question and he's calling for a narrative -- or she's volunteering a narrative.

---

[3]In [Respondent's] Answer . . ., [Respondent] states:

P.S. - your investigator - Larry Neustel was here Sept. 20-95 - we showed him our entire kennel & pointed out where Don found fault - He told us he found nothing to warrant a fine and would recommend only a warning - I didn't know why we would be issued even a warning - Larry was a super, nice guy - we could easily work with someone like him - He had a lot of common sense on how a working kennel operates - He understood it is not a show place that is 100% perfect - 100% of the time!

[Answer at 25.]

ADMINISTRATIVE LAW JUDGE: All right, I'll allow her to talk in narrative form. Go ahead, Miss Hansen.

THE RESPONDENT: Where was I? What was the question?

MR. BOMMELMAN: Okay, dated June 11th.

THE RESPONDENT: Did I refuse the inspection? No. I refused the inspector. We did ask for a different inspector. We believe that a different inspector would find totally different, or much less - much less minor, cosmetic violations. We asked for a different inspector. When -- when Don and Larry came, I didn't want Don to do the inspection. I asked Larry if he would do the inspection, so did you.

ADMINISTRATIVE LAW JUDGE: Who is Larry?

THE RESPONDENT: Larry Neustel, he's an investigator. He was an inspector, so we felt he should be qualified. He said he could not do it because he was an investigator. I asked him if he would just go out to the kennel and look at it just for his opinion so he could see what it looked like at the present time. We've done a great deal of improvement, a lot of new material and he said he couldn't do it. I wish he would have, you know. I really wish he would have gone through it. I wish he would have been here, I would have asked him this same thing and he would have told you the same thing. When we got the witness . . .

MS. CARROLL: Objection, Your Honor. She's speculating about testimony of somebody. I move to strike.

ADMINISTRATIVE LAW JUDGE: Yes, it's -- you're speculating of what he might say if he were here.

THE RESPONDENT: When we got the witness list that you would be presenting, his name was on there so we assumed that was -- you know, for sure that he'd be here. If I knew he wasn't going to be here, I would have called him as -- as my own witness. I don't know why he isn't here when he was listed on the witness sheet.

Tr. 217-19.

[Respondent] had also apparently encountered problems with [inspector] Borchert over a period of time. [Respondent] said [inspector Borchert] would only criticize her facility when he conducted an inspection and that "I literally get sick to my stomach when Don [Borchert] drives in because I know he's only there to find fault & never has a positive word." (Answer at first unnumbered page.)

[Respondent] also said:

> . . . Don does not tell you where the problem areas are when he does his inspections - He just looks at everything then goes in the house and starts writing - When he hands the inspection sheet over to be signed I've learned to read it all over - then I ask him to go back outside and show me where the problem is - otherwise, I don't know[.]

Answer at 7.

> . . . Sometimes I forget to ask [animal buyers for their phone numbers] - after all there is no space [on forms] that specifically asks for the buyer's phone number - I explained this to Don - that if USDA wanted or required the phone # they'd have a space for it - Don really lost his temper - He shook his finger at me and his voice got high and squeaky and he shouted. "I told you to put the phone number in that box and I gave you a sheet where I wrote that in!" . . . After Don lost his temper we called Maryland & told them what happened - They assurred [sic] us that USDA does not require the phone number of the buyer and that if Don spoke to me that way again that I was to gather up my papers and ask him to leave and to tell him that the inspection was over - then I was to call Maryland and Texas.

Answer at 12-13.

[Respondent] also testified about [inspector] Borchert not wearing protective clothing on another occasion until she complained to his superiors:

> . . . He did not ever wear protective gear when he first was doing the inspection until we found out it was available. We had parvo on our place and never had a clue where it came from. After we found out he did have protective gear available, we called the Texas office and said the inspector was standing in our kennel without any protective gear. And they called him back and talked to him for quite a length of time and after that he

> always wore his protective gear. It's -- I think it's a real danger having him go from somebody's pet shop, somebody else's kennel. We know other inspectors that brought -- it was some chicken disease onto a place. They just inspected a chicken. . .

Tr. 303-04.

[Respondent] said that other dog breeders had also complained about [inspector] Bo[r]chert's inspections (RX 19).

However, regardless of [Respondent's] reasons for objecting to [inspector] Borchert as an inspect[or], or what other animal handlers may have thought of [inspector] Borchert, he was still an APHIS official with the authority under the [Animal Welfare] Act and [the R]egulations to conduct inspections for the Secretary. [Respondent] could not refuse to allow him to conduct an inspection. [Respondent] therefore violated [section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and] section 2.126 of the [R]egulations [(9 C.F.R. § 2.126)] even if she were willing to allow another APHIS official to conduct the inspection.

Sanction

The Department'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, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), 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 also commands, in determining the [civil penalty] 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.

7 U.S.C. § 2149(b).

[Respondent] contends that she corrected many of the deficiencies found at her facility and offered statements from many persons with whom she deals attesting to the condition of her facility and her animals (RX 20). Even though [Respondent] may have corrected deficiencies and even corrected them within the time period allowed by the inspector, it is the Department's policy that a [subsequent correction of a condition not in compliance with the Animal Welfare Act or the Regulations and Standards has no bearing on the fact that a violation has occurred.] *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996).

There is no showing, however, that, despite the deficiencies found by [inspector] Borchert, [that Respondent intentionally mistreated her animals]. . . . [Inspector] Borchert also testified that [Respondent] kept her animals in "good condition" (Tr. 194).

Considering all the circumstances, I find a penalty of $[4,3]00 is appropriate. As for a suspension of [Respondent's Animal Welfare Act] license, Complainant contends that the violations were willful and seeks a 30-day license suspension. As . . . [these] violations [were] willful, [Respondent's Animal Welfare Act] license [is] suspended for 30 days.

Findings of Fact

1. Respondent, Judie Hansen, doing business as Wild Wind Petting Zoo, was [a class "C"] animal exhibitor licensed from 1992 to 1996 by APHIS [and currently holds a class "A" dealer license].

2. On June 19, 1995, Respondent . . . failed to:

a. ensure that primary enclosures for kittens had an elevated resting surface; and

b. keep the premises clean . . . in order to protect animals from injury and to facilitate the required husbandry practices.

[3]. On June 19[, 1995,] and August 8, 1995, Respondent . . . failed to:

a. provide for the removal and disposal of animal . . . waste . . . so as to minimize vermin infestation, odors, and disease hazards;

b. construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement; and

c. keep the premises where housing facilities for dogs are located clean and . . . control weeds. . . .

[4]. On June 19[, 1995,] and October 25, 1995, Respondent . . . failed to:

a. store supplies of food . . . in a manner that protects the supplies from

spoilage, contamination, and vermin infestation; and

b. ensure that animal areas were free of clutter, including equipment, furniture, and stored material.

[5]. On August 8, [1995,] and October 25, 1995, Respondent . . . failed to remove excreta from primary enclosures for ferrets as often as [necessary] to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors.

6. On June 19, [1995,] August 8, [1995,] and October 25, 1995, Respondent . . . failed to construct indoor and outdoor housing facilities so as to be structurally sound and maintain [indoor and outdoor facilities] in good repair, to protect animals from injury and to contain them.

[7]. On October 25, 1995, Respondent failed to:

a. design and construct housing facilities for dogs so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury; and

b. provide for the regular and frequent collection, removal, and disposal of animal waste in a manner that minimizes the risk of contamination and disease.]

[8]. On June 11, 1997, Respondent failed to allow an APHIS inspector access to her facility and records.

Conclusions of Law

Respondent . . . willfully violated [section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and] the following Regulations and Standards: 9 C.F.R. §§ . . . 2.100(a), 2.126; 3.1(a), 3.1(b), 3.1(e), 3.1(f), 3.6(b), . . . 3.11(c), 3.53(c), 3.125(a), 3.125(d), 3.131(a), and 3.131(c).

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.[4] The standard of proof in administrative proceedings conducted

[4] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981).

under the Animal Welfare Act is preponderance of the evidence.[5] An examination of the record reveals that the ALJ found that Complainant proved 23 of the 33 violations alleged in the Complaint and the Amended Complaint.[6] I agree with the

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[5]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 19 (Nov. 18, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 45-46 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 149 (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *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*, 156 F.3d 1227 (3d Cir. 1998) (Table); *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).

[6]The ALJ found that: (1) Respondent violated section 3.6(b) of the Standards (9 C.F.R. § 3.6(b)) on June 19, 1995, as alleged in paragraph 1(b) of the Complaint; (2) Respondent violated section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)) on June 19, 1995, as alleged in paragraph 1(d) of the Complaint; (3) Respondent violated section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) on June 19, 1995, as alleged in paragraph 1(f) of the Complaint; (4) Respondent violated section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)) on June 19, 1995, and August 8, 1995, as alleged in paragraph 2(b) of the Complaint; (5) Respondent violated section 3.53(c) of the Standards (9 C.F.R. § 3.53(c)) on June 19, 1995, and August 8, 1995, as alleged in paragraph 2(c) of the Complaint; (6) Respondent violated section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) on June 19, 1995, and August 8, 1995, as alleged in paragraph 2(d) of the Complaint; (7) Respondent violated section 2.75 of the Regulations (9 C.F.R. § 2.75) on June 19, 1995, and October 25, 1995, as alleged in paragraph 3 of the Complaint; (8) Respondent violated section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) on June 19, 1995, and October 25, 1995, as alleged in paragraph 4(a) of the Complaint; (9) Respondent violated section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)) on June 19, 1995, and October 25, 1995, as alleged in paragraph 4(b) of the Complaint; (10) Respondent violated section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)) on August 8, 1995, and October 25, 1995, as alleged in paragraph 6(b) of the Complaint; (11) Respondent

(continued...)

ALJ, except that I dismiss the three violations alleged in paragraphs 1(f) and 3 of the Complaint. Thus, I find that Complainant has proven 20 of the 33 violations alleged.

Respondent's Appeal consists of two separately handwritten appeal documents by Greg Bommelman and Judie Hansen, respectively. The portion of Respondent's Appeal written by Mr. Bommelman is referred to as "Respondent's Appeal A"; the portion of Respondent's Appeal written by Respondent is referred to as "Respondent's Appeal B."

Respondent's Appeal A contains 17 arguments. First, Respondent contends that the ALJ decided not upon facts, but upon hearsay (Respondent's Appeal A at 1, ¶ 1). However, an examination of the record does not reveal that the ALJ relied upon unreliable hearsay evidence or that the ALJ's decision is factually unsupported. Moreover, neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence. The Administrative Procedure Act provides, with respect to the admission of evidence, that:

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[9](...continued)
violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) on June 19, 1995, August 8, 1995, and October 25, 1995, as alleged in paragraph 7 of the Complaint; and (12) Respondent violated section 2.126 of the Regulations (9 C.F.R. § 2.126) on July 11, 1997, as alleged in paragraph 8 of the Amended Complaint.

Moreover, the ALJ, in Finding of Fact 3(c), states that on June 19, 1995, and October 25, 1995, Respondent "failed to design and construct housing facilities for dogs and cats so as to be structurally sound and to maintain the facilities in good repair, to protect animals from injury, to contain them and to restrict the entrance of other animals" (Initial Decision and Order at 24), in violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)), as alleged in paragraph 4(c) of the Complaint. However, the ALJ's discussion only includes Respondent's failure to keep her facility in good repair, in violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) on October 25, 1995 (Initial Decision and Order at 6). Therefore, I infer that the ALJ only found the October 25, 1995, violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)), alleged in paragraph 4(c) of the Complaint. Further still, the ALJ, in Finding of Fact 4(a), states that on August 8, 1995, and October 25, 1995, Respondent failed to "provide for the regular and frequent collection, removal and disposal of animal waste and bedding in a manner that minimizes the risk of contamination and disease" (Initial Decision and Order at 24), in violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), as alleged in paragraph 6(a) of the Complaint. However, the ALJ explicitly states in his discussion of the violations that the evidence was not sufficient to find that Respondent violated section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) on August 8, 1995 (Initial Decision and Order at 9). Therefore, I infer that the ALJ only found the October 25, 1995, violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) alleged in paragraph 6(a) of the Complaint.

§ 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).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act.[7] Moreover,

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[7]*See, e.g., Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (stating that the only limit on hearsay evidence in an (continued...)

responsible hearsay has long been admitted in the Department's administrative proceedings.[8]

Second, Respondent argues that Respondent cannot "achieve" a decision because the ALJ is prejudiced by being employed by USDA. However, no instances of prejudicial actions by the ALJ are cited (Respondent's Appeal A at 1, ¶ 2). Due process requires an impartial tribunal, and a biased administrative law judge deprives the litigant of this impartiality.[9]

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[7](...continued)
administrative context is that it bear satisfactory indicia of reliability; it is not the hearsay nature *per se* of the proffered evidence that is significant, it is the probative value, reliability, and fairness of its use that are determinative), *cert. denied*, 511 U.S. 1081 (1994); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991) (stating that hearsay statements are admissible in administrative hearings, as long as they are relevant and material); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (stating that hearsay evidence is admissible in administrative proceedings, so long as the admission of evidence meets the test of fundamental fairness and probity); *Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 846 (6th Cir. 1990) (stating that hearsay evidence is admissible in an administrative proceeding, provided it is relevant and material); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (stating that hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (stating that it is well established that hearsay evidence is admissible in administrative proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982) (stating that hearsay evidence is admissible in administrative proceedings and depending on reliability, can be substantial evidence).

[8]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 39 (Nov. 18, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1355 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

[9]*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
(continued...)

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

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[9](...continued)
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).

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 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.[10] The fact that the administrative law judge who presides over a hearing and issues an initial decision in the proceeding is an employee of the agency which instituted the proceeding neither disqualifies the administrative law judge nor renders the hearing unfair. Administrative law judges are employed by the agency whose actions they review. If employment by an agency constituted legal bias, as Respondent contends, administrative law judges would be forced to recuse themselves in every case.

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[10] *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).

I have reviewed the record in this proceeding, and I find neither a basis for Respondent's allegation that the ALJ is biased or prejudiced against Respondent in this proceeding nor evidence that Respondent did not receive a fair hearing.

Third, Respondent argues that Complainant did not call Mr. Larry Neustel, who was on Complainant's witness list, and that the ALJ failed to "read" a report by Mr. Neustel, which report Respondent argues would show Respondent "not at fault" (Respondent's Appeal A at 1, ¶ 3). A party is not required to call a person as a witness merely because that person's name appears on that party's list of anticipated witnesses. If Complainant believes that Complainant's case would not be advanced by Mr. Neustel's testimony, Complainant is not constrained to call Mr. Neustel as a witness. Moreover, the ALJ committed no error by not "reading" Mr. Neustel's report.

Fourth, Respondent argues that the ALJ did not find a "pattern of abuse of power created" by inspector Borchert, which means to Respondent that the ALJ did not take the "Breeder Opinions" in RX 19 under advisement as the ALJ had said he would do in the hearing (Respondent's Appeal A at 1, ¶ 4). I disagree with Respondent because the ALJ did address RX 19, even though the ALJ was specific at the hearing that other breeders' opinions of inspector Borchert would be given little weight, as follows:

> Hansen said that other dog breeders had also complained about Bouchert's [sic] inspections. (RX 19.)
>
> However, regardless of Hansen's reasons for objecting to Borchert as an inspection [sic], or what other animal handlers may have thought of Borchert, he was still an APHIS official with the authority under the Act and regulations to conduct inspections for the Secretary. She could not refuse to allow him to conduct an inspection. Hansen therefore violated section 2.126 of the regulations even if she were willing to allow another APHIS official to conduct the inspection.

Initial Decision and Order at 21-22.

> THE RESPONDENT: It's my belief that a lot of these charges that we've been written up for would not have been written up by other inspectors and it's my attempt to find out how other inspectors do their inspecting. And I think you'd be pretty interested in our response.

ADMINISTRATIVE LAW JUDGE: That's been marked as R-19, then. All right.

* * *

. . . .

THE RESPONDENT: What about these packets that we gave you?

. . . .

THE RESPONDENT: There are some dog breeders that have made statements in there that they said that Don said about other breeders and us. Do we have any way of refuting anything that, you know, that he . . .

. . . .

MS. CARROLL: They want to refute the hearsay.

THE RESPONDENT: He's made comments to other people about our kennels and the condition of our animals.

ADMINISTRATIVE LAW JUDGE: Well, that's -- that's hearsay. Even if I admit those, I'm not going to give a whole lot of weight to what was said or allegedly said in those comments because I don't think that's relevant to make a determination but whether what's specifically in the complaint today and that's what I'm concerned about and not what may have been said someplace else. It's whether there is substantial evidence to support his findings that there were violations.

. . . .

ADMINISTRATIVE LAW JUDGE: I understand the point you're making, yes. I understand, but that's why I'm reserving on deciding -- I'm going to look through it to see if I shall admit it or not.

Tr. 205, 321-23.

Fifth, Respondent claims to have a tape of a USDA attorney stating that dog breeders cannot win at a hearing (Respondent's Appeal A at 2, ¶ 5). Such a tape

has no relevance to this proceeding.

Sixth, Respondent contends that she wrote USDA a letter requesting a different inspector than inspector Borchert, but that USDA purposely sent the same inspector, so that USDA could write a violation for refusal to allow inspection (Respondent's Appeal A at 2, ¶ 6). This argument has no merit. If a dealer or exhibitor refuses to allow an APHIS official to inspect the dealer's or exhibitor's facility during business hours, then a violation of section 2.126 of the Regulations (9 C.F.R. § 2.126) has occurred, and the ALJ was correct in finding the violation.

Seventh, Respondent argues that she proved that the inspector has poor credibility (Respondent's Appeal A at 2, ¶ 7). This argument is not supported in the record.

Eighth, Respondent argues no dealer "can be 100% correct 100% of the time" (Respondent's Appeal A at 2, ¶ 8). However, each dealer and exhibitor is required to be in compliance with the Regulations and Standards at all times (9 C.F.R. § 2.100(a)). The fact that compliance with the Regulations and Standards may be difficult for Respondent is neither a defense nor a mitigating circumstance.

Ninth, Respondent accuses USDA of allowing USDA inspectors to engage in the character assassination of breeders (Respondent's Appeal A at 2, ¶ 9). Breeder character assassination by USDA personnel is not proven in this record, but, even if USDA inspectors engaged in character assassination, such activity would not be relevant to this proceeding.

Tenth, Respondent argues that the testimonials from puppy buyers in RX 20 should be sufficient evidence to show that Respondent has been wrongfully accused of violations (Respondent's Appeal A at 3, ¶ 10). I disagree. The testimonials of Respondent's customers are irrelevant to Respondent's compliance with the Animal Welfare Act and the Regulations and Standards.

Eleventh, Respondent complains that the ALJ denied Respondent's request to have a number of days equal to Complainant to file a brief (Respondent's Appeal A at 3, ¶ 11; Respondent's Appeal B at 19). The Rules of Practice do not require between parties an equal number of days within which to file a brief, but require only that each party have a "reasonable" opportunity to file a brief (7 C.F.R. § 1.142(b)). Respondent had from the close of the hearing on July 23, 1997, to November 21, 1997, to file her brief. I find that this period of time afforded Respondent a reasonable opportunity to file her brief, and I do not find error because Complainant was given a longer period of time within which to file a brief than Respondent.

Twelfth, Respondent argues that USDA sets its own rules in the hearing to suppress Respondent's evidence and prevent the truth about USDA's inspector from revelation (Respondent's Appeal A at 3, ¶ 12). This argument has no merit. The

Rules of Practice apply to all parties, including Complainant, and do not provide for the suppression of evidence.

Thirteenth, Respondent argues that the inspector had difficulty remembering how "bad" the kennel was (Respondent's Appeal A at 3, ¶ 13). However, the inspector is not required to remember details, which may be gleaned from the inspection reports made at the time of the inspection.

Fourteenth, Respondent argues that the "bookkeeping" violations are based upon the inspector requiring more information than is required under the Regulations (Respondent's Appeal A at 4, ¶ 14) and contends that she did not violate the recordkeeping requirements in section 2.75 of the Regulations (Respondent's Appeal B at 1-4). The Complaint alleges that Respondent willfully violated section 2.75(a) and (b) of the Regulations (9 C.F.R. § 2.75(a), (b)) by failing to make, keep, and maintain records and forms of the sale or acquisition of animals (Compl. ¶ 3). As discussed in this Decision and Order, *supra*, Complainant did not prove by a preponderance of the evidence that Respondent violated section 2.75 of the Regulations (9 C.F.R. § 2.75), as alleged in the Complaint, and paragraph 3 of the Complaint is dismissed.

Fifteenth, Respondent implies that the reason for inspector Borchert's duty stations with USDA are because of the type of information in the "Breeder Reports" (Respondents Appeal A at 4, ¶ 15). The reason for inspector Borchert's duty station is not relevant to any issue in this proceeding.

Sixteenth, Respondent reiterates previous arguments that the inspector has spread rumors, has committed character assassination, and has tried to damage Respondent's business (Respondent's Appeal A, at 4, ¶ 16). The record does not support these charges as true. Moreover, even if true, such behavior by the inspector is not a defense to the allegations in the Complaint nor a mitigating circumstance.

Seventeenth, Respondent argues that Wild Wind Kennels has "a difficult time passing any inspection, because the rules change" (Respondent's Appeal A at 5, ¶ 17). To illustrate the argument, Respondent argues that everything was fine at Respondent's pre-license inspection, but then inspector Borchert "tore off the top copy after it was signed" and wrote non-complying items on it for the next inspection (Respondent's Appeal A at 5, ¶ 17). This argument has no merit. In fact, Respondent disproves the argument, since Respondent passed the inspection prior to license. I find that an inspector's remarks on a pre-license inspection report for items to be in compliance by the next inspection cannot reasonably be construed to be a "rules change."

Respondent's Appeal B contains 21 arguments which are not raised in Respondent's Appeal A. First, Respondent denies that she violated section 3.1(a)

of the Standards (9 C.F.R. § 3.1(a)) by having sharp points and exposed wire on dog runs, as alleged in paragraph 4(c) of the Complaint (Respondent's Appeal B at 4-5). Respondent argues that the sharp points were "blunt cut with a wire cutter - the long points were left on purpose - they were pushed into the dirt to hold the wire in place while the gravel was shoveled over it" (Respondent's Appeal B at 4-5). I infer that Respondent's point is that there was a repair job in progress which would have buried the exposed wire and sharp points safely under gravel. However, I find that Respondent has admitted the violation. The violation occurred when the dogs were exposed to the hazard of the sharp pointed wire. Moreover, Respondent does not explain how "blunt cut" wire would not continue to be a dangerous, flesh-penetrating hazard, even when not sharpened into points. Further, Respondent does not explain how the burial of the wire points would protect dogs who dig, if the reason for the repair job was to counter digging dogs: "I was repairing a place where dogs could have dug under the fence" (Respondent's Appeal B at 5 (emphasis in original)). Therefore, I reject Respondent's argument.

However, paragraph 4(c) of the Complaint alleges that the violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) occurred on both June 19, 1995, and on October 25, 1995. The ALJ referenced only the evidence from the October 25, 1995, inspection report (Initial Decision and Order at 6). Inspector Borchert's June 19, 1995, inspection report (CX 2) does not provide any evidence that Respondent violated section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) on June 19, 1995. Therefore, Complainant has proven only one of the two violations of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) alleged in paragraph 4(c) of the Complaint.

Second, Respondent denies that she violated section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)), as alleged in paragraph 4(b) of the Complaint (Respondent's Appeal B at 5). Although Respondent admits to having "various items" in the housing area for dogs, Respondent argues that the kennel was being built in a former machinery repair shop and that the items still there could not be put out in the weather, but that Respondent still did nothing "to violate the dogs health and safety" (Respondent's Appeal B at 5). However, Respondent fails to state how having equipment and stored materials in the housing facilities does not violate the prohibition in section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)) against having "equipment" and "stored materials" in the housing facilities. Respondent's argument is rejected.

Third, Respondent denies that she violated section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)), as alleged in paragraph 4(a) of the Complaint (Respondent's Appeal B at 5). Respondent argues that the feed was placed on pallets away from the wall on the advice of inspector Borchert. Respondent admits that the feed was

on top of the enclosures in the animal area, but argues that she was unaware that that constituted a violation. When Respondent learned it was a violation, Respondent states that it was corrected the next day (Respondent's Appeal B at 5). Respondent admits to having bleach and open food containers not properly stored. Respondent argues that the bleach was diluted and the food sack was a bag containing a small amount of feed which would not fit in a plastic storage container (Respondent's Appeal B at 6). Since Respondent admits the violations, and because the excuses offered do not exculpate Respondent's violations, I affirm the ALJ's conclusion that Respondent violated section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)), as alleged in paragraph 4(a) of the Complaint.

Fourth, Respondent denies that she violated section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), as alleged in paragraph 6(a) of the Complaint (Respondent's Appeal B at 6-7). Although Respondent admits that the pail of feces did not have a lid on it at the time of the October 25, 1995, inspection, Respondent argues that her employee was cleaning pens at the time of the inspection. The ALJ found that the open pail of feces was caused by the inspection and constituted a "technical" violation (Initial Decision and Order at 9). Under the circumstances, I find this violation to be minor and neither the civil penalty assessed against Respondent nor the suspension of Respondent's Animal Welfare Act license is based upon this violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)). As discussed in this Decision and Order, *supra*, neither the ALJ nor I found that Respondent violated section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) on August 8, 1995, as alleged in paragraph 6(a) of the Complaint.

Fifth, Respondent denies that she violated section 3.6(b) of the Standards (9 C.F.R. § 3.6(b)), as alleged in paragraph 1(b) of the Complaint (Respondent's Appeal B at 7-8). Respondent admits that she did not know of the elevated surface requirement in the Standards (Answer at 2). However, Respondent argues that the kittens were in a traveling enclosure, which has no shelf, and is not required to have a shelf, but that the Complaint charges her with housing the kittens in a primary enclosure, which must have an elevated resting surface.

This record does not reveal that inspector Borchert drew a distinction between primary enclosures for cats, regulated under section 3.6(b)(4) of the Standards (9 C.F.R. § 3.6(b)(4)), requiring elevated resting surfaces and mobile or traveling housing facilities for cats, regulated under sections 3.5 and 3.14 of the Standards (9 C.F.R. §§ 3.5, .14), which have no requirement for elevated resting surfaces (CX 1 at 2, item 7, III, #30; Tr. 68-69). I infer that inspector Borchert meant primary enclosures, rather than mobile or traveling housing facilities, because the Complaint charges Respondent that way (Compl. ¶ 1(b)) and because the context of inspector Borchert's testimony (Tr. 68-69) indicates that Complainant and the

ALJ understood the charge to be for primary enclosures.

The evidence is that Respondent obtained these kittens from a neighbor for adoption and that the kittens were adopted the "next day." I conclude that Respondent did not transport the kittens anywhere and that Respondent committed a violation by housing kittens in a traveling enclosure used as a primary enclosure, without an elevated resting surface. Nonetheless, based on the short duration of this violation, neither the civil penalty assessed against Respondent nor the suspension of Respondent's Animal Welfare Act license is based on this violation of section 3.6(b) of the Standards (9 C.F.R. § 3.6(b)).

Sixth, Respondent denies that she violated section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)), as alleged in paragraph 1(f) of the Complaint (Respondent's Appeal B at 8). I find that Complainant did not prove the violation of 9 C.F.R. § 3.11(a) alleged in paragraph 1(f) of the Complaint by a preponderance of the evidence. First, while CX 1 at 3, item 7, III, #36, which is the basis for the allegation in paragraph 1(f) of the Complaint, provides some evidence that Respondent violated 9 C.F.R. § 3.11(a), it is not clear. Second, as stated in this Decision and Order, *supra*, Respondent rebutted Complainant's evidence.

Seventh, Respondent denies that she violated section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)), as alleged in paragraph 2(d) of the Complaint (Respondent's Appeal B at 8-9). However, Respondent nevertheless admits the charge from the June 19, 1995, inspection report (CX 1 at 3, item 7, III, #37), when she states that "2 or 3 pallets were stood on end off the ground on a metal shelf at the end of a van body - they were stored neatly - and were not a violation of 3.11(c)" (Respondent's Appeal B at 8). Also, Respondent admits to having "pig weeds" at the east end of her house (Tr. 162), as alleged in the August 8, 1995, inspection report (CX 2 at 2, item 7, III, #37), but argues that the particular weeds in question are such that no vermin could hide there (Respondent's Appeal B at 9). Therefore, I conclude that Respondent admits to the facts supporting the violations of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)), even though Respondent disagrees that these facts should constitute violations. I agree with the ALJ that these facts constitute violations of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

Eighth, Respondent denies that she violated section 3.53(c) of the Standards (9 C.F.R. § 3.53(c)), as alleged in paragraph 2(c) of the Complaint (Respondent's Appeal B at 9). Respondent once again argues, as Respondent did before the ALJ, that the rabbits cited by inspector Borchert as being housed in insufficient space were actually "meat" rabbits not subject to regulation under the Animal Welfare Act (Respondent's Appeal B at 9).

However, I agree with the ALJ that there was nothing at the kennel to distinguish breeding rabbits or exhibition rabbits from "meat" rabbits (Initial

Decision and Order at 15). Therefore, the ALJ's decision finding the violation of section 3.53(c) of the Standards (9 C.F.R. § 3.53(c)), as alleged in paragraph 2(c) of the Complaint, is affirmed.

Ninth, Respondent denies that she violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)), as alleged in paragraph 7 of the Complaint, concerning the cougar's housing facilities and primary enclosure, on June 19, 1995, and August 8, 1995 (Respondent's Appeal B at 10). Respondent argues that her facilities were in good repair and did protect the cougar from injury and contain the cougar; that there is no possibility that the cougar could escape; that the cougar was chained to keep the cougar several feet from the back door of the school bus; that the door was only open when Respondent was actually nearby and interacting with the cougar; that the door was otherwise always closed and locked; and that inspector Borchert's report that the door was left open is incorrect (Respondent's Appeal B at 10).

Inspector Borchert provided photographs documenting his conclusions that the lack of a perimeter fence and the open door to the school bus housing the cougar means that humans or animals could move right up to the cougar, possibly endangering the cougar (CX 19, 20, and 21). Respondent's arguments that the structure is sufficient to protect the cougar from injury and contain the cougar are not supported by the evidence.

Tenth, Respondent denies that she violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)), as alleged in paragraph 7 of the Complaint, concerning the ferrets' facility on June 19, 1995, and October 25, 1995 (CX 1 at 2, item 7, III, #10; CX 3 at 2, item 7, III, #10) (Respondent's Appeal B at 10). Respondent argues that the exposed "ends of brads (small nails) did not constitute and [sic] danger of injury to the ferrets" (Respondent's Appeal B at 10 (emphasis in original)). Thus, Respondent admits to having protruding small nails in the ferret cage. Respondent's argument that the small nails could not cause injury to the ferrets is not credible. Respondent's argument is rejected.

Eleventh, Respondent denies that she violated section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)), as alleged in paragraph 2(b) of the Complaint, concerning the manure pile on June 19, 1995, and August 8, 1995 (Respondent's Appeal B at 10-11). Respondent argues that collecting the animal and food wastes and bedding and composting this material in a pile (CX 17) at the kennel constitutes compliance with the "[d]isposal facilities" requirements of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

However, I agree with the ALJ that heaping manure in a pile, with corral straw and bedding, next to the kennel, to allow the natural decomposition process to occur, is not "removal and disposal" as contemplated by the Standards.

Twelfth, Respondent denies that she violated section 3.131(a) of the Standards

(9 C.F.R. § 3.131(a)) on August 8, 1995, and October 25, 1995, as alleged in paragraph 6(b) of the Complaint, concerning feces accumulation in the ferret enclosure (Respondent's Appeal B at 12). Respondent does not deny the accumulation of feces in the ferret enclosure, but argues that the amount was not enough to contaminate the animals. Respondent's main point is that ferrets only foul one corner of the pen and the pertinent pen was large enough to let feces accumulate without contaminating the animals, in violation of section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)). (Respondent's Appeal B at 12.) However, regardless of the habits of ferrets to isolate their feces, Respondent is also required to clean the primary enclosure of the ferrets often enough to "minimize disease hazards and to reduce odors" (9 C.F.R. § 3.131(a)). I affirm the ALJ's conclusion that Respondent violated 9 C.F.R. § 3.131(a) on August 8, 1995, and October 25, 1995.

Thirteenth, Respondent denies that she violated section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)), as alleged in paragraph 1(d) of the Complaint (Respondent's Appeal B at 12-13). Respondent does not argue that she did not keep the barn alleyway free of empty feed sacks, but argues that nothing in the alleyway could injure the animals. However, section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)) requires that the premises must be kept clean to not only protect animals, but also facilitate prescribed husbandry practices. Respondent admits she failed to keep the premises clean and her description of the manner in which she kept the barn (Answer at 3-4) indicates that, at a minimum, the barn was not sufficiently clean to facilitate prescribed husbandry practices. Therefore, Respondent's argument is rejected.

Fourteenth, Respondent does not deny that she violated section 2.126 of the Standards (9 C.F.R. § 2.126), as alleged in paragraph 8 of the Amended Complaint (Respondent's Appeal B at 13). Respondent argues, however, that her refusal to allow inspection is justified because: the agency was trying to get a "refusal" on Respondent's record; inspector Borchert and the "Texas office" knew that Respondent had "repeatedly" asked for a new inspector; Respondent cannot go along with an inspector who has said he is "out to get us" and who "wants to shut us down"; Respondent is being fined for having the courage to "stand up to" unfair and exaggerated violations; Respondent believes a different inspector would not "write [Respondent] up" for the same things as inspector Borchert; and Respondent asked Larry Neustel to inspect on June 11, 1997, but Mr. Neustel said he could not (Respondent's Appeal B at 13).

I have carefully examined all of Respondent's justifications for refusing to allow an APHIS inspector to inspect her premises. However, Respondent has not advanced any arguments which justify or mitigate Respondent's violation of section

2.126 of the Standards (9 C.F.R. § 2.126). Respondent may not choose her inspector. The Regulations state that "[e]ach dealer [or] exhibitor . . . shall, during business hours, allow APHIS officials . . ." to examine records required to be kept by the Animal Welfare Act and the Regulations and to inspect the facilities, property, and animals (9 C.F.R. § 2.126). Therefore, I find Respondent's arguments irrelevant to the question whether she refused to allow an APHIS official access, during business hours, to her regulated kennel. I reject Respondent's arguments.

Fifteenth, Respondent makes a large number of disparaging accusations against inspector Borchert and references the "breeder opinions" survey in RX 19 (Respondent's Appeal B at 13-15). However, inspector Borchert's performance and the survey of breeder opinion on inspector Borchert in RX 19 have already been addressed in response to Respondent's fourth argument in Respondent's Appeal A in this Decision and Order, *supra*. It bears repeating that an inspector is only an evidence gatherer. The inspector has no authority to find that anyone violated the Animal Welfare Act or the Regulations and Standards, but merely presents evidence, first to the agency and the agency's counsel, and then before an administrative law judge. If the allegations in the Complaint are not supported by a preponderance of the evidence, then the allegations in the Complaint suffering lack of evidentiary support will be dismissed. Therefore, I find that Respondent's allegations against the inspector are irrelevant to whether Respondent committed the violations in the Complaint.

Sixteenth, Respondent argues that the ALJ pointed out in the decision (Initial Decision and Order at 22-23) that Respondent provided overall humane care to her animals and that Respondent's animals were kept in good condition (Respondent's Appeal B at 15-16). Respondent argues that the "bottom line" is that she has a good vaccination and de-worming program, that her animals are healthy, and that her animals have never been found to be injured, mistreated, unhealthy, crowded, or dirty (Respondent's Appeal B at 16). There is no evidence that Respondent intentionally mistreated her animals. Moreover, the evidence supports a finding that Respondent's animals were in "good condition" (Tr. 194). When assessing a civil penalty, the gravity of the violation must be taken into account (7 U.S.C. § 2149(b)), and I have taken into account the condition of Respondent's animals when determining the amount of the civil penalty to be assessed.

Seventeenth, Respondent argues that the $3,000 civil penalty assessed against Respondent by the ALJ is what a $30,000 civil penalty would be like to other people (Respondent's Appeal B at 15). Respondent argues that all income at the kennel goes back into the kennel and that income is so small that a time payment of a large civil penalty would not be realistic (Respondent's Appeal B at 16). As

discussed in this Decision and Order, *infra*, a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed.

Eighteenth, Respondent denies that any violations were willful, because she "did not ever deliberately commit an act with the intention to ignore rules or standards" (Respondent's Appeal B at 16). However, I agree with the ALJ (Initial Decision and Order at 23) that Respondent's violations are willful, as explained in this Decision and Order, *infra*.

Nineteenth, Respondent questions what a 30-day suspension would mean to her business operations (Respondent's Appeal B at 16-18).

Complainant contends that Respondent has been informed of the effects of a 30-day suspension of Respondent's Animal Welfare Act license and provides a letter dated March 20, 1998, from opposing counsel to Respondent which purports to answer the questions on the 30-day suspension raised by Respondent (Complainant's Response at 33, Attach. A).

Twentieth, Respondent accuses opposing counsel of saying Respondent admitted things not admitted by Respondent (Respondent's Appeal B at 18-19). However, the Judicial Officer will not accept that the Respondent admitted something, unless the Complainant points to the place in the record where that purported admission is located, and the admission is actually there.

Finally, Respondent argues that there cannot be a decision in Respondent's favor because the inspector, the attorney, and the ALJ all work for USDA (Respondent's Appeal B at 20). Respondent's complaint is meritless. An agency may combine investigative, adversarial, and adjudicative functions, as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case, does not participate in or advise in the decision or agency review in the case or a factually related case. (5 U.S.C. § 554(d).)[11]

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[11]*See also Sheldon v. SEC*, 45 F.3d 1515, 1518-19 (11th Cir. 1995) (holding that Securities and Exchange Commission proceedings do not violate the "separation of powers" or deny broker-dealers due process of law merely because the agency combines investigative, adversarial, and adjudicative functions); *Trust & Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 297 (7th Cir. 1994) (stating that it has long been settled that the combination of investigative and adjudicative functions within an agency, absent more, does not create an unconstitutional risk of bias in administrative adjudication); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) (stating that an agency may combine investigative, adversarial, and adjudicative functions, as long as no employees serve in dual roles); *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164, 167 (2d Cir. 1992) (stating that the Administrative Procedure Act is violated only where an individual actually participates in a single case as both a prosecutor and an adjudicator); *Touche Ross & Co. v. SEC*, 609 F.2d 570, (continued...)

Respondent makes no assertion that any USDA employee or agent engaged in the performance of investigative or prosecuting functions in this proceeding, participated in or advised in the ALJ's Initial Decision and Order or the agency review of the ALJ's Initial Decision and Order.

Complainant's Response and Cross-Appeal

Complainant's Response to Respondent's Appeal contains eight arguments in the nature of a cross-appeal, in which Complainant appeals the ALJ's sanction and all seven paragraphs of the Complaint wherein the ALJ found no violations (Complainant's Response and Cross-Appeal at 7-8, 16-18, 20-21, 24, 27, 33-35). Respondent's response to Complainant's Response to Respondent's Appeal consists of two separate handwritten responses by Greg Bommelman and Judie Hansen, respectively. The portion of Respondent's response to Complainant's Response to Respondent's Appeal written by Respondent is referred to as Respondent's Response A and the portion of Respondent's response written by Mr. Bommelman is referred to as Respondent's Response B.

Complainant contends that Respondent's Appeal is untimely, in that Respondent's Appeal was due on March 20, 1998, but Respondent's Appeal was not filed until March 24, 1998 (Complainant's Response and Cross-Appeal at 2-3). Respondent contends that Respondent's Appeal was "mailed well in advance" of the date it was due, but due to a blizzard and road conditions, it was late. Respondent further states that she believed Respondent's Appeal could be deemed to be filed on the date the envelope containing Respondent's Appeal was postmarked. (Respondent's Response A at 1; Respondent's Response B at 2.)

Section 1.145(a) of the Rules of Practice provides that an appeal petition must be filed with the Hearing Clerk within 30 days after receiving service of the Judge's decision. The Respondent's mailing of the Respondent's Appeal prior to the due date of the appeal petition is not "filing with the Hearing Clerk" and Respondent's Appeal Petition, which was filed with the Hearing Clerk after the date it was due, is untimely as Complainant contends.

Complainant's Response and Cross-Appeal is timely. Moreover, Respondent

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[11](...continued)
581 (2d Cir. 1979) (stating that it is uniformly accepted that many agencies properly combine the functions of prosecutor, judge, and jury, and a hearing conducted by such an agency does not automatically violate due process); *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940) (stating the blending of the functions of enforcement and adjudication in a single agency is not sufficient to invalidate a hearing fairly conducted).

filed a timely reply to Complainant's Response and Cross-Appeal and properly incorporated by reference Respondent's untimely original appeal. Therefore, Respondent's untimely original appeal was resuscitated, because the Rules of Practice allow "any relevant issue" to be raised in response to an appeal (7 C.F.R. § 1.145(b)).[12]

First, Complainant contends that the ALJ erred by not finding the violation of section 2.50(c) of the Regulations (9 C.F.R. § 2.50(c)) alleged in paragraph 5 of the Complaint (Complainant's Response and Cross-Appeal at 7-8). The ALJ found, with respect to paragraph 5 of the Complaint, that section 2.50(d) of the Regulations (9 C.F.R. § 2.50(d)) exempts unweaned puppies from the identification requirement in section 2.50(c) of the Regulations and that the record does not show that the puppies in question were weaned and thereby required to be identified. Complainant has failed to meet its burden of proving that Respondent failed to identify her dogs, in violation of section 2.50(c) of the Regulations (9 C.F.R. § 2.50(c)) (Initial Decision and Order at 3-5).

Complainant argues that the puppies are not exempt under 9 C.F.R. § 2.50(d) because the evidence supports a finding that the puppies were weaned and were not maintained as a litter with their dam in the same primary enclosure (Complainant's Response and Cross-Appeal at 7). As evidence, Complainant argues that Respondent testified that Respondent had prepared ID tags for the puppies and it "stands to reason" that Respondent would not have individually identified unweaned members of a litter kept with the mother that Respondent did not have to identify individually; that inspector Borchert stated that the unidentified dogs were held back from sale for breeding purposes, which "suggests" that the litter was of marketable age, but unweaned puppies are not marketable; that inspector Borchert stated that some animals had been removed from the litter, which "suggests" that the litter was not intact as the exemption requires; and, that even if the dogs were unweaned, Respondent let the animals sleep on Respondent's bed, which "means" that the puppies were not maintained as a litter with their dam in the

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[12]*In re Daniel Strebin*, 56 Agric. Dec. 1095, 1145 (1997) (stating that the Rules of Practice provide for filing of a response to an appeal and in such response, any relevant issue not presented in the appeal petition may be raised); *In re Otto Berosini*, 54 Agric. Dec. 886, 888 n.** (1995) (stating that respondent's original appeal was late-filed and would have been dismissed on jurisdictional grounds; however, since respondent's reply to complainant's timely appeal properly incorporated by reference respondent's original appeal, respondent's original appeal constitutes a timely cross-appeal); *In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 424-25 (1994) (stating that the Rules of Practice provide for filing of a response to an appeal and in such response any relevant issue not presented in the appeal petition may be raised), *aff'd*, 48 F.3d 305 (8th Cir. 1995).

same primary enclosure, which the exemption requires (Complainant's Response and Cross-Appeal at 8).

Respondent contends that inspector Borchert never inspected any dogs to determine if they had tags or tattoos (Respondent's Response B at 4). However, I find that the record clearly indicates that inspector Borchert did find that new dogs and puppies were not identified (CX 3 at 2, item 7, III, #45) and that their identification numbers were listed on a card on their pen (Respondent's Response A at 4). Respondent also contends that there were only three puppies involved. However, the number of puppies involved is not a defense to a violation of section 2.50(c) of the Standards.

I reject Complainant's argument because it is speculative. Complainant uses terms like "stands to reason" and "suggests," and it appears that Complainant relies not on facts evidenced in the record, but rather Complainant's interpretation of facts evidenced by the record.

Second, Complainant argues that the ALJ erred by not finding the August 8, 1995, violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), concerning soiled newspapers, alleged in paragraph 6(a) of the Complaint (Complainant's Response and Cross-Appeal at 16-18). The ALJ found, with respect to paragraph 6(a) of the Complaint, that the soiled newspapers did not constitute a violation, as they occurred as part of the regular cleaning of the facility (Initial Decision and Order at 9).

Complainant argues that the presence of the soiled newspapers did represent a violation. Inspector Borchert noted two distinct categories of newspapers: old, soiled newspapers and soiled newspapers. Complainant argues that distinguishing one group as "old" soiled newspapers indicates that they had been in the animal area for longer than 5 minutes, thus, violating the Standard for frequent removal of waste (Complainant's Response and Cross-Appeal at 16-17). Respondent responds that all of the newspapers were being gathered to be placed in trash containers, were not in the animal enclosures, and were placed in trash containers within 5 minutes after having been collected (Respondent's Response A at 5-6; Respondent's Response B at 6).

Since all the soiled newspapers were outside the enclosure, I infer that Complainant is arguing that the "sack of old" newspapers had already been there for longer than 5 minutes, when the other papers were put on the ground. Although Complainant's interpretation is one way to look at the evidence, it is just as likely that the two sets of soiled newspapers were generated during the same cleaning. Perhaps, inspector Borchert was only distinguishing between papers still on the ground and those papers already bagged for disposal. However, the evidence does not support either scenario. I find the Complainant's argument speculative, in that

it interprets the evidence rather than providing the requisite preponderance of the evidence that the "old" soiled newspapers were put there at a time prior to the rest of the soiled newspapers.

Third, also concerning paragraph 6(a) of the Complaint, Complainant argues that the ALJ's characterization of Respondent's leaving the cover off the pail of feces as merely a "technical" violation of section 3.1(f) of the Standards, is error (Complainant's Response and Cross-Appeal at 16-18).

I disagree with Complainant. I infer that the ALJ meant that Respondent met the technical requirements for a violation of 9 C.F.R. § 3.1(f), but that the violation was *de minimis*. I agree with the ALJ that the pail was left uncovered, which constitutes a violation, but I find the circumstances such that I am not assessing a civil penalty or suspending Respondent's Animal Welfare Act license for this violation.

Fourth, Complainant argues that the ALJ erred by not finding that on June 19, 1995, and August 8, 1995, Respondent failed to ensure that the floors and walls of indoor housing facilities were impervious to moisture, as required by sections 3.2(d) and 3.3(e) of the Standards (9 C.F.R. §§ 3.2(d), .3(e)), as alleged in paragraph 2(a) of the Complaint. The ALJ found that inspector Borchert said that the only way to test the surface to determine if it is impervious to moisture is by spraying it with water and that he did not spray water on the surface. Inspector Borchert did not explain how he determined the surfaces were not impervious to moisture and under these circumstances, the ALJ found that Complainant had not met its burden of proving Respondent violated sections 3.2(d) and 3.3(e) of the Standards (9 C.F.R. §§ 3.2(d), .3(e)) (Tr. 119-20, 194; Initial Decision and Order at 9-10).

The gravamen of Complainant's argument is that "[i]t is axiomatic that in order to be sealed, a surface must be of sufficient uniformity so that the sealant can adhere to it" (Complainant's Response and Cross-Appeal at 20). The rest of Complainant's argument implies that to achieve compliance with the Standards all "surfaces to be covered be sanded and free from dirt and loose paint" (Complainant's Response and Cross-Appeal at 20). Respondent responds that she did paint or put water sealer on everything that was required to be sealed (Respondent's Response A at 6-7). Further, Respondent notes that inspector Borchert never properly tested the surfaces to determine whether they were in fact impervious to moisture (Respondent's Response B at 3).

I reject Complainant's argument because the Standard has no requirement that surfaces to be sealed must be sanded and free from dirt and loose paint.

Moreover, Complainant cites no authority for the axiom on surface uniformity. I agree with the ALJ that inspector Borchert could not have determined

imperviousness to moisture by only looking at the surfaces, and inspector Borchert testified that the only test for imperviousness is to spray water, which inspector Borchert testified he did not do (Tr. 194).

Fifth, Complainant argues that the ALJ erred by not finding the violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)) alleged in paragraph 1(a) of the Complaint.

Paragraph 1(a) of the Complaint alleges that Respondent failed to provide outdoor housing facilities for dogs that are large enough to allow each animal to sit, stand, lie in a normal manner, and turn about freely, in violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

Section 3.4(b) of the Standards requires that each outdoor facility include one or more shelter structures that are large enough to allow each animal in the shelter to sit, stand, lie in a normal manner, and turn about freely. Complainant did not prove that the shelter structures were not large enough to allow each animal in the shelter to sit, stand, lie in a normal manner, and turn about freely.

Sixth, Complainant argues that the ALJ erred by not finding the violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)), concerning failure to keep non-disposable food receptacles clean and sanitized, as alleged in paragraph 1(c) of the Complaint (Complainant's Response and Cross-Appeal at 23-24). The ALJ found, with respect to paragraph 1(c) of the Complaint, based on Respondent's Answer and testimony, that inspector Borchert was not referring to a food utensil, but to a water receptacle which, in any event, was not dirty, but which had mineral deposits caused by hard water (Initial Decision and Order at 11).

Complainant makes the following arguments:

> First, the ALJ erred in failing to find a violation. In his inspection report, [inspector] Borchert specified that the violation was due to "dirty food receptacles." This means that the receptacles were not for water, but for food, and that there were more than one.
>
> Second, [Respondent] is required to sanitize food and water receptacles. To sanitize means to "make physically clean and to remove and destroy, to the maximum degree that is practical, agents injurious to health." [(Footnote omitted). Respondent's] receptacles were not sanitized.

Complainant's Response and Cross-Appeal at 24.

The ALJ did not err in crediting the testimony of Respondent that the receptacle in question was a water, and not a food, receptacle, and not finding a violation. Respondent's Answer informed Complainant that Respondent's defense to the

charge of a dirty dog bowl would be that the bowl in question was an old water pail with lime deposits from the local hard water (Answer at 3c). Respondent testified to this same set of facts at the hearing (Tr. 282-83). (Respondent reiterates this position in Respondent's Response A at 7; Respondent's Response B at 7.) Complainant could have refuted the facts from Respondent's Answer and testimony, but did not; leaving only the terse statement from inspector Borchert's report: "[d]irty feed receptacles must be kept clean[.] Correct by 6-20-95[.]" (CX 1 at 3, item 7, III, #34.)

Therefore, Complainant has not shown by a preponderance of the evidence that the receptacle in question was a food receptacle.

Seventh, Complainant seemingly argues that the ALJ erred by not finding the violation of section 3.11(d) of the Standards (9 C.F.R. § 3.11(d)), concerning failure to control pests, as alleged in paragraph 1(e) of the Complaint (Complainant's Response and Cross-Appeal at 27). The ALJ found, with respect to paragraph 1(e) of the Complaint, as follows:

> 13. Paragraph 1.e. of the Complaint alleges that [on June 19, 1995, Respondent] failed to maintain an effective pest control program as required by section 3.11(d) of the [S]tandards. . . .
>
> . . . .
>
> [Respondent] said that this was the only occasion when there were a "lot of flies" during an inspection. She said she promptly removed the dogs and sprayed the enclosure with a kennel-approved spray she kept in the enclosure. She said she also uses baits and traps and has turkeys to eat flies and bugs.
>
> An "effective" program under section 3.11(d) [of the Standards (9 C.F.R. § 3.11(d))] does not require the complete elimination of pests such as flies, which is probably impossible to achieve, but a program to "reduce" contamination by pests. The appearance of flies on only one occasion does not necessarily establish that [Respondent] lacked an effective pest control program. The action she took also reflects the maintenance of such a program. [Respondent] did not violate section 3.11(d) [of the Standards (9 C.F.R. § 3.11(d))].

Initial Decision and Order at 13-14.

Complainant seemingly argues that the ALJ erred, as follows:

> The Standards require that licensees establish effective pest control measures [footnote omitted. Inspector] Borchert inspected [Respondent's] facility on June 19, 1995, and noted the presence of an inordinate number of flies [(footnote omitted). Respondent] admits this, but notes that she sprayed and corrected the problem. The ALJ found no violation because "[t]he presence of flies on only one occasion does not necessarily establish that [Respondent] lacked an effective pest control program [footnote omitted].

Complainant's Response and Cross-Appeal at 27.

My examination of Complainant's "argument" reveals that Complainant describes the ALJ's actions, but Complainant does not actually argue that the ALJ committed error; therefore, Complainant's "argument" is rejected.

Finally, Complainant appeals the ALJ's sanction, reiterating Complainant's recommendation that Respondent be issued a cease and desist order, assessed an $8,000 civil penalty, and suspended for 30 days, and continuing thereafter, until Respondent is in compliance with the Animal Welfare Act and the Regulations and Standards, and has paid the civil penalty (Complainant's Response and Cross-Appeal at 34-35). Complainant argues in support of its recommended sanction that Respondent has the size business for such a sanction; that Respondent lacks good faith; that Respondent refused inspection; that Respondent denies her acts were willful; that Respondent made personal attacks on the inspector; and that Respondent regularly fails to comport with the Animal Welfare Act and the Regulations and Standards, while blaming zealous inspectors and difficult requirements for her failures (Complainant's Response and Cross-Appeal at 33-34). Respondent responds that she has done nothing to warrant a fine, that she is being punished for exercising her right to a hearing, and that the good condition of her animals should be taken into consideration (Respondent's Response A at 9-11). Complainant's arguments are addressed in this Decision and Order, *infra*, in my discussion of the sanction.

Respondent's Reply to Complainant's Cross-Appeal

Respondent's Response contains a number of contentions that were raised in Respondent's Appeal, which I fully addressed in this Decision and Order, *supra*,

and which I do not reiterate here. Further, in addition to responses to arguments raised by Complainant in Complainant's Response and Cross-Appeal, Respondent raises five new issues. First, Respondent contends that she is entitled to a jury trial in the county in which the alleged violations occurred and asks whether this proceeding is civil or criminal (Respondent's Response B at 2-3). This proceeding is not a criminal prosecution and the constitutional provisions in Article III, § 2 of the United States Constitution and the Sixth Amendment to the United States Constitution, which afford the right to a jury trial in criminal proceedings, are not applicable to this proceeding.[13] The Seventh Amendment to the United States

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[13]*See United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating that the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Loaisiga*, 104 F.3d 484, 486 (1st Cir.) (stating that deportation proceedings are civil matters exempt from Sixth Amendment protections; they are primarily conducted by administrative bodies and not by courts), *cert. denied*, 117 S. Ct. 2447 (1997); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (stating that deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment); *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6th Cir. 1991) (holding that the Sixth Amendment does not apply to a civil matter, such as a labor relations proceeding conducted by the National Labor Relations Board); *United States v. Schellong*, 717 F.2d 329, 336 (7th Cir. 1983) (holding that denaturalization proceedings are not criminal proceedings; therefore, there is no right to a jury trial under Article III of the United States Constitution or the Sixth Amendment), *cert. denied*, 465 U.S. 1007 (1984); *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983) (holding that the Sixth Amendment does not apply to administrative discharge proceedings conducted by the National Guard because such proceedings are not criminal in nature); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1366 (10th Cir. 1979) (rejecting the characterization of Occupational Safety and Health Administration administrative proceedings, in which civil penalties can be assessed, as criminal proceedings and the argument that the Sixth Amendment is applicable to such proceedings); *Camp v. United States*, 413 F.2d 419, 422 (5th Cir.) (holding that there is no Sixth Amendment right to counsel in non-criminal administrative proceedings before the Selective Service Board), *cert. denied*, 396 U.S. 968 (1969); *Haven v. United States*, 403 F.2d 384, 385 (9th Cir. 1968) (holding that the Sixth Amendment right to counsel does not apply in administrative proceedings in the selective service process), *cert. dismissed*, 393 U.S. 1114 (1969); *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9th Cir. 1960) (stating that the Sixth Amendment applies only to criminal proceedings and that Congress may properly provide civil proceedings for the collection of civil penalties which are civil or remedial sanctions rather than punitive and the Sixth Amendment has no application to such proceedings); *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402, 407 (7th Cir. 1933) (rejecting contention that proceedings under section 6(a) of the Grain Futures Act of September 21, 1922, are "essentially criminal" and holding that, since the proceedings are not criminal in nature, there is no right to a jury trial under Article III, § 2 of the United States Constitution), *cert. denied*, 291 U.S. 680 (1934); *Gee Wah Lee v. United States*, 25 F.2d 107 (5th Cir.) (per curiam) (concluding that the appeal of a deportation order by a United States commissioner is not a trial on a criminal charge covered by Article III, § 2 of the United States Constitution), *cert. denied*, 277 U.S. 608 (1928); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee under the Sixth

(continued...)

Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

Courts have long construed the phrase "Suits at common law" as referring to cases analogous to those tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary.[14] Congress is free to create new

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[13](...continued)
Amendment applies only to those proceedings technically criminal in nature); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the Sixth Amendment is only applicable to proceedings technically criminal in nature and concluding that the Sixth Amendment is not applicable to administrative proceedings under the Packers and Stockyards Act of 1921); *In re Conrad Payne*, 57 Agric. Dec. ___, slip op. at 10-11 (Dec. 8, 1998) (concluding that the respondent's rights under the Sixth Amendment are not implicated in an administrative proceeding instituted under section 2 of the Act of February 2, 1903, as amended); *In re Saulsbury Enterprises, Inc.*, 57 Agric. Dec. 82, 100 (1997) (concluding that Article III, § 2 of the United States Constitution and the Sixth Amendment, which afford the right to a jury trial in criminal proceedings, are not applicable to administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)).

[14]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that "[t]he Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right'"); *Tull v. United States*, 481 U.S. 412, 417 (1987) (stating that the Court has construed the language of the Seventh Amendment to require a jury trial on the merits in those actions that are analogous to "Suits at common law"); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449 (1977) (stating that "[t]he phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (stating that the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Parsons v. Bedford*, 3 Pet. 433, 445-46 (1830) (construing the phrase "Suits at common law" in the Seventh Amendment as referring to cases tried in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not customary); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating that the Seventh Amendment right to a jury trial attaches in cases involving legal rather than equitable claims); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that the (continued...)

statutory public rights, as it did with the enactment of the Animal Welfare Act, and assign their adjudication to an administrative agency before which a litigant has no right to a jury trial, without violating the Seventh Amendment's requirement that a jury trial is to be preserved in suits at common law.[15] Thus, I conclude that the

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[14](...continued)
Supreme Court has consistently interpreted the phrase "Suits at common law" in the Seventh Amendment to refer to suits in which legal rights are to be ascertained and determined, in contradistinction to those suits in which equitable rights alone are recognized and equitable remedies are administered), *cert. denied*, 513 U.S. 1148 (1995); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that the right to a jury turns on the nature of the issue to be resolved and on the forum in which it is to be resolved); *Welch v. TVA*, 108 F.2d 95, 99 (6th Cir. 1939) (stating that the usual method of determining the value of private property taken for public use has been to accord the land owner the right to have damages assessed by a jury, but this is a matter of legislative discretion because condemnation proceedings by the United States for the use and benefit of the Tennessee Valley Authority are not suits at common law in which the right to trial by jury is guaranteed by the Seventh Amendment), *cert. denied*, 309 U.S. 688 (1940); *NLRB v. Tidewater Exp. Lines, Inc.*, 90 F.2d 301, 303 (4th Cir. 1937) (per curiam) (stating that the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits as were maintainable under common law at the time the amendment was adopted); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits of such character as were maintainable at common law at the time the amendment was adopted); *In re Hudson*, 170 B.R. 868, 873-74 (E.D.N.C. 1994) (stating that the right to a jury trial under the Seventh Amendment extends only to matters of private right and finding that a creditor who files a claim with the bankruptcy court loses the Seventh Amendment right to a jury trial); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating that the United States Supreme Court has interpreted the right to trial by jury to mean the right which existed in suits under common law in 1791, when the Seventh Amendment was adopted; the Seventh Amendment does not create a jury trial right, it simply preserves the right that already existed under the common law).

[15]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that if a claim that is legal in nature asserts a public right, then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (noting that the Seventh Amendment is not applicable to administrative proceedings); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449-461 (1977) (stating that when Congress creates statutory public rights, it may assign their adjudication to an administrative agency with which a jury trial would be incompatible without violating the Seventh Amendment's injunction that jury trial is to be preserved at common law); *Pernell v. Southhall Realty*, 416 U.S. 363, 383 (1974) (assuming that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency; and stating that *Block v. Hirsh*, 256
(continued...)

[15](...continued)
U.S. 135 (1921), stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (stating that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication); *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1378 (5th Cir. 1996) (stating that application to the Environmental Protection Agency for a boiler and industrial furnace permit required under the Resource Conservation and Recovery Act triggered a public rights dispute; therefore, the applicant has no right to a jury trial under the Seventh Amendment), *cert. denied*, 519 U.S. 1055 (1997); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating that when the government sues in its sovereign capacity to enforce public rights, Congress may assign the fact-finding and initial adjudication to an administrative forum); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that in cases in which "public rights" are being litigated, e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, the Seventh Amendment does not prohibit Congress from assigning that fact-finding function and initial adjudication to an administrative forum with which a jury would be incompatible), *cert. denied*, 513 U.S. 1148 (1995); *Sasser v. Administrator, EPA*, 990 F.2d 127, 130 (4th Cir. 1993) (holding that a person charged in an administrative complaint for discharging pollutants has no Seventh Amendment right to a jury trial and stating that "[g]enerally speaking, the Seventh Amendment does not apply to disputes over statutory public rights, `those which arise between the Government and persons subject to its authority in connection with the performance of constitutional functions of the executive and legislative departments'"); *Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226, 228 (Fed. Cir.) (stating that public rights may be constitutionally adjudicated by legislative courts and administrative agencies without implicating the Seventh Amendment right to a jury trial), *cert. denied*, 506 U.S. 829 (1992); *Myron v. Hauser*, 673 F.2d 994, 1004 (8th Cir. 1982) (stating that generally the Seventh Amendment is not applicable to administrative or statutory proceedings and concluding that the Seventh Amendment is not applicable to reparation proceedings before the Commodity Futures Trading Commission); *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979) (stating that the Supreme Court has held that the Seventh Amendment right to a jury trial does not extend to situations where Congress has seen fit to set up an administrative procedure for adjudication of disputes arising out of statutorily created rights), *cert. denied*, 449 U.S. 854 (1980); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that at least when only public rights are involved, Congress may provide for administrative fact-finding with which a jury trial would be incompatible and even where the statutory public rights are enforceable in favor of a private party they can be committed to an administrative agency for determination); *Floyd S. Pike Electrical Contractor, Inc. v. Occupational Safety and Health Review Comm'n*, 557 F.2d 1045 (4th Cir. 1977) (per curiam) (stating that the Seventh Amendment is not a bar to the imposition of civil penalties by an administrative tribunal, as authorized by the Occupational Safety and Health Act of 1970); *Penn-Dixie Steel Corp. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 1078, 1080 (7th Cir. 1977) (stating that the Supreme Court held in *Atlas Roofing Co., supra*, that the Seventh Amendment does not bar Congress from assigning to an administrative agency the task of adjudicating Occupational Safety and Health Act violations); *Dorey Electric Co. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 357, 358 (4th Cir. 1977) (per curiam) (stating that the Supreme Court held in *Atlas Roofing Co., supra*, that the Seventh Amendment poses no bar to the disposition of a charge
(continued...)

Seventh Amendment to the United States Constitution does not entitle Respondent to a jury trial in this administrative proceeding.

Moreover, Respondent has no right under the Administrative Procedure Act to have the hearing conducted in the county in which the alleged violations occurred. The Administrative Procedure Act merely provides, with respect to the location of the hearing, as follows:

§ 554. Adjudications

. . . .

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

(1) the time, place, and nature of the hearing[.]

. . . .

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[15](...continued)
of the violation of the Occupational Safety and Health Act and the assessment of a civil penalty by an administrative tribunal); *Mohawk Excavating, Inc. v. Occupational Safety and Health Review Comm'n*, 549 F.2d 859, 865 (2d Cir. 1977) (stating that the Seventh Amendment is not a bar to the imposition of civil penalties through the administrative process without a jury trial in the enforcement of the Occupational Safety and Health Act); *Clarkson Construction Co. v. Occupational Safety and Health Review Comm'n*, 531 F.2d 451, 455-56 (10th Cir. 1976) (stating that it is within the power of Congress to choose an administrative process for the enforcement of the safe and healthful working conditions objective of the Occupational Safety and Health Act of 1970 and the administrative proceeding which resulted in the imposition of a civil sanction for the violation of the Act is not an action at common law within the meaning of the Seventh Amendment; hence no jury trial right arises); *National Velour Corp. v. Durfee*, 637 A.2d 375, 379 (R.I. 1994) (stating that if an action involves the adjudication of public rights, no jury is required pursuant to the Seventh Amendment); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating that where a right is created by statute and committed to an administrative forum, jury trial is not required by the Seventh Amendment); *In re Conrad Payne*, 57 Agric. Dec. ___, slip op. at 14-15 (Dec. 8, 1998) (concluding that the Seventh Amendment does not entitle the respondent to a jury trial in an administrative proceeding instituted under section 2 of the Act of February 2, 1903, as amended); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 100 (1997) (holding that there is no constitutional right to a jury trial in administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988) (rejecting respondent's contention that he was improperly denied a jury trial in an administrative proceeding under the Animal Welfare Act, and stating that it is well settled that a jury trial is not required in an administrative disciplinary proceeding), *aff'd*, 878 F.2d 358, 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 fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

5 U.S.C. § 554(b).

In any event, the record establishes that Respondent's residence and licensed facility are located in Donnybrook, North Dakota, and that all of the alleged violations at issue in this proceeding occurred in Donnybrook, North Dakota. The hearing in this proceeding was conducted in Minot, North Dakota, and both Donnybrook and Minot are located in Ward County, North Dakota. Respondent did not move for a change of venue, and I do not find that conducting the hearing in this proceeding in Minot, North Dakota, violated Respondent's right to due process or the requirement under the Administrative Procedure Act that the location of the hearing be chosen with due regard for the convenience and necessity of the parties or their representatives.[16]

Second, Respondent contends that she has made a Freedom of Information Act request for a report concerning her facility prepared by Mr. Larry Neustel and that the "USDA Central Sector (Dr. Walt Christenson) has stated that no FOIA information will be released to Ms. Hansen until this case is settled" (Respondent's Response B at 3-4 (emphasis in original)).

The Freedom of Information Act (5 U.S.C. § 552) requires each federal agency to make its non-exempt records available, upon request, to a requester. If a request is denied, an aggrieved party may file a complaint in the district court of the United States in which the aggrieved party resides, or has a principal place of business, or in which the agency records are situated, or in the District of Columbia, which court has jurisdiction to enjoin the agency from withholding agency records and order production of agency records improperly withheld. Thus, the exclusive forum for correcting any improper denial of Respondent's Freedom of Information Act request is a district court of the United States.

Third, Respondent argues that Ms. Carroll's license[17] should be suspended until

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[16] *See generally Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir.) (stating that an alien's due process rights were not violated by holding a waiver of deportation proceeding in Louisiana, rather than near his residence in Virginia, where the alien did not move for a change of venue, but indicated a willingness to proceed in Louisiana), *cert. denied*, 516 U.S. 806 (1995).

[17] Based on Ms. Carroll's status in this proceeding and the context of Respondent's argument, I infer that Ms. Carroll is licensed to practice law and that Respondent's reference to "Ms. Carroll's license" (continued...)

she is in full compliance with the oath she has taken and that Ms. Carroll should be assessed a civil penalty of $250,000 for representing an individual who lied under oath and for trying to obtain money through deception (Respondent's Response B at 8). Respondent does not indicate the nature of the oath that Ms. Carroll has taken; the Complainant, the person who Ms. Carroll represents in this proceeding, did not testify in this proceeding; and there is no evidence that Ms. Carroll tried to obtain money through deception. Further, even if I found that Ms. Carroll violated an oath, represented a perjurer, and attempted to obtain money by deception (which I do not find), I have no jurisdiction to suspend Ms. Carroll's license to practice law or to assess Ms. Carroll a civil penalty either for representing persons who lie under oath or for attempting to obtain money through deception.

Fourth, Respondent contends that Ms. Carroll must be practicing law for a foreign power. Respondent cites as support for her contention that Ms. Carroll must be practicing law for a foreign power, Ms. Carroll's use of the title "Esquire" in reference to herself (Respondent's Response B at 9). However, while the word "esquire" is used in various ways,[18] in the United States, the title "Esquire" is

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[17](...continued)
is to Ms. Carroll's license to practice law.

[18]*See generally, e.g.*, Merriam Webster's Collegiate Dictionary 396 (10th ed. 1997):

esquire . . . **1** : a member of the English gentry ranking below a knight **2** : a candidate for knighthood serving as shield bearer and attendant to a knight **3** — used as a title of courtesy usu. placed in its abbreviated form after the surname <John R. Smith, *Esq.*> **4** *archaic* : a landed proprietor

The Oxford English Dictionary Vol. V, 398 (2d ed. 1991):

esquire . . . .

1.a. *Chivalry.* A young man of gentle birth, who as an aspirant to knighthood, attended upon a knight, carried his shield, and rendered him other services.

. . . .

2. A man belonging to the higher order of English gentry, ranking immediately below a knight.

. . . .

3. As a title accompanying a man's name. Originally applied to those who were (continued...)

frequently appended after the name of an attorney,[19] and the title "Esquire" does not indicate that the attorney, after whose name the title is appended, is practicing law for a foreign power. Moreover, the record is clear that Ms. Carroll represents Complainant in Complainant's official capacity as an employee of the United States.

Fifth, Respondent asserts that "the House subcommittee on government management . . . gave the USDA a rating of D" (Respondent's Response B at 9). Respondent does not indicate the relevance of this asserted rating to the issues in this proceeding.

Sanction

As to the appropriate sanction, the Animal Welfare Act provides:

§ 2149. Violations by licensees

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[18](...continued)
'esquires' in sense 2; subsequently extended to other persons to whom an equivalent degree of rank or status is by courtesy attributed.

. . . .

4. . . . A gentleman who escorts a lady in public.

Bouvier's Law Dictionary 1074 (3d ed. 1914):

ESQUIRE. A title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law; and therefore it confers no distinction in the law.

See also Esquire, Inc. v. Esquire Slipper Mfg. Co., 243 F.2d 540, 543 (1st Cir. 1957) (stating that the word *esquire* is not capable of precise definition, but it is a word firmly established in the english vocabulary and the word carries with it strong implications of youthful gentility in an aura of wealth); *Christian v. Ashley County*, 24 Ark. 142, 151 (Ark. 1863) (stating that the word *esquire* is a sufficient designation of the occupation of an associate judge); *Call v. Foresman*, 5 Watts 331, 332 (Pa. 1836) (per curiam) (stating that the word *esquire* is properly used to designate a justice of the peace); *Commonwealth v. Vance*, 15 Serg. & Rawle 35, 37 (Pa. 1826) (indicating that the term *esquire* applies to associate justices); *Antonelli v. Silvestri*, 137 N.E.2d 146, 147-48 (App. Ct. Ohio 1935) (stating that by common acceptation an *esquire* has no relation to the law; it is often added to the name of poets or artists and the term may be applied to a landed proprietor or country squire; the term is one of courtesy, indicating a gentleman attending or escorting a lady; nowhere do we find that the term *esquire* denotes an attorney at law).

[19]Black's Law Dictionary 546 (6th ed. 1990).

(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.[20]

Complainant seeks: (1) a 30-day suspension of Respondent's Animal Welfare Act license, (2) a civil penalty of $8,000, and (3) a cease and desist order. Complainant bases the requested 30-day suspension on the repeated and ongoing recordkeeping and facilities violations, and refusal to allow inspection. Complainant argues that a civil penalty of $8,000 is appropriate in light of the size of Respondent's business and that a cease and desist order is warranted to ensure the correction of existing violations and to prevent future interference with USDA inspectors. (Complainant's Brief at 23.)

Furthermore, Complainant argues, *inter alia,* that Respondent, despite her claims to the contrary, has not acted in good faith; that Respondent has publicly announced her refusal to allow inspector Borchert to inspect her facility; that refusal to allow inspection is very detrimental to enforcement of the Animal Welfare Act, requiring a severe sanction; and that her actions were willful, despite her denial of willfulness and claims of good faith (Complainant's Brief at 23-24).

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.[21] The

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[20]*In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 67-68 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998), *appeal docketed* No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (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).

[21]*See, e.g., In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (imposing a $20,000 civil penalty and a permanent disqualification from obtaining a license for 33 violations of the Animal (continued...)

[21](...continued)
Welfare Act and the Regulations); *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (imposing a $13,500 civil penalty and a 2-year disqualification from obtaining a license for 16 violations of the Animal Welfare Act and the Regulations and Standards); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day suspension of Respondent's license for 19 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189, 222 (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), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 178-79 (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), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *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*, 156 F.3d 1227 (3d Cir. 1998) (Table); *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 (continued...)

Department in the past has permanently disqualified or revoked dealers' and exhibitors' licenses for the kind of violations that are found in this proceeding.[22]

Respondent replies that the violations are not willful; that the violations caused no harm to the animals; that the animals are healthy and have never been injured, mistreated, crowded, or dirty; that a $3,000 civil penalty would be like $30,000 to others; that Respondent would not even be able to pay in time-scheduled payments such a large civil penalty; that Respondent lives frugally, but still would not be able to buy vaccines, dog food, and materials for building new cages; that Respondent has no savings; that all income is put back into the kennel; and that if Respondent is fined and suspended, it is the dogs which will suffer (Respondent's Appeal B at 15-18). However, a respondent's ability to pay a civil penalty and the collateral effects of a respondent's payment of a civil penalty are not considered in determining the amount of the civil penalty to be assessed.[23]

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[21](...continued)
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).

[22]*See, e.g., In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (imposing a $20,000 civil penalty and a permanent disqualification from obtaining a license for 33 violations of the Animal Welfare Act and the Regulations); *In re John D. Davenport*, 57 Agric. Dec. 189, 222, 237-42 (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), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 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 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).

[23]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 David M. Zimmerman*, 57 (continued...)

Respondent also raises several concerns over what business activities are allowed while under suspension (Respondent's Appeal B at 16-18), but I direct Respondent to seek information directly from APHIS on that issue.

The Complaint alleges that each of the violations alleged in the Complaint was willful, and the ALJ found the proven violations to be willful (Initial Decision and Order at 23). 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.[24]

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[23](...continued)
Agric. Dec. ___, slip op. at 16 n.1 (Nov. 18, 1998) (stating that the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *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).

[24]*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 David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 32 (Nov. 18, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 71-72 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 286 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219-20 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 167-68 (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 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*, 156 F.3d 1227 (3d Cir. 1998) (Table); *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, (continued...)

The ALJ found that Complainant proved 23 of the 33 violations alleged in the Complaint.[25] I agree with the ALJ on all the violations which he found, except that I dismiss the three violations alleged in paragraphs 1(f) and 3 of the Complaint. Thus, I find that Complainant has proven 20 of the 33 violations alleged. Also, I find Respondent's violations of 9 C.F.R. § 3.6(b) alleged in paragraph 1(b) of the Complaint and the October 25, 1995, violation of 9 C.F.R. § 3.1(f) alleged in paragraph 6(a) of the Complaint, are *de minimis*, and I do not assess a civil penalty or impose a suspension of Respondent's Animal Welfare Act license for these violations.

Complainant has not charged, and the record does not show, that Respondent has any violations prior to those that are the subject of this proceeding.

Some of Respondent's violations are *de minimis*, but the gravity of refusing to allow inspection and of repeatedly violating the Standards, is significant.

Based upon inspector Borchert's inspection reports for the dates of June 19, 1995, August 8, 1995, and October 25, 1995, I conclude that Respondent usually maintains approximately 100 animals, and sometimes half that many, which makes Respondent's kennel a large facility (CX 1, 2, 3).

I agree with the ALJ that there is no evidence that Respondent's animals were not provided with overall humane care. Corrections were generally promptly

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[24](...continued)
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. 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.

[25]See note 6.

made.[26] Moreover, the record does not reveal that there were any injuries emanating from any of the violations. Further, I agree with the ALJ that the record reveals that Respondent kept the animals in good condition (Tr. 194). I also find that Respondent usually exhibited good faith in attempting to achieve and to maintain compliance.

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 30-day suspension of Respondent's Animal Welfare Act license, and a $4,300 civil penalty are appropriate and necessary to ensure Respondent's compliance in the future, deter others from violating the Animal Welfare Act, and thereby fulfill the remedial purposes of the Animal Welfare Act.

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

Order

1. Respondent Judie Hansen is assessed a civil penalty of $4,300. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

Colleen A. Carroll
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, Colleen A. Carroll, within 65 days after service of this Order on Respondent. The

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[26]Corrections are to be encouraged and may be taken into account when determining the sanction to be imposed. *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 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 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)).

certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0048.

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 ensure that primary enclosures for kittens have an elevated resting surface;

b. failing to keep the premises clean in order to protect animals from injury and to facilitate the required husbandry practices;

c. failing to provide for the removal and disposal of animal waste so as to minimize vermin infestation, odors, and disease hazards;

d. failing to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement;

e. failing to keep the premises where housing facilities for dogs are located clean and control weeds;

f. failing to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation;

g. failing to ensure that animal areas are free of clutter, including equipment, furniture, and stored material;

h. failing to design and construct housing facilities for dogs and cats so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury and to contain them;

i. failing to provide for the regular and frequent collection, removal, and disposal of animal waste in a manner that minimizes the risk of contamination and disease;

j. failing to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained in the primary enclosures and to minimize disease hazards and to reduce odors;

k. failing to construct indoor and outdoor housing facilities so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury and to contain them; and

l. failing to allow an APHIS inspector access to her facility and records.

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

3. Respondent's Animal Welfare Act license is suspended for a period of 30 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 30-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.

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISION

In re: RONALD L. WIECZOREK AND DEANNA WIECZOREK.
EAJA-FSA Docket No. 99-0001.
Decision and Order filed December 17, 1998.

EAJA application — Business days — Substantially justified.

The Judicial Officer affirmed Hearing Officer Paul Handley's award of $1,755 to Equal Access to Justice Act (EAJA) Applicants. The EAJA Applicants were prevailing parties in an adversary adjudication captioned *In re Ronald Wieczorek*, Case No. 97000990W. The Judicial Officer held that fees and other expenses may be awarded under the EAJA, unless, *inter alia*, the agency's position in the adversary adjudication is substantially justified. A position is substantially justified under the EAJA, if the position is reasonable in law and fact. *Pierce v. Underwood*, 487 U.S. 552 (1988). The Judicial Officer found that the Farm Service Agency's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified because the agency's position in the adversary adjudication was based upon the method it used to establish proposed rent under the preservation loan service program, which method was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997). The Judicial Officer also held that the term *business days* in the National Appeals Division Rules of Procedure (7 C.F.R. § 11.9(a)(2)) includes all days, except legal public holidays, as listed in 5 U.S.C. § 6103, Saturdays, and Sundays; therefore, the Hearing Officer's Appeal Determination did not become a final disposition in *In re Ronald Wieczorek*, Case No. 97000990W, until November 19, 1997, and the EAJA Applicants' December 18, 1997, filing was a timely EAJA application under the Department's Procedures Relating to Awards Under the EAJA (7 C.F.R. § 1.193(a)).

Margit Halvorson, for Respondent.
Chris A. Nipe, Mitchell, South Dakota, for Applicants.
Initial decision issued by Paul Handley, Hearing Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Ronald L. Wieczorek and Deanna Wieczorek [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice], by sending an incomplete EAJA application, dated November 25, 1997, to Paul Handley, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter Hearing Officer]. Applicants completed their EAJA application by sending supplemental information, dated December 15, 1997, to Larry Jordan, Western Regional Office, National Appeals Division, United States Department of Agriculture.

Applicants allege in their EAJA Application that: (1) they were prevailing parties in an appeal of a March 3, 1997, adverse decision issued by the Farm

Service Agency, United States Department of Agriculture [hereinafter Respondent], regarding the feasibility of, and rental rate for, the leaseback of Applicants' property through the preservation loan servicing program, *In re Ronald Wieczorek*, Case No. 97000990W; (2) Respondent's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified; (3) Applicants incurred attorney fees and costs of $1,860.30 in connection with their appeal of Respondent's March 3, 1997, adverse decision; and (4) Applicants' net worth does not exceed $2,000,000 (Applicants' November 25, 1997, filing; Invoice Number 00000045; December 15, 1997, Affidavit of Chris A. Nipe; and Summary of Financial Condition).

Respondent submitted Government's Answer to Application for Fees Under the Equal Access to Justice Act [hereinafter Answer], dated January 8, 1998, to the Hearing Officer. The Answer: (1) states that Applicants' EAJA Application was not timely filed (Answer at 1-2); (2) states that Applicants' EAJA Application is not legally sufficient in that (i) the EAJA Application is filed to recover attorney fees from the "Foreign Service Agency," (ii) the EAJA Application does not show the net worth of Applicants at the time the proceeding was initiated, as required by section 1.191(a) of the EAJA Rules of Practice (7 C.F.R. § 1.191(a)), and (iii) some of the attorney fees requested in the EAJA Application were not incurred in connection with the adversary adjudication relating to the adverse decision issued by Respondent regarding the feasibility of Applicants' farm and home plan and the proposed rental rate for the leaseback of Applicants' property (Answer at 2-3); (3) states that Respondent's position regarding the method used to determine the proposed rental rate for the leaseback of Applicants' property and the proposed rental rate was substantially justified (Answer at 3-9); and (4) requests that the Hearing Officer dismiss Applicants' EAJA Application (Answer at 9).

Applicants submitted Appellant's [sic] Reply to Government's Answer to Application for Fees, dated January 21, 1998, to the Hearing Officer. On September 8, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicants submitted a completed EAJA Application on December 15, 1997, and that the EAJA Application was timely (Initial Decision and Order at 2); (2) found that Respondent's position regarding the proposed rental rate for the leaseback of Applicants' property was not substantially justified (Initial Decision and Order at 3-4); (3) found that Applicants were the prevailing parties in *In re Ronald Wieczorek*, Case No. 97000990W (Initial Decision and Order at 5); (4) found that all of the fees and expenses claimed by Applicants were incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W, and are reasonable and justified (Initial Decision and Order at 4-5);

(5) concluded that neither the Equal Access to Justice Act nor the EAJA Rules of Practice permit the award of Applicants' expenses titled "sales tax" (Initial Decision and Order at 5); and (6) awarded Applicants $1,755 (Initial Decision and Order at 5).

On October 8, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer on matters pertaining to the Equal Access to Justice Act in United States Department of Agriculture [hereinafter USDA] proceedings covered by the EAJA Rules of Practice (7 C.F.R. § 1.189).[1] On November 27, 1998, Applicants filed Appellant's [sic] Reply to Farm Service Agency's Petition for Review of Judicial Officer, and on November 29, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful reading of the record in this proceeding, I agree with the Hearing Officer's Initial Decision and Order. Therefore, while I reword the Initial Decision and Order, I am adopting the general format of and findings and conclusions in the Hearing Officer's Initial Decision and Order, as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Hearing Officer's findings of fact and conclusions, as reworded.

Applicable Statutory Provisions

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

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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)).

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to

be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based[.]

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E) (1994 & Supp. II 1996).

HEARING OFFICER'S INITIAL DECISION AND ORDER (AS REWORDED)

HISTORICAL INFORMATION

On March 3, 1997, Respondent issued an adverse decision regarding the feasibility of Applicants' farm and home plan and Respondent's proposed rental rate for the leaseback of Applicants' property under the preservation loan servicing program. Applicants were offered the opportunity to resolve Respondent's March 3, 1997, adverse decision through mediation, which was completed on July 9, 1997, without the matter being resolved. On July 14, 1997, Respondent again issued the denial of leaseback program assistance to Applicants, based upon Applicants' lack of a feasible farm and home plan and Respondent's proposed rental rate, and Applicants appealed Respondent's adverse decision. On August 26, 1997, the Hearing Officer conducted a hearing, and on October 14, 1997, the Hearing Officer issued an Appeal Determination in which the Hearing Officer found that Respondent's proposed rental rate was in error. *In re Ronald Wieczorek*, Case No. 97000990W. Respondent did not submit a request for a review of the Hearing Officer's Appeal Determination.

On November 25, 1997, Applicants submitted an incomplete EAJA Application for fees and expenses under the authority of 5 U.S.C. § 504 and 7 C.F.R. §§ 1.180-.203. Applicants submitted a completed EAJA Application, dated December 15, 1997, which was received on December 18, 1997.

On May 19, 1998, Larry Jordan, Assistant Director, National Appeals Division, USDA, notified Applicants and Respondent that the record pertaining to Applicants' EAJA Application was closed, effective May 19, 1998. Neither Applicants nor Respondent requested further proceedings, as authorized by 7 C.F.R. § 1.199.

The Order in this Equal Access to Justice Act proceeding is issued on the basis of the record in the proceeding for which Applicants seek fees and expenses, *In re Ronald Wieczorek*, Case No. 97000990W, and on submissions relating to Applicants' EAJA Application.

STATEMENT OF THE CASE

Respondent contends that Applicants' EAJA Application was not timely filed, that Respondent's position in *In re Ronald Wieczorek*, Case No. 97000990W, was substantially justified, and that Applicants' EAJA Application is not legally sufficient.

Applicants contend that the EAJA Application for fees and expenses was filed timely, that Respondent's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified, that Applicants are the prevailing parties in *In re Ronald Wieczorek*, Case No. 97000990W, and that Applicants' EAJA Application is authorized by law and fully supportable.

THE APPLICATION FOR FEES AND EXPENSES WAS TIMELY FILED

Respondent contends that Applicants did not file a timely EAJA Application in accordance with 7 C.F.R. § 1.193, which provides that an application must be filed no later than 30 days after final disposition of the proceeding by USDA. Final disposition means the date on which a decision disposing of the merits of the proceeding becomes final and unappealable, both within USDA and to the courts (7 C.F.R. § 1.193(b)). The record establishes that *In re Ronald Wieczorek*, Case No. 97000990W, became final on November 19, 1997, and that Applicants filed their EAJA Application on December 18, 1997. Therefore, Applicants filed their EAJA Application no later than 30 days after final disposition of *In re Ronald Wieczorek*, Case No. 97000990W, in accordance with 7 C.F.R. § 1.193.

RESPONDENT'S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED

A decision concerning whether Respondent's position was "substantially justified" must be based upon the record of the adversary adjudication for which fees and other expenses are sought (5 U.S.C. § 504(a)(1)).

The adversary adjudication for which Applicants seek fees and other expenses, *In re Ronald Wieczorek*, Case No. 97000990W, resulted from Applicants' appeal of Respondent's denial of Applicants' application for leaseback program assistance under 7 C.F.R. pt. 1951, subpart S. The basis for Respondent's denial of Applicants' leaseback application was Respondent's finding that Applicants' October 28, 1996, farm and home plan was not feasible and that the rent for Applicants' property would be $17,952.

The Hearing Officer found that Applicants' farm and home plan was not feasible. However, Applicants presented evidence at the August 26, 1997, hearing that they were able to obtain financing from a bank to pay Respondent's proposed lease amount; thus, pursuant to 7 C.F.R. § 1951.911(a)(6)(i) (1997), the issue of the feasibility of Applicants' farm and home plan was moot (*In re Ronald Wieczorek*, Case No. 97000990W, Appeal Determination at 3). Therefore, the only remaining issue in *In re Ronald Wieczorek*, Case No. 97000990W, was Respondent's proposed rental rate.

Respondent's proposed rental rate was based on a telephone survey of five lenders located in Mitchell, Plankinton, Stickney, and Mount Vernon, South Dakota. Respondent used the data gleaned from this survey to compute an average cash rental rate for average cropland and average pasture land between Mount Vernon and Plankinton, South Dakota. Further, Respondent conducted a telephone survey of two commercial grain elevators, located in Davison County, and a farmer located 2 miles north of Mount Vernon, South Dakota; whereby Respondent obtained an average per bushel grain storage rate, which Respondent incorporated into its proposed rental rate. (*In re Ronald Wieczorek*, Case No. 97000990W, Appeal Determination at 2.)

Section 1951.911(a)(6)(iii) of USDA's Servicing and Collections regulations (7 C.F.R. § 1951.911(a)(6)(iii) (1997)) requires Respondent to make a survey of lease amounts of farms that are in the immediate area of the leaseback applicant's farm and that have soils, capabilities, and income which are similar to the leaseback applicant's farm, in order to determine market rent. Therefore, Respondent's rental rate determination was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997). (*In re Ronald Wieczorek*, Case No. 97000990W, Appeal Determination at 4.)

Respondent contends that its position regarding the leaseback rental proposal was substantially justified, as Respondent's method of survey used to make this determination was reasonable. A review of the record fails to support Respondent's contention that its survey method was substantially justified. In fact, the evidence establishes that the survey method used by Respondent to determine the proposed rental rate fails as a reasonable approach, as it was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997). Therefore, Respondent has failed to meet its burden of proving that its position in *In re Ronald Wieczorek*, Case No. 97000990W, was "substantially justified."

APPLICANTS' FEES AND EXPENSES ARE REASONABLE AND JUSTIFIED

Respondent argues that Applicants' EAJA Application is not legally sufficient because the EAJA Application states that it is being filed to recover attorney fees from the "Foreign Service Agency." Applicants' reference to the "Foreign Service Agency" as the agency from whom Applicants seek an Equal Access to Justice Act award is an obvious typographical error that does not affect the legal sufficiency of Applicants' EAJA Application.

Respondent further argues that the "Summary of Financial Condition" does not indicate Applicants' financial condition at the time the proceeding was initiated.

The time period for the Applicants' "Summary of Financial Condition" can be determined by comparing the information in the "Summary of Financial Condition" with the financial information that is a matter of record, which meets 7 C.F.R. §§ 1.184(a)-(b)(1) and 1.190(a)-(b).

Respondent also contends that some of the fees that Applicants allege they incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W, are unrelated to *In re Ronald Wieczorek*, Case No. 97000990W. Respondent bases this contention on its view that the "adversary adjudication" arose from Respondent's adverse decision dated July 14, 1997, and that some of the fees which Applicants seek to recover are for legal services performed prior to July 14, 1997. This argument is not supported by the record in *In re Ronald Wieczorek*, Case No. 97000990W, as Respondent's original adverse decision was issued on March 3, 1997. Thus, the attorney fees incurred by Applicants from March 3, 1997, were incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W.

Respondent did not contest the rate of $90 per hour, which Applicants allege was charged by their attorney. The Equal Access to Justice Act provides that attorney fees shall not be awarded in excess of $125 per hour, unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee. (5 U.S.C. § 504(b)(1)(A)(ii).)[2] Therefore, Applicants' claim for attorney fees at the rate of $90 per hour is approved, and the claimed hours are similarly approved, excluding those billed prior to March 3, 1997. Applicants' expense titled "sales tax," included as a part of the attorney fees in the amount of $105.30, are not permitted under 5 U.S.C. § 504(b)(1)(A)(ii) or

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[2]Section 1.186(b) of the EAJA Rules of Practice limits attorney fees to $75 per hour, as follows:

§ 1.186 Allowable fees and expenses.

. . . .

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b).

However, Respondent does not contend that the $75 per hour limitation in 7 C.F.R. § 1.186(b) applies in this proceeding.

7 C.F.R. § 1.186(a)-(c) and are denied. There are no special circumstances which would make the award of fees unjust. Applicants have not unduly or unreasonably protracted the final resolution of *In re Ronald Wieczorek*, Case No. 97000990W.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified.

2. Applicants meet all conditions of eligibility for an award, under the Equal Access to Justice Act, of fees and expenses incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W.

3. Applicants were the prevailing parties in *In re Ronald Wieczorek*, Case No. 97000990W.

4. Applicants' attorney customarily charges $90 per hour for legal services in the course of his business.

5. The fees awarded in this Decision and Order are based upon prevailing market rates for the kind and quality of services furnished Applicants.

6. Attorney fees incurred by Applicants in connection with *In re Ronald Wieczorek*, Case No. 97000990W, were reasonable.

7. Applicants' expense titled "sales tax" in the amount of $105.30 is not approved, as it is an expense not permitted under 5 U.S.C. § 504(b)(1)(A) or 7 C.F.R. § 1.186(a)-(c).

8. Applicants did not unduly or unreasonably delay or protract the final resolution of *In re Ronald Wieczorek*, Case No. 97000990W.

9. There are no special circumstances that would make the award of fees unjust.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in its Petition for Review by Judicial Officer [hereinafter Appeal Petition]. First, Respondent contends that Applicants' EAJA Application was required to be received by the Hearing Officer no later than December 17, 1997, and if the Hearing Officer received Applicants' EAJA Application later than December 17, 1997, Applicants' EAJA Application must be rejected as untimely (Appeal Pet. at 5-6).

I disagree with Respondent's contention that Applicants were required to file their EAJA Application no later than December 17, 1997. Section 1.193(a) of the EAJA Rules of Practice requires that an EAJA Application must be filed no later than 30 days after final disposition of the proceeding by USDA, and section

1.193(b) of the EAJA Rules of Practice defines the term *final disposition*, as follows:

> **§ 1.193 Time for filing application.**
>
> (a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after final disposition of the proceeding by the Department.
>
> (b) For the purposes of this rule, *final disposition* means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become[s] final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(a)-(b) (emphasis added).

The Hearing Officer issued an Appeal Determination in *In re Ronald Wieczorek*, Case No. 97000990W, on October 14, 1997, and Respondent asserts that Respondent received a copy of the Appeal Determination on October 27, 1997 (Appeal Pet. at 5). Section 11.9(a)(2) of the National Appeals Division Rules of Procedure limits the period during which an agency may seek review of a Hearing Officer's determination, as follows:

> **§ 11.9 Director review of determination of Hearing Officers.**
>
> (a) *Requests for Director review.* . . .
>
> (2) Not later than 15 business days after the date on which an agency receives the determination of a Hearing Officer under § 11.8, the head of the agency may make a written request that the Director review the determination. . . .

7 C.F.R. § 11.9(a)(2).

Respondent contends that Hearing Officer's Appeal Determination became a *final disposition* on November 17, 1997, 15 business days after the date on which Respondent received a copy of the Appeal Determination. However, I find that, using Respondent's method of calculating the date of *final disposition*, the Appeal Determination in *In re Ronald Wieczorek*, Case No. 97000990W, did not become a *final disposition* of the proceeding until November 19, 1997.

The term *business days* is not defined for the purposes of the National Appeals Division Rules of Procedure. However, the term *business days* generally includes all days, except Saturdays, Sundays, and legal public holidays.[3] Therefore, I find that, as used in 7 C.F.R. § 11.9(a)(2), the term *business days* includes all days, except Saturdays, Sundays, and legal public holidays.[4] Using this definition of the term *business days*, I find that Respondent's written request for the Director to review the Hearing Officer's Appeal Determination in *In re Ronald Wieczorek*, Case No. 97000990W, had to be made in accordance with section 11.9(a)(2) of the National Appeals Division Rules of Procedure (7 C.F.R. § 11.9(a)(2)), no later than November 18, 1997,[5] and the Hearing Officer's Appeal Determination became a

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[3]*See generally NLRB v. Frazier*, 144 F.R.D. 650, 657-58 (D.N.J. 1992) (indicating that "business days" are all days except Saturdays, Sundays, and legal holidays); *Kletzien v. Ford Motor Co.*, 668 F. Supp. 1225, 1229 (E.D. Wis. 1987) (indicating that if the term "business days" had been used, it would not include weekends and holidays); *Rock Finance Co. v. Central Nat. Bank of Sterling*, 89 N.E.2d 828, 831 (Ill. App. Ct. 1950) (stating that "[i]n the legal literature it appears that the phrase `business day' is used by courts and text writers to denote a day upon which business is conducted, as contrasted with holidays or Sundays"). *Cf. Kussmaul v. Peters Constr. Co.*, 583 F. Supp. 91, 94-95 (D.R.I. 1983) (indicating that the term "next business day" does not include Saturdays, Sundays, and legal holidays); *State v. Duncan*, 43 So. 283, 287 (La. 1907) (distinguishing between the term "secular or business day" and days of public rest and legal holidays).

[4]The Act of September 6, 1966, as amended, lists legal public holidays, as follows:

§ 6103. Holidays

(a) The following are legal public holidays:

New Year's Day, January 1.
Birthday of Martin Luther King, Jr., the third Monday in January.
Washington's Birthday, the third Monday in February.
Memorial Day, the last Monday in May.
Independence Day, July 4.
Labor Day, the first Monday in September.
Columbus Day, the second Monday in October.
Veterans Day, November 11.
Thanksgiving Day, the fourth Thursday in November.
Christmas Day, December 25.

5 U.S.C. § 6103(a).

[5]I conclude that Respondent's written request for the Director to review the Hearing Officer's Appeal Determination in *In re Ronald Wieczorek*, Case No. 97000990W, had to be made no later than

(continued...)

final disposition of the proceeding on November 19, 1997.

The record indicates that Applicants' EAJA Application was filed December 18, 1997, 29 days after final disposition of the proceeding by USDA.[6] Therefore, Applicants' EAJA Application was not filed late, as Respondent contends.

Second, Respondent contends that the Hearing Officer erred in finding that Respondent was not substantially justified in its determination of the proposed rent amount (Appeal Pet. at 6-7).

Fees and other expenses incurred by Applicants in connection with *In re Ronald Wieczorek*, Case No. 97000990W, may be awarded to Applicants under the Equal Access to Justice Act unless, *inter alia*, Respondent's position in the proceeding was substantially justified.

An agency's position is *substantially justified* under the Equal Access to Justice Act, if, even though it is incorrect, a reasonable person could think the position is correct, *viz.*, the position is reasonable in law and fact.[7] While the agency bears the burden of proving the substantial justification of its position,[8] the fact that the agency lost in the underlying litigation does not create a presumption that its position was not substantially justified.[9]

Section 1951.911(a)(6)(iii) of USDA's Servicing and Collections regulations

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[5](...continued)
November 18, 1997, by counting October 28, 1997, as the first business day after the day on which Respondent received the Hearing Officer's Appeal Determination and by not counting Saturdays, Sundays, and Veterans Day (November 1, 2, 8, 9, 11, 15, and 16, 1997), as business days.

[6]See the date stamp in the lower right-hand corner of the letter, dated December 15, 1997, from Chris A. Nipe to Larry Jordan, which reads "DEC 18 '97 RCVD".

[7]*See Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988) (stating that a position is *substantially justified* under the Equal Access to Justice Act if it is: justified in substance or in the main; justified to a degree that could satisfy a reasonable person; justified to the extent that a reasonable person could think it correct; or a position that has a reasonable basis in law and fact); *Derickson Co. v. NLRB*, 774 F.2d 229, 232 (8th Cir. 1985) (stating that the test of *substantial justification* is a practical one, *viz.*, whether the agency's position was reasonable both in law and fact); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.) (stating that the test of whether the position of the United States is *substantially justified* is essentially one of reasonableness in law and fact), *cert. denied*, 469 U.S. 1088 (1984).

[8]*See Derickson Co. v. NLRB*, 774 F.2d 229, 232 (8th Cir. 1985); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.), *cert. denied*, 469 U.S. 1088 (1984).

[9]*See Keasler v. United States*, 766 F.2d 1227, 1231 (8th Cir. 1985).

describes the survey to be made to determine the amount of the proposed rent for leaseback property, as follows:

> **§ 1951.911 Preservation Loan Service Programs.**
>
> (a) *Leaseback/buyback. . . .*
>
> . . . .
>
> (6) *Processing leaseback requests. . . .*
>
> . . . .
>
> (iii) Leaseback property will be leased for an amount equal to that for which similar properties in the area are being leased or rented (market rent). In no case will inventory property be leased for a token amount. The County Supervisor will make a survey of lease amounts of farms in the immediate area with similar soils, capabilities and income. The amount of the rental will be determined by the County Supervisor. Prior to entering into a Leaseback/Buyback Agreement, the County Supervisor will advise the applicant, by letter, of the rent amount. If the leaseback applicant disagrees with the proposed rental, the applicant can appeal in accordance with subpart B of part 1900 of this chapter.

7 C.F.R. § 1951.911(a)(6)(iii) (1997).

While the County Supervisor did conduct a survey, the Hearing Officer describes the survey, as follows:

> **FINDINGS OF FACT:**
>
> . . . .
>
> 5. Agency documentation dated January 13, 1997, shows the Agency conducted a survey of the cash rental rates of the average cropland and average pasture land between Mount Vernon (in Davison County), South Dakota, and Plankinton (in Aurora County), South Dakota. This survey shows that four commercial banks and Farm Credit Services (located in Mount Vernon, Mitchell and Stickney, South Dakota) were called, with a reported average cropland cash rate of $25.00 to $40.00, and average pasture/grassland at $12.00 to $20.00, which was calculated showing an amount of $12,363 for 542.5 acres of the Appellant's [sic] land. Also, the Agency surveyed one producer two (2) miles north of Mount Vernon, South Dakota, and two (2) commercial grain elevators (located in Mount Vernon

and Mitchell, South Dakota) for the average per bushel grain storage rental amount, which was calculated to be .09 cents per bushel for storage rental or a total of $5,589.00 for the Appellant's [sic] ten grain storage bins. (Agency exhibits E and K)

6. On June 11, 1997[,] an appraisal of Appellant's [sic] approximate 659 acres of land, with 604 acres located six (6) miles east of Plankinton (in Aurora County), South Dakota, and 55 acres located two (@) miles northwest of Mount Vernon (in Davison County), South Dakota, shows a market value for rent income of $18,811.00, based on three (3) comparable sales, with one sale noted located in the same section and most similar to Appellant's [sic] land. (Agency exhibits G and R)

. . . .

CONCLUSIONS

. . . .

The Agency's January 13, 1997[,] surveys document that the lease payment was based on telephone calls to four (4) commercial banks, two (2) commercial grain elevators and Farm Credit Service, and only one farm within two miles of the Appellant's [sic] farm, but that this farm failed to be documented if it met the requirement of having similar soils, capabilities and income potential (FOF 5). Furthermore, the evidence shows an appraisal market rental total of $18,811.00 for the approximate 659 acres, was used in part by the Agency to support their [sic] rental amount determination, in that the amount of $17,952.00 (plus an amount of $5.00 per acre for the remaining 116.5 acres) was less than the appraisal market rental value. However, the appraisal document shows only one out of three (3) sales comparables, used in determining the market rental amount of $18,811.00, documents being in the immediate area and similar to the Appellant's [sic] farm (FOF 6).

In re Ronald Wieczorek, Case No. 97000990W, Appeal Determination at 2-4.

Further, the Hearing Officer concludes that the County Supervisor's survey was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997), as follows:

. . . Therefore, this evidence shows that while the Agency did provide these

> surveys documented in the running record dated January 13, 1997, that the Agency's surveys fail to document nor support farms found in the immediate area with similar soils, capabilities and income potential to the Appellant's [sic] property serving as the basis for the Agency's proposed rental amount of $17,952.00.

In re Ronald Wieczorek, Case No. 97000990W, Appeal Determination at 4.

Respondent has not met its burden of proof that its position in *In re Ronald Wieczorek*, Case No. 97000990W, with respect to the method used to establish a proposed amount of rent under a leaseback/buyback agreement, was substantially justified.

Third, Respondent contends that the Hearing Officer erred "in inferring that the regulations required [the Farm Service Agency] to obtain an appraisal or obtain 'comparable rental farms' using an appraisal approach" (Appeal Pet. at 7-8).

Respondent quotes the portion of the Initial Decision and Order upon which Respondent bases its contention that the Hearing Officer inferred that "the regulations required the Farm Service Agency to obtain an appraisal or obtain 'comparable rental farms' using an appraisal approach." However, the Hearing Officer did not find that the regulations *required* the Farm Service Agency "to obtain an appraisal or comparable rental farms using an appraisal approach," as Respondent contends.

Fourth, Respondent contends that the Hearing Officer erred because the Farm Service Agency's "survey approach was a generally applicable interpretation of the regulations" and "the Hearing Officer's inference that an appraisal approach was required was not based on generally applicable interpretations of the pertinent regulations" (Appeal Pet. 8-9).

As stated in this Decision and Order, *supra*, the method used by the Farm Service Agency to establish a proposed amount of rent was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997), and I do not find that the Hearing Officer found that an appraisal approach was *required*.

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

Order

Pursuant to the Equal Access to Justice Act, Applicants are awarded $1,755 for fees which they incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W.

FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF ACT

DEPARTMENTAL DECISION

In re: KINZUA RESOURCES, LLC.
FSSAA Docket No. 98-0001.
Decision and Order filed June 5, 1998.

Sourcing area application — Geographically and economically separate — Administrative law judge bound by rules of practice — Modification of rules of practice to meet statutory requirements — Constructive notice by Federal Register publication.

The Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer (Chief ALJ) approving the Applicant's proposed sourcing area. The sourcing area is geographically and economically separate from the geographic area from which the Applicant harvests for export timber originating from private lands. The evidence adequately supports the Chief ALJ's Findings and Conclusions. *In re Stimson Lumber Co.*, 54 Agric. Dec. 155 (1995), does not hold that geographic separation is determined by comparing the distance between the sourcing area and an applicant's timber manufacturing facilities to the distance between the area from which an applicant harvests for export unprocessed timber originating from private lands and the applicant's timber manufacturing facilities; instead, *Stimson* holds that areas located west of the Cascade Mountain Range are geographically and economically separate from timber manufacturing facilities located east of the crest of the Cascade Mountain Range. Although two commenters requested a hearing during the comment period, no request for a hearing was made during the review period, which is the only time during which a hearing may be requested (7 C.F.R. § 1.417(e)); therefore, the failure to hold a hearing was not error. The Rules of Practice (7 C.F.R. §§ 1.410-.429) are published in the Federal Register; thereby constructively notifying the parties of the requirement that requests for a hearing must be filed during the 10-day review period. The record establishes that the Regional Forester considered the comments and that the Chief ALJ responded to all of the relevant comments. Parties may file an appeal within 10 calendar days after receiving service of the judge's decision (7 C.F.R. § 1.426), and generally, administrative law judges and the judicial officer are bound by rules of practice. However, administrative law judges and the judicial officer may modify rules of practice when modification is necessary to comply with statutory requirements, such as the deadline in 16 U.S.C.A. § 620b(c)(3)(A). The Chief ALJ did not err when he modified the Rules of Practice to meet a statutory deadline.

Kirk Johansen, Portland, Oregon, for Applicant.
Regional Forester, pro se.
Steve Thompson, Whitefish, Montana, for The Public Lands Council; the Sierra Club, Northwest Conservation Committee; and Montana Wilderness Association.
Daniel Van Vactor, Bend, Oregon, for Blue Mt. Lumber Products, LLC; Malheur Lumber Company; D.R. Johnson Lumber Co.; Joseph Timber Company, LLC; and Ochoco Lumber Company.
Asante Riverwind, Fossil, Oregon, for Blue Mountains Biodiversity Project.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Kinzua Resources, LLC [hereinafter Kinzua], instituted this proceeding on February 6, 1998, pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990, as amended (16 U.S.C. §§ 620-620j) [hereinafter the FRCSRA]; the regulations promulgated pursuant to the FRCSRA (36 C.F.R. §§ 223.185-.203) [hereinafter the Regulations]; and the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (7 C.F.R. §§ 1.410-.429) [hereinafter the Rules of Practice], by filing an application for a sourcing area for its Heppner, Oregon, and Pilot Rock, Oregon, timber manufacturing facilities.

The Regional Forester for Region 6 completed publication of a notice of Kinzua's sourcing area application in newspapers of general circulation in the proposed sourcing area on March 18, 1998. A 30-day comment period followed, ending on April 17, 1998. Seventeen comments were received. Fourteen comments opposed Kinzua's sourcing area application. One commenter supported Kinzua's sourcing area application, and two commenters did not state whether they opposed or supported Kinzua's sourcing area application. In response to a number of the commenters' concerns, Kinzua filed an amended sourcing area application [hereinafter Amended Application] on April 27, 1998. In accordance with section 1.417 of the Rules of Practice (7 C.F.R. § 1.417), following the 30-day comment period, commenters had 10 working days from the close of the comment period to review the written comments and submit written recommendations and requests for a hearing to the administrative law judge.

The Regional Forester recommended approval of Kinzua's Amended Application. No other recommendations were received; and although American Wildlands and Wyoming Outdoor Council requested a hearing in their joint comment filed March 31, 1998, no hearing was requested during the review period, as provided in section 1.417(c) of the Rules of Practice (7 C.F.R. § 1.417(c)). Therefore, no hearing was held, and on May 19, 1998, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a Decision and Order [hereinafter Initial Decision and Order]* in which he approved Kinzua's Amended Application based on the written record (Initial Decision and Order at 6).

*The Chief ALJ filed the Initial Decision and Order on May 20, 1998.

On May 29, 1998, The Lands Council,** the Sierra Club, Northwest Conservation Committee, and the Montana Wilderness Association filed a joint appeal petition; and Blue Mt. Lumber Products, LLC, Malheur Lumber Company, D.R. Johnson Lumber Company, Joseph Timber Company, LLC, and Ochoco Lumber Company filed a joint appeal petition. On June 1, 1998, Blue Mountains Biodiversity Project filed its appeal petition.

**Section 1.426(a) of the Rules of Practice provides that only a party to the proceeding may appeal the decision of the judge, as follows:

§ 1.426 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 10 calendar 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. § 1.426(a).

Section 1.411(h) defines the term "party of record or party" for purposes of a proceeding to determine approval or disapproval of a sourcing area application, as follows:

§ 1.411 Definitions.

As used in these procedures, the terms as defined in the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620, *et seq.* (Act) and in the regulations issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in these procedures:

. . . .

(h) *Party of record or Party* is a party to the proceeding to determine approval or disapproval of a sourcing area application. . . . The sourcing area applicant and persons who submit written comments on the sourcing area application at issue during the 30 calendar day comment period, including the Regional Forester, are the parties of record.

7 C.F.R. § 1.411(h).

"The Lands Council" is not the sourcing area applicant, the Regional Forester, or a person who submitted a written comment on the sourcing area application at issue in this proceeding. Therefore, "The Lands Council" is not a party under the Rules of Practice and cannot appeal the Chief ALJ's Initial Decision and Order. However, based on the record in this proceeding, I infer that "The Lands Council" referenced in the joint appeal petition filed by The Lands Council, the Sierra Club, Northwest Conservation Committee, and the Montana Wilderness Association is "The Public Lands Council" which is a person which submitted a comment on the sourcing area application at issue on March 30, 1998; and thus is a party who may appeal the Chief ALJ's Initial Decision and Order.

On June 1, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer*** for decision. On June 1, 1998, based on the June 6, 1998, deadline for approval or disapproval of Kinzua's Amended Application,**** I issued

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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 Secretary of Agriculture delegated authority to the Judicial Officer 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).

****Section 490(c)(3)(A) of the FRCSRA requires the Secretary of Agriculture to approve or disapprove a sourcing area application within 4 months of receipt of the application, as follows:

> **§ 620b. Limitations on substitution of unprocessed Federal timber for unprocessed timber exported from private lands**
>
> . . . .
>
> **(c) Sourcing areas**
>
> . . . .
>
> **(3) Grant of approval for sourcing areas for processing facilities located outside of the northwestern private timber open market area**
>
> **(A) In general**
>
> For each applicant, the Secretary . . . shall, on the record and after an opportunity for a hearing, not later than 4 months after receipt of the application for a sourcing area, either approve or disapprove the application.

16 U.S.C.A. § 620b(c)(3)(A) (West Supp. 1998).

Moreover, section 1.426(d) of the Rules of Practice requires that the Judicial Officer rule on an appeal within 4 months after the institution of the proceeding, as follows:

> **§ 1.426 Appeal to Judicial Officer.**
>
> . . . .
>
> (d) *Decision of the Judicial Officer on appeal.* 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 within 4 months after the institution of the proceeding, pursuant to 16

(continued...)

an Informal Order requiring the parties to file any response to the appeal petitions no later than 3:00 p.m., eastern time, June 4, 1998. On June 4, 1998, Kinzua filed Kinzua Resources, LLC's Response To All Appeals.

Based upon a careful consideration of the record in this proceeding, 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.

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

. . . .

Findings of Fact

1. Kinzua Resources, LLC, is an Oregon limited liability company [(Amended Application at 1)]. Kinzua owns two sawmills and one whole log chip mill operating in the sourcing area for which application is being made. One sawmill and the chip mill are located in Heppner, Oregon, and the second sawmill is located in Pilot Rock, Oregon. Kinzua's affiliates are: ATR Services, Inc.; ATR Land & Cattle, Inc.; Greg Demers; Lane Plywood, Inc.; Pioneer Aviation, LLC; and Pioneer Resources, LLC. [(Amended Application ¶ 3, Ex. 4; Letter from Robert W. Williams, Regional Forester, to the Chief ALJ, dated April 15, 1998 [hereinafter Regional Forester's Review], at 1.)]

2. Neither Kinzua nor any of its affiliates has purchased National Forest timber during the past 24-month period [(Regional Forester's Review at 1)].

3. Kinzua has exported private timber from lands situated west of the crest of the Cascade Mountains . . . [(Amended Application ¶ 1(C), Ex. 2)].

4. [Timber for] Kinzua's Pilot Rock, Oregon, and Heppner, Oregon, [timber manufacturing facilities is private timber] from private lands and . . . from other [timber manufacturing facilities (Amended Application ¶ 1(C); Regional

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****(...continued)
U.S.C. 620b(c)(3).

7 C.F.R. § 1.426(d).

This proceeding was instituted on February 6, 1998. Therefore, the deadline for the issuance of the Decision and Order is June 6, 1998.

Forester's Review at 1)].

5. Kinzua's Amended Application describes the proposed sourcing area as follows:

> Commencing at the intersection of the Canadian border and the Cascade Mountain Range; proceed southerly along the crest of the Cascade Mountain Range to the intersection with the California state line; then east along the 42nd Latitude line (the Oregon and Idaho southern state lines) to the intersection with the Utah state line; then south along the 114th longitudinal line (western state line of Utah) to the intersection with the Arizona state line; then east along the Utah and Colorado southern state lines to the intersection with Interstate 25; then north along Interstate 25 through Colorado to the Wyoming state line; then east along the Wyoming state line until the intersection with the 104th Longitudinal line; and then north on the 104th Longitudinal line (along the eastern state lines of Wyoming and Montana) to the intersection with the Canadian border; then west along the Canadian border to the point of beginning.

[Amended Application ¶ 1(B).]

6. Kinzua's Amended Application includes a map of sufficient scale and detail to clearly show: Kinzua's desired sourcing area boundary; the location of Kinzua's timber manufacturing facilities in Pilot Rock, Oregon, and Heppner, Oregon; the private lands within and outside the sourcing area from which Kinzua exported, sold, traded, exchanged, or otherwise conveyed timber within the past 24 months for the purpose of exporting such timber [(Amended Application ¶ 1(C), Ex. 2; Regional Forester's Review ¶ 1(a))].

7. The sourcing area boundaries [proposed in Kinzua's Amended Application] follow appropriate features, using major natural and cultural features including . . . prominent ridge systems, main roads or highways, . . . and political subdivisions [(Amended Application ¶ 1(B), Ex. 1, 2; Regional Forester's Review ¶ 1(b))].

8. [Kinzua's proposed sourcing area] includes both private and federal lands from which Kinzua intends to acquire unprocessed timber for its [timber manufacturing facilities in Heppner, Oregon, and Pilot Rock, Oregon (Regional Forester's Review ¶ 1(c))].

9. Kinzua's Amended Application identifies 1[0] competitors with timber manufacturing facilities in the same [general] vicinity as Kinzua's Heppner, Oregon, and Pilot Rock, Oregon, [timber manufacturing facilities (Amended

Application, Ex. 3)]. In addition, the Regional Forester [states that there are] 9 companies that have competed [with Kinzua for timber in the proposed sourcing area (Regional Forester's Review ¶ 1(d)].

10. The State of Washington offers approximately 55 million board feet of timber for bid annually, which is dispersed among the competing [timber manufacturing facilities] throughout the area. The State of Oregon has minimal [acres of] productive timber land in the proposed sourcing area. [(Regional Forester's Review ¶ 1(d).)]

11. Kinzua provided the Regional Forester with a list of its timber purchases for both the Heppner, Oregon, and Pilot Rock, Oregon, [timber manufacturing facilities] for 1996 and 1997. The Regional Forester believes that other companies can and do compete for the private timber that is available. [(Regional Forester's Review ¶ 1(d).)]

12. Kinzua's Amended Application is printed on company letterhead, contains the required certification statement, and is . . . signed and notarized[, as required by section 223.190(c)(4) and (f) of the Regulations (36 C.F.R. § 223.190(c)(4), (f)) (Amended Application)].

13. The [sourcing area that is the subject of Kinzua's Amended Application] is geographically and economically separate from [geographic areas] from which Kinzua harvests or acquires . . . for export [unprocessed timber originating from private lands]. The area from which Kinzua exports private timber is west of the Cascade Mountain Range, while the proposed sourcing area is entirely east of the [crest of the Cascade] Mountain Range. [(Regional Forester's Review ¶ 2.)]

14. [Generally, timber is not hauled over the Cascade Mountain Range from] west to east. Several commenters [state] that this pattern has . . . changed [(Comments filed by Blue Mt. Lumber Products, LLC, March 26, 1998; Ochoco Lumber Company, March 30, 1998; Joseph Timber Company, LLC, March 30, 1998; Malheur Lumber Company, March 30, 1998; D.R. Johnson Lumber Company, March 31, 1998)]. The Regional Forester, however, found that while a change in the flow of timber may be developing, at present, only a limited amount of timber [is] moved from west to east [over the crest of the Cascade Mountain Range (Regional Forester's Review ¶ 2)].

Conclusions of Law

1. The sourcing area that is the subject of [Kinzua's Amended A]pplication is geographically and economically separate from any geographic area from which Kinzua harvests for export any unprocessed timber originating from private lands.

2. Kinzua has satisfied all of the procedural and technical requirements of the

FRCSRA and the Regulations.

Discussion

[Section 490(c)(3)(A) of the FRCSRA] provides that the Secretary may approve a sourcing area application only if the Secretary determines that:

> [T]he area that is the subject of the application, in which the timber manufacturing facilities at which the applicant desires to process timber originating from Federal lands are located, is geographically and economically separate from any geographic area from which that person harvests for export any unprocessed timber originating from private lands.

16 U.S.C.A. § 620b(c)(3)(A) (West Supp. 1998). The Regional Forester reviewed Kinzua's sourcing area application and . . . determined that the requirements of the FRCSRA were met [(Letter from Robert W. Williams, Regional Forester, to the Chief ALJ, filed May 6, 1998 [hereinafter Regional Forester's Recommendation])]. There is no evidence to warrant a finding in contravention of the Regional Forester's determination.

Several commenters opposed Kinzua's sourcing area application on the grounds that Kinzua's proposed sourcing area is not economically and geographically separate from private lands from which Kinzua harvests or acquires private timber for export. These commenters assert that timber moves in both directions across the Cascade Mountain Range, and that the Cascade Mountain Range is, therefore, no longer an appropriate sourcing area boundary, as previously held.[1] The Regional Forester, however, determined that, while patterns may be changing as Federal timber becomes more difficult to obtain, the Cascade Mountain Range is still an appropriate boundary under current purchasing patterns, as movement of timber from west to east [over the Cascade Mountain Range] is still unusual . . . [(Regional Forester's Review ¶ 2)].

Some commenters opposed the size of the proposed sourcing area. Although, size is not a factor to be considered under the FRCSRA, the [proposed sourcing area in the] Amended Application [is] . . . considerably [smaller than the sourcing area proposed in Kinzua's application for a sourcing area filed February 6, 1998],

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[1]*See, e.g., In re Stimson Lumber Co.*, 56 Agric. Dec. 480 (1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155 (1995); *In re Springdale Lumber Co.*, 53 Agric. Dec. 1185 (1994); *In re Crown Pacific, Ltd.*, 53 Agric. Dec. 1118 (1994).

which may alleviate some concern. Several commenters were opposed to sourcing areas, in general, because of concerns about the affect [of sourcing areas] on jobs and on the preservation of natural resources. These concerns do not affect the validity of the proposed sourcing area under the FRCSRA. A few commenters noted technical deficiencies in Kinzua's application, all of which were corrected in the Amended Application.

The record supports the Regional Forester's Recommendation. As such, it shall be followed and Kinzua's Amended Application shall be approved.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

On May 29, 1998, The Public Lands Council,[2] the Sierra Club, Northwest Conservation Committee, and the Montana Wilderness Association filed Appeal of Judge Palmer's May 19, 1998 Order and Decision Approving the Sourcing Area Requested by Kinzua Resources, LLC [hereinafter Thompson Appeal Petition], and Blue Mt. Lumber Products, LLC, Malheur Lumber Company, D.R. Johnson Lumber Co., Joseph Timber Company, LLC, and Ochoco Lumber Company filed Blue Mt. Lumber Products, Malheur Lumber Company, D.R. Johnson Lumber Co., Joseph Timber Company, and Ochoco Lumber Company's Appeal Petition and Brief [hereinafter Oregon Appeal Petition]. On June 1, 1998, Blue Mountains Biodiversity Project filed Appeal to the Judicial Officer [hereinafter Biodiversity Appeal Petition].

The parties that filed the Thompson Appeal Petition raise four issues. First, the parties that filed the Thompson Appeal Petition contend that the Regional Forester's Recommendation is not adequate to support the Initial Decision and Order (Thompson Appeal Petition at 2.)

The Regional Forester's Recommendation by itself is not adequate to support all of the Findings of Fact in the Initial Decision and Order. However, the record consists of much more than the Regional Forester's Recommendation; and in particular, the Chief ALJ relied heavily on the Regional Forester's Review. I find that the Initial Decision and Order is supported by the record, and I adopt, with only minor changes, the Initial Decision and Order as the final Decision and Order.

Second, the parties that filed the Thompson Appeal Petition contend that the Regional Forester failed to fully consider the comments (Thompson Appeal Petition at 2).

I disagree with the parties that filed the Thompson Appeal Petition and find that

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[2]See note **.

the record establishes that the Regional Forester considered the comments. The Regional Forester's Review states that "[w]e are not making a recommendation on whether or not to approve the sourcing area until the 10 day [review] period is completed. That will give us the opportunity to examine any new material that may come to light. . . ." (Regional Forester's Review ¶ 2.) The Regional Forester's Recommendation states:

> As we said in our letter of April 15, we were awaiting the end of the review and comment period before making a recommendation concerning the Kinzua sourcing area application. We have now reviewed all of the comments, the last of which were forwarded to us by your office, via FAX.
>
> . . . .
>
> Therefore, based on our review, including the comments, we believe that Kinzua meets the requirements for being awarded the revised sourcing area for which they [sic] have applied.

Third, the parties that filed the Thompson Appeal Petition contend that the evidence is not sufficient to establish that the areas west of the crest of the Cascade Mountain Range from which Kinzua harvests for export unprocessed timber originating from private lands are geographically and economically separate from areas east of the crest of the Cascade Mountain Range (Thompson Appeal Petition at 5-6). While the record establishes that a change in the flow of timber is developing (Comments filed by Blue Mt. Lumber Products, LLC, March 26, 1998; Ochoco Lumber Company, March 30, 1998; Joseph Timber Company, LLC, March 30, 1998; Malheur Lumber Company, March 30, 1998; D.R. Johnson Lumber Company, March 31, 1998), at present, only a limited amount of timber is moved from west to east over the crest of the Cascade Mountain Range. I do not find that the Chief ALJ erred by concluding that the areas west of the Cascade Mountain Range from which Kinzua harvests for export unprocessed timber originating from private lands are geographically and economically separate from areas east of the crest of the Cascade Mountain Range.

Fourth, the parties that filed the Thompson Appeal Petition contend that the Regional Forester inappropriately refers to the "Forest Resources Conservation and Shortage Relief Act of 1997" (Thompson Appeal Petition at 6-7 (emphasis in original)).

The Regional Forester's Recommendation does reference the "Forest Resources Conservation and Shortage Relief Act of 1997," as parties that filed the Thompson

Appeal Petition contend. Specifically, the Regional Forester's Recommendation states that: comments that Kinzua should not be allowed to begin competing for timber in the area where other purchasers are already competing for National Forest timber and comments that a company should not be able to export private timber in one area and be able to purchase National Forest timber in another area do not respond to whether Kinzua meets the requirements of the Forest Resources Conservation and Shortage Relief Act of 1997.

This proceeding is conducted pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. §§ 620-620j), as amended by the Forest Resources Conservation and Shortage Relief Amendments Act of 1993, Pub. L. No. 103-45, 107 Stat. 223; section 6(d)(35) of the Act of November 2, 1994, Pub. L. No. 103-437, § 6(d)(35), 108 Stat. 4581, 4585; and the Forest Resources Conservation and Shortage Relief Act of 1997, Pub. L. No. 105-83, Title VI, 111 Stat. 1617-24. While I find that the Regional Forester's reference to the Forest Resources Conservation and Shortage Relief Act of 1997 is error, it is harmless error, because the comments in question do not address whether Kinzua's Amended Application should be approved or disapproved under the Forest Resources Conservation and Shortage Relief Act of 1990, as amended (16 U.S.C. §§ 620-620j).

The parties that filed the Oregon Appeal Petition raise two issues. First, the parties that filed the Oregon Appeal Petition contend that the record shows that Kinzua's proposed sourcing area and export area are not adequately separate, geographically and economically, to satisfy the FRCSRA requirements (Oregon Appeal Petition at 3-6).

I disagree with the contention that Kinzua's proposed sourcing area is not geographically and economically separate from the geographic area from which Kinzua harvests for export unprocessed timber originating from private lands.

The parties that filed the Oregon Appeal Petition, relying on *In re Stimson Lumber Co.*, 54 Agric. Dec. 155 (1995), contend that the United States Department of Agriculture "has interpreted 'geographic' separateness by comparing the relative length between the sourcing area and the mills and the export area and the mills." (Oregon Appeal Petition at 4.) However, while there is a finding in *In re Stimson Lumber Co., supra*, 54 Agric. Dec. at 159-60, that "[t]he private land owned by applicant in California from which it sells some timber for export is over 1,000 miles distant from its mills in Montana," *Stimson* does not hold that geographic separation is determined by comparing the distance between the sourcing area and the timber manufacturing facilities to the distance between the area from which an applicant harvests for export unprocessed timber originating from private lands and the timber manufacturing facilities. To the contrary, in *Stimson*, the Judicial

Officer states that no detailed discussion of the evidence is necessary because, as in the instant proceeding, the applicant's western boundary for the proposed sourcing area was the crest of the Cascade Mountain Range and the geographic area from which the applicant harvested for export unprocessed timber originating from private lands was west of the crest of the Cascade Mountain Range, as follows:

> No detailed discussion of the evidence is necessary since the Applicant's western boundary was established, by amendment, as the crest of the Cascade Mountain Range, and it has recently been determined in three cases in which Boise Cascade was the chief opponent of the sourcing area applications that with rare, incidental exceptions, timber does not move from west of the crest of the Cascade Ridge (which is where Applicant's wholly-owned subsidiary has been selling timber for export) to mills east of the crest of the Cascade Ridge. *In re Springdale Lumber Co.*, 53 Agric. Dec. [1185 (1994)]; *In re Crown Pacific, Ltd.*, 53 Agric. Dec. [1118 (1994)]; *In re Crown Pacific Inland Lumber Limited Partnership*, 53 Agric. Dec. [1140 (1994)]. Although the western boundary of the sourcing areas in the two *Crown Pacific* cases was not *identical* to the *Springdale* case, where, as here, the western boundary is the "crest of the Cascade" Mountain Range, the whole thrust of the evidence, findings and conclusions in all three cases was that areas located west of the crest of the Cascade Ridge are geographically and economically separate from mills located east of the crest of the Cascade Ridge.

In re Stimson Lumber Co., supra, 54 Agric. Dec. at 162-63.

The parties that filed the Oregon Appeal Petition also point to the evidence in the record that supports their contention that "the summit of the Cascade Mountains does not represent an economic dividing line" (Oregon Appeal Petition at 5-6). While the record establishes that a change in the flow of timber is developing (Comments filed by Blue Mt. Lumber Products, LLC, March 26, 1998; Ochoco Lumber Company, March 30, 1998; Joseph Timber Company, LLC, March 30, 1998; Malheur Lumber Company, March 30, 1998; D.R. Johnson Lumber Company, March 31, 1998), at present, only a limited amount of timber is moved from west to east over the crest of the Cascade Mountain Range (Regional Forester's Review ¶ 2). I do not find that the Chief ALJ erred by concluding that the areas west of the Cascade Mountain Range from which Kinzua harvests for export unprocessed timber originating from private lands are geographically and

economically separate from areas east of the crest of the Cascade Mountain Range.

Second, the parties that filed the Oregon Appeal Petition contend that the Chief ALJ failed to consider timber purchasing patterns for both Kinzua and others in the vicinity of the sourcing area, as required under the FRCSRA (Oregon Appeal Petition at 7-8). Specifically, the parties that filed the Oregon Appeal Petition state that "[t]he Secretary of Agriculture must consider the timber purchasing patterns, on private and Federal lands, of the applicant as well as other persons in the same local vicinity as the applicant, and the relative similarity of such purchasing pattern before granting a sourcing are [sic] application. (16 U.S.C. 620a(c)(3).) No such review is reflected in the administrative record." (Oregon Appeal Petition at 7 (emphasis in the original).)

As an initial matter, the provision requiring consideration of "patterns" is set forth in 16 U.S.C.A. § 620b(c)(3)(C) (West Supp. 1998), not 16 U.S.C. § 620a(c)(3), as the parties that filed the Oregon Appeal Petition contend. Further, the requirement that the Secretary of Agriculture "consider equally the timber purchasing patterns, on private and Federal lands, of the applicant as well as other persons in the same local vicinity as the applicant, and the relative similarity of such purchasing patterns" was repealed by section 602(a)(2)(C)(ii) of the Forest Resources Conservation and Shortage Relief Act of 1997.

However, section 602(a)(2)(C)(ii) of the Forest Resources Conservation and Shortage Relief Act of 1997 does amend section 490(c)(3) of the FRCSRA by adding a new subsection (C) which requires consideration of sourcing patterns, as follows:

> **§ 620b. Limitations on substitution of unprocessed Federal timber for unprocessed timber exported from private lands**
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> . . . .
>
> **(c) Sourcing areas**
>
> . . . .
>
> **(3) Grant of approval for sourcing areas for processing facilities located outside of the northwestern private timber open market area**
>
> . . . .

> **(C) For timber manufacturing facilities located in States other than Idaho**
>
> . . . [I]n making the determination referred to in subparagraph (A), the Secretary . . . shall consider the private timber export and the Federal timber sourcing patterns for the applicant's timber manufacturing facilities, as well as the federal timber sourcing patterns for the timber manufacturing facilities of other persons in the same local vicinity of the applicant, and the relative similarity of such Federal timber sourcing patterns. Private timber sourcing patterns shall not be a factor in such determinations in States other than Idaho.

16 U.S.C.A. § 620b(c)(3)(C) (West Supp. 1998).

The Initial Decision and Order reveals that the Chief ALJ considered the sourcing patterns for Kinzua's Heppner, Oregon, and Pilot Rock, Oregon, timber manufacturing facilities, as well as the Federal timber sourcing patterns for timber manufacturing facilities of other persons in the same local vicinity as Kinzua's Heppner, Oregon, and Pilot Rock, Oregon, timber manufacturing facilities and the relative similarity of such Federal timber sourcing patterns (Initial Decision and Order at 2-5).

Blue Mountains Biodiversity Project raises three issues in the Biodiversity Appeal Petition. First, Blue Mountains Biodiversity Project contends that it did not have sufficient time to prepare and file its appeal petition (Biodiversity Appeal Petition at 2-3).

Blue Mountains Biodiversity Project was served with the Initial Decision and Order on May 28, 1998. Section 1.426(a) of the Rules of Practice provides:

> **§ 1.426 Appeal to Judicial Officer.**
>
> (a) *Filing of petition.* Within 10 calendar 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. § 1.426(a).

The Chief ALJ did not provide the parties with the time for filing an appeal, as set forth in section 1.426(a) of the Rules of Practice. Instead, the Chief ALJ provides in the Initial Decision and Order that:

> . . . In order to comply with the statutory deadline, an appeal must be filed no later than May 29, 1998; it may be filed by telefax directed to the Hearing Clerk at (202)720-9776.

Initial Decision and Order at 6.

If the Chief ALJ had given Blue Mountains Biodiversity Project 10 calendar days after its receipt of service of the Initial Decision and Order in which to file its appeal petition, a final agency decision could not have been issued by June 6, 1998, the date that Kinzua's application for a sourcing area must be approved or disapproved, as required by section 490(c)(3)(A) of the FRCSRA (16 U.S.C.A. § 620b(c)(3)(A) (West Supp. 1998)) and section 1.426(d) of the Rules of Practice (7 C.F.R. § 1.426(d)). The Chief ALJ's Initial Decision and Order provides the parties with actual notice that the Chief ALJ had modified the Rules of Practice in this proceeding by ordering that any appeal must be filed no later than May 29, 1998,[3] rather than within 10 calendar days after receiving service of the Initial Decision and Order. Generally, administrative law judges and the judicial officer are bound by rules of practice,[4] but they may modify rules of practice to comply with

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[3]I further note that on May 29, 1998, Mr. Asante Riverwind, co-director, Blue Mountains Biodiversity Project, orally requested that the Judicial Officer grant Blue Mountains Biodiversity Project a 21-day extension of time within which to file its appeal petition. I denied the request for a 21-day extension of time, but extended Blue Mountains Biodiversity Project's time for filing an appeal petition to 4:00 p.m., eastern time, June 1, 1998. (Informal Order as to Blue Mountains Biodiversity Project's Request for Extension of Time, filed June 1, 1998.)

[4]*See In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating that the judicial officer has no authority to depart from Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders).

statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the FRCSRA (16 U.S.C.A. § 620b(c)(3)(A) (West Supp. 1998)).[5] The Chief ALJ did not err when he modified the Rules of Practice to meet a statutory deadline.

Second, Blue Mountains Biodiversity Project contends that the United States Department of Agriculture failed to respond to serious concerns raised by the commenters (Biodiversity Appeal Petition at 3-4).

The Chief ALJ responds, in the Initial Decision and Order, to the comments that are relevant to the issue of whether the area that is the subject of Kinzua's Amended Application is geographically and economically separate from the geographic area from which Kinzua harvests for export unprocessed timber originating from private lands. Additionally, there are a number of comments that identify serious concerns of the commenters, which the Chief ALJ states are not relevant to the issue in this proceeding. However, I do not find that the Chief ALJ erred by failing to address irrelevant comments, even though those comments raise serious societal, economic, and ecological issues. The issue in this proceeding is narrow, viz., whether Kinzua's Amended Application should be approved or disapproved under the criteria in the FRCSRA. The Initial Decision and Order reflects the Chief ALJ's careful consideration of all of the comments submitted in this proceeding that are relevant to the criteria that must be met for approval of Kinzua's Amended Application.

Third, Blue Mountains Biodiversity Project contends that the Chief ALJ failed to respond to a request for a hearing made before the end of the period in which a hearing request must be made and failed to provide notice of the period within which a request for a hearing must be made (Biodiversity Appeal Petition at 3).

I disagree with both of Blue Mountains Biodiversity Project's contentions. The Chief ALJ specifically responds to the request for a hearing, as follows:

> [A]lthough one commenter indicated a desire for a hearing in its comment, no formal request for a hearing was received during the appropriate period. As such, no hearing was held and this [Initial] Decision and Order is based entirely on the written record.

Initial Decision and Order at 2.

American Wildlands and Wyoming Outdoor Council requested a hearing in

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[5] *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997).

their joint comment which was filed March 31, 1998, during the comment period which ended April 17, 1998. However, the Rules of Practice do not provide that a party may request a hearing during the comment period, but instead provide that a hearing may only be requested during the review period, as follows:

> **§ 1.417 Review period.**
>
> . . . .
>
> (c) *Request for a hearing.* The sourcing area applicant, the sourcing area holder whose sourcing area is the subject of a formal review and persons who submitted written comments, or the attorney of record for a party in the proceeding, may review the comments and request a hearing within 10 working days after the comment period, pursuant to 36 CFR 233.190(h)(2) [sic]. The request must be postmarked no later than the 10th working day of the review period. . . . The request for a hearing shall be filed with the Judge. The hearing is for the purpose of supplementing the written record submitted prior to the hearing. The written record submitted prior to the hearing consists of papers and documents submitted during the 30 calendar day comment period, the 10 working day review period, and any motions submitted before the hearing.

7 C.F.R. § 1.417(c).

Therefore, the Chief ALJ did not err by finding that no request for a hearing was made during the appropriate period (the review period) and concluding that no hearing should be held in this proceeding.

Moreover, I do not find that there was a failure to notify the parties of the time during which requests for a hearing may be filed with the administrative law judge, as Blue Mountains Biodiversity Project asserts. The Rules of Practice are published in the Federal Register,[6] thereby constructively notifying the parties of the requirement that all requests for a hearing must be filed during the 10-day

[6] *See* 59 Fed. Reg. 8823, 8824-30 (1994).

review period.[7]

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

Order

The Amended Application of Kinzua Resources, LLC, for a sourcing area for its Heppner, Oregon, and Pilot Rock, Oregon, timber manufacturing facilities is approved, and the sourcing area is established pursuant to the FRCSRA and the Regulations.

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[7]*See FCIC v. Merrill*, 332 U.S. 380, 384-85 (1947) (stating that just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989) (stating that publication in the Federal Register constitutes constructive notice of the contents of federal regulations); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F. 117, 122 n.4 (6th Cir. 1988) (stating that it has long been established that publication of regulations in the Federal Register has the legal effect of constructive notice of their contents to all who are affected thereby); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983) (stating that it has long been established that publication in the Federal Register has the legal effect of constructive notice of their contents to all who are affected thereby); *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 787 n.2 (5th Cir. 1978) (stating that it is well settled that publications in the Federal Register are deemed legally sufficient notice to all interested persons); *Cervase v. Office of the Federal Register*, 580 F.2d 1166, 1168-69 (3d Cir. 1978) (stating that publication in the Federal Register gives constructive notice of the existence of the published regulations); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976) (stating that publication of regulations in the Federal Register is constructive notice of their contents); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964) (stating that appellants are bound by regulations since their publication in the Federal Register provides constructive notice), *cert. denied*, 381 U.S. 904 (1981); *In re Jerry Goetz*, 57 Agric. Dec. 1470, 1524-25 (1997) (stating that respondent had constructive notice of the Beef Promotion and Research Order and the Rules and Regulations (7 C.F.R. §§ 1260.101-.316) because they are published in the Federal Register), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1453 (1997) (stating that respondent had constructive notice of the animal welfare regulations and standards (9 C.F.R. §§ 1.1-3.142) because they are published in the Federal Register), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1353 (1997) (stating that respondents had constructive notice of the animal welfare regulations and standards (9 C.F.R. §§ 1.1-3.142) because they are published in the Federal Register), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 256 (1997) (stating that respondent had constructive notice of 9 C.F.R. § 2.126 because the regulation is published in the Federal Register), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997).

FRESH CUT FLOWERS AND FRESH CUT GREENS PROMOTION AND INFORMATION ACT

DEPARTMENTAL DECISIONS

In re: EVERFLORA, INC., A NEW JERSEY CORPORATION.
FCFGPIA Docket No. 97-0001.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia,* that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $29,551.50 for assessments under the Act plus late charges of $5,653.47 or $35,204.97 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . [they have] chosen to market, [and] despite . . . [their] objections to the content of the advertising, . . . [there is] no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Everflora, Inc. shall pay to the order of the National Promoflor Council, $29,551.50 for the assessments its owes under the Act plus late charges of $5,653.47, or $35,204.97 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor]

In re: FERRIS BROTHERS, INC., A NEW JERSEY CORPORATION. FCFGPIA Docket No. 97-0002. Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $26,303.50 for assessments under the Act plus late charges of $5,166.35 or $31,469.85 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But, from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Ferris Brothers, Inc. shall pay to the order of the National Promoflor Council, $26,303.50 for the assessments its owes under the Act plus late charges of $5,166.35, or $31,469.85 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor]

In re: SUBURBAN WHOLESALE FLORISTS, INC., A NEW JERSEY CORPORATION.
FCFGPIA Docket No. 97-0003.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $62,376.50 for assessments under the Act plus late charges of $15,590.13 or $77,966.63 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Suburban Wholesale Florists, Inc. shall pay to the order of the National Promoflor Council, $62,376.50 for the assessments its owes under the Act plus late charges of $15,590.13, or $77,966.63 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor]

In re: DUTCH FLOWER LINE, INC., A NEW YORK CORPORATION. FCFGPIA Docket No. 97-0004. Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $32,799.50 for assessments under the Act plus late charges of $5,761.77 or $38,561.27 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F. 2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Dutch Flower Line, Inc. shall pay to the order of the National Promoflor Council, $32,799.50 for the assessments its owes under the Act plus late charges of $5,761.77, or $38,561.27 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor]

In re: FRANK W. MANKER WHOLESALE GROWER, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0005.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $28,453.50 for assessments under the Act plus late charges of $4,891.33 or $33,344.83 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); Hudson v. U.S., 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Frank W. Manker Wholesale Grower, Inc. shall pay to the order of the National Promoflor Council, $28,453.50 for the assessments its owes under the Act plus late charges of $4,891.33, or $33,344.83 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: QUALITY WHOLESALE FLORIST, INC., A CONNECTICUT CORPORATION.
FCFGPIA Docket No. 97-0006.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $42,032.00 for assessments under the Act plus late charges of $11,766.25 or $53,798.25 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra*, at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Quality Wholesale Florist, Inc. shall pay to the order of the National Promoflor Council, $42,032.00 for the assessments its owes under the Act plus late charges of $11,766.25, or $53,798.25 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: HENRY C. ALDERS WHOLESALE FLORIST, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0007.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
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3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
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5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $28,425.00 for assessments under the Act plus late charges of $5,122.30 or $33,547.30 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra*, at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.*, at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Henry C. Alders Wholesale Florist, Inc. shall pay to the order of the National Promoflor Council, $28,425.00 for the assessments its owes under the Act plus late charges of $5,122.30, or $33,547.30 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: HARRY VLACHOS, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0008.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $59,569.50 for assessments under the Act plus late charges of $12,555.49 or $72,124.99 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Harry Vlachos, Inc. shall pay to the order of the National Promoflor Council, $59,569.50 for the assessments its owes under the Act plus late charges of $12,555.49, or $72,124.99 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: MUELLER BROTHERS, INC., A NEW JERSEY CORPORATION.
FCFGPIA Docket No. 97-0009.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $65,952.50 for assessments under the Act plus late charges of $11,882.28 or $77,834.78 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Mueller Brothers, Inc. shall pay to the order of the National Promoflor Council, $65,952.50 for the assessments its owes under the Act plus late charges of $11,882.28, or $77,834.78 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: U.S. EVERGREENS, INC., A NEW YORK CORPORATION. FCFGPIA Docket No. 97-0010. Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 24, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $7,864.50 for assessments under the Act plus late charges of $1,221.66 or $9,086.16 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, U.S. Evergreens, Inc. shall pay to the order of the National Promoflor Council, $7,864.50 for the assessments its owes under the Act plus late charges of $1,221.66, or $9,086.16 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: GEORGE RALLIS, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0011.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 24, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $14,044.00 for assessments under the Act plus late charges of $2,280.89 or $16,324.89 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id*, *supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: MAJOR WHOLESALE FLORIST, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0012.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On May 5, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $11,230.00 for assessments under the Act plus late charges of $1,699.97 or $12,929.97 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); Hudson v. U.S., 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Major Wholesale Florist, Inc. shall pay to the order of the National Promoflor Council, $11,230.00 for the assessments its owes under the Act plus late charges of $1,699.97, or $12,929.97 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: EVERFLORA MIAMI, INC., A FLORIDA CORPORATION.
FCFGPIA Docket No. 97-0013.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On May 5, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $10,372.50 for assessments under the Act plus late charges of $1,764.59 or $12,137.09 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, George Rallis, Inc. shall pay to the order of the National Promoflor Council, $14,044.00 for the assessments its owes under the Act plus late charges of $2,280.89, or $16,324.89 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW /DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Everflora Miami, Inc. shall pay to the order of the National Promoflor Council, $10,372.50 for the assessments its owes under the Act plus late charges of $1,764.59, or $12,137.09 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: HOLLAND FLOWER EXPRESS, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0014.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On May 5, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia*, that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia,* because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $14,509.00 for assessments under the Act plus late charges of $2,364.52 or $16,873.52 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra*, the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> 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.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra*, at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *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); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F. 2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th *Cir.*), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977); *Hudson v. U.S.*, 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Holland Flower Express, Inc. shall pay to the order of the National Promoflor Council, $14,509.00 for the assessments its owes under the Act plus late charges of $2,364.52, or $16,873.52 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

MISCELLANEOUS ORDERS

In re: STEW LEONARD'S.
98 AMA Docket No. M 1-1.
Order Denying Interlocutory Appeals filed December 4, 1998.

Interlocutory appeal — Premature appeal — Intervention.

The Judicial Officer denied interlocutory appeals from a ruling by Administrative Law Judge Dorothea A. Baker (ALJ) denying motions to consolidate and striking answers, on the ground that interlocutory appeals are not permitted under the Rules of Practice.

Donald A. Tracy, for Respondent.
James A. Wade, Hartford, Connecticut, for Petitioner.
Sydney Berde, St. Paul, Minnesota, for Agri-Mark, Inc.
John Vetne, Newburyport, Massachusetts, for New England Dairies, Inc.
Ruling issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Stew Leonard's [hereinafter Petitioner] instituted this proceeding on February 17, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter AMAA]; the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. pt. 1001) [hereinafter the New England Milk Marketing 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], by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner: (1) contends that a February 6, 1998, determination by the Market Administrator for the New England Milk Marketing Order that Petitioner is not a producer-handler under 7 C.F.R. § 1001.10, is not in accordance with law (Pet. ¶¶ 3, 15); and (2) requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner is not required to comply with "requirements of a handler under federal statutes, regulations, and milk orders" (Pet. at 5).

On April 24, 1998, the Administrator of the Agricultural Marketing Service [hereinafter Respondent] filed an Answer: (1) denying the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Answer ¶¶ 3, 9); and (2) stating that the Petition fails to state a claim upon which relief can be

granted (Answer at 3).[1]

On June 8, 1998, Agri-Mark, Inc., and the National Milk Producers Federation filed Motion of Agri-Mark, Inc., and National Milk Producers Federation for Leave to Participate in the Above Captioned Proceeding [hereinafter Motion to Intervene], in which Agri-Mark, Inc., and the National Milk Producers Federation requested an order granting them leave to participate in oral argument and to file a brief in this proceeding, pursuant to section 900.57 of the Rules of Practice (7 C.F.R. § 900.57).[2] On June 29, 1998, Respondent filed Respondents [sic] Reply to Motion of Agri-Mark and National Milk Producers Federation to Participate in the Proceeding; and Status Report [hereinafter Respondent's Reply] stating that Respondent takes no position with respect to Agri-Mark, Inc.'s and National Milk Producers Federation's request to file briefs, but "would oppose any motion by a non-party otherwise to appear or act as a party at an evidentiary hearing or any other aspect of this case" (Respondent's Reply at 1).

On July 9, 1998, the ALJ granted the Motion to Intervene "to the extent that [Agri-Mark, Inc., and the National Milk Producers Federation] may file briefs"

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[1]On August 12, 1998, Petitioner filed Motion to Amend Petition Filed Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Motion to Amend Petition] and Amended Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Amended Petition]. The Amended Petition states that the Market Administrator's "February 6, 1998 letter, and the continuing refusal to confirm Stew Leonard's status as a producer-handler are not in accordance with law" (Amended Pet. ¶ 19) and requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner "is no longer required to file handler reports and comply with all other requirements of a handler under federal statutes, regulations, and milk orders" (Amended Pet. at 5-6). On August 21, 1998, Respondent filed Respondent's Reply to Motion to Amend Petition and Answer to Amended Petition [hereinafter Amended Answer]. The Amended Answer: (1) states that Respondent does not object to Petitioner's Motion to Amend Petition (Amended Answer at 1); (2) denies the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Amended Answer ¶¶ 3, 9); and (3) states that the Amended Petition fails to state a claim upon which relief can be granted (Amended Answer at 3). On September 10, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] granted Petitioner's Motion to Amend Petition (Ruling on Motion to Amend).

[2]Section 900.57 of the Rules of Practice provides:

§ 900.57 Intervention.

Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the judge, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

7 C.F.R. § 900.57.

(Ruling on Motion for Leave to Participate in Proceeding).

On September 1, 1998, Agri-Mark, Inc., filed: (1) Petition of Agri-Mark, Inc., pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) in *In re Agri-Mark, Inc.*, 98 AMA Docket No. M 1-2; (2) Motion of Agri-Mark, Inc. For an Order For Consolidated Hearing on Its Petition [hereinafter Agri-Mark, Inc.'s Motion to Consolidate], in which Agri-Mark, Inc., requested consolidation of this proceeding and *In re Agri-Mark, Inc.*, 98 AMA Docket No. M 1-2; and (3) Answer of Agri-Mark, Inc., in this proceeding.

On September 9, 1998, Petitioner filed Motion to Strike Answer of Agri-Mark, Inc., in which Petitioner requested that the ALJ strike the Answer of Agri-Mark, Inc., from the record and Petitioner's Objection to Agrimark's [sic] Motion to Consolidate, in which Petitioner requested that the ALJ deny Agri-Mark, Inc.'s Motion to Consolidate. On September 17, 1998, Respondent filed Respondent's Motion to Strike Agri-Mark, Inc.'s "Answer"; and Respondent's Opposition to Agri-Mark, Inc.'s Motion for Consolidated Hearing, in which Respondent requested that the ALJ deny Agri-Mark, Inc.'s Motion to Consolidate and strike Answer of Agri-Mark, Inc. On September 21, 1998, Agri-Mark, Inc., filed Response of Agri-Mark, Inc. To Petitioner's Objection for Consolidated Hearing. On September 23, 1998, Petitioner filed Petitioner's Memorandum in Support of Its Objection to Agri-Mark's Motion to Consolidate.

On September 14, 1998, New England Dairies, Inc., filed: (1) a petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3; (2) an answer [hereinafter New England Dairies, Inc.'s Answer] to the Amended Petition in this proceeding; and (3) New England Dairies, Inc., Petition to Intervene and to Consolidate for Hearing on its Affirmative Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter New England Dairies, Inc.'s Petition to Consolidate], in which New England Dairies, Inc., requested consolidation of this proceeding and *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3, and intervention in this proceeding.

On September 22, 1998, the ALJ: (1) struck Answer of Agri-Mark, Inc.; (2) denied Agri-Mark, Inc.'s Motion to Consolidate; (3) struck New England Dairies, Inc.'s Answer; (4) denied New England Dairies, Inc.'s Petition to Consolidate; and (5) permitted New England Dairies, Inc., to participate in this proceeding "to the limited extent of filing briefs" (Rulings on Respondent's Motion to Strike Agri-Mark, Inc.'s, "Answer" and Agri-Mark, Inc.'s, Motion for Consolidated Hearing; Rulings on New England Dairies, Inc.'s "Answer" to Amended Petition of Stew Leonard's [Petitioner herein] and Petition to Intervene and Consolidate for Hearing [hereinafter Rulings Denying Motions to Consolidate and Striking Answers] at 2).

On October 13, 1998, and October 26, 1998, respectively, Agri-Mark, Inc., and

New England Dairies, Inc., appealed the ALJ's Rulings Denying Motions to Consolidate and Striking Answers[3] 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).[4] On November 4, 1998, Petitioner filed Response of Stew Leonard's in Opposition to the Appeal to the Judicial Officer of Agri-Mark, Inc. On November 9, 1998, Respondent filed Respondent's Reply to Appeal of Agri-Mark and New England Dairies. On November 17, 1998, Agri-Mark, Inc., filed Reply of Agri-Mark, Inc. to Stew Leonard's Response in Opposition to Appeal to Judicial Officer. On November 23, 1998, Petitioner filed Response of Stew Leonard's in Opposition to the Appeal to the Judicial Officer of New England Dairies, Inc., and on November 24, 1998, the Hearing Clerk referred the case to the Judicial Officer for decision.

Section 900.65(a) of the Rules of Practice limits the time during which a party may file an appeal to a 30-day period *after* service of the *judge's decision*, as follows:

§ 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.

7 C.F.R. § 900.65(a).

Section 900.51(o) of the Rules of Practice defines the word *decision*, as follows:

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[3]New England Dairies, Inc., filed its appeal of the ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3. The ALJ did not issue Rulings Denying Motions to Consolidate and Striking Answers in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3. I infer that New England Dairies, Inc., intends to appeal the ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers issued in this proceeding.

[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)).

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the [AMAA] shall apply with equal force and effect. In addition, unless the context otherwise requires:

. . . .

(o) The term *decision* means the judge's initial decision in proceedings subject to 5 U.S.C. 556 and 557, and includes the judge's (1) findings of fact and conclusions with respect to all material issues of fact, law or discretion as well as the reasons or basis thereof, (2) order, and (3) rules [sic] on findings, conclusions and orders submitted by the parties.

7 C.F.R. § 900.51(o).

The ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers is not a *decision*, as defined in section 900.51(o) of the Rules of Practice (7 C.F.R. § 900.51(o)), but rather is an interlocutory ruling. Thus, the October 13, 1998, Appeal of Agri-Mark, Inc., to the Judicial Officer [hereinafter Agri-Mark, Inc.'s Appeal Petition] and the October 26, 1998, Appeal of New England Dairies, Inc., to the Judicial Officer [hereinafter New England Dairies, Inc.'s Appeal Petition] are interlocutory appeals, which are not permitted under the Rules of Practice.[5]

Moreover, Agri-Mark, Inc.'s Appeal Petition and New England Dairies, Inc.'s Appeal Petition, both of which were filed prior to the issuance of a decision by the ALJ, must be rejected as premature.

The United States Department of Agriculture'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, that:

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[5]*See In re Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1062, 1063 (1982) (stating that interlocutory appeals are not permitted under the Rules of Practice) (Order Denying Appeals); *In re H. Naraghi*, 40 Agric. Dec. 1687 (1981) (dismissing the respondent's interlocutory appeal to the Judicial Officer relating to an administrative law judge's grant of the petitioner's request for the taking of oral depositions for discovery purposes) (Order Dismissing Interlocutory Appeal).

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. . . .

Fed. R. App. P. 4(a)(1), *reprinted in* 28 U.S.C. app. at 591 (1994).

The notes of the Advisory Committee on Appellate Rules regarding a 1979 amendment to Rule 4(a)(1) make clear that Rule 4(a)(1) is specifically designed to prevent premature as well as late appeals, as follows:

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "o[f]." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. . . .

Fed. R. App. P. 4(a)(1) advisory committee's note (1979 Amendment).[6]

For the foregoing reasons, Agri-Mark, Inc.'s Appeal Petition and New England Dairies, Inc.'s Appeal Petition are denied.

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[6] *Accord Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (stating that a notice of appeal filed while timely motion to alter or amend judgment was pending in district court was absolute nullity and could not confer jurisdiction on court of appeals); *Willhauck v. Halpin*, 919 F.2d 788, 792 (1st Cir. 1990) (stating that a premature notice of appeal is a complete nullity); *Mondrow v. Fountain House*, 867 F.2d 798, 799 (3d Cir. 1989) (stating that the appellate court had no jurisdiction to hear appeal during pendency of motion for new trial timely filed in trial court).

In re: AGRI-MARK, INC.
98 AMA Docket No. M 1-2.
Dismissal of Petition filed December 15, 1998.

Donald A. Tracy, for Respondent.
Sydney Berde, St. Paul, Minnesota, for Petitioner.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Premised upon a consideration of the pleadings and entire record herein, including the reasons set forth by Respondent in its filing, dated October 30, 1998, entitled: "Respondent's Motion to Dismiss the Petition and to Have the Case Assigned to Judge Baker" the Petition filed by Agri-Mark, Inc. on September 1, 1998, and, as amended by the Amended Petition filed September 21, 1998, is hereby Dismissed.

Copies hereof shall be served upon the parties.

In re: NEW ENGLAND DAIRIES, INC.
98 AMA Docket No. M 1-3.
Dismissal of Petition filed December 15, 1998.

Donald A. Tracy, for Respondent.
Sydney Berde, St. Paul, Minnesota, for Petitioner.
Order issued by Dorothea A. Baker, Administrative Law Judge.

The following Order is issued after a consideration of the record as a whole, including Respondent's Motion to Dismiss the Petition, filed October 30, 1998. Respondent has set forth compelling reasons why the Petitioner herein is attempting to intervene in another 15A proceeding and has filed an inappropriate baseless Petition and one which is not in conformity with the law and regulations, all as more fully set forth by Respondent in its Motion to Dismiss.

New England Dairies, Inc.'s Petition to Intervene and to Consolidate for Hearing on its Affirmative Petition Pursuant to 7 U.S.C. § 608(c)(15)(A); and, its Affirmative Claims of Intervenor/Petitioner filed September 14, 1998, are Dismissed.

Copies hereof shall be served upon the parties.

In re: PAT KNIGHT.
A.Q. Docket No. 98-0010.
Order Dismissing Complaint filed September 15, 1998.

Darlene Bolinger, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint filed herein on August 4, 1998, be dismissed.

In re: PETER A. LANG, d/b/a SAFARI WEST.
AWA Docket No. 96-0002.
Stay Order filed July 1, 1998.

Colleen A. Carroll, for Complainant.
Respondent, pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 13, 1998, I issued a Decision and Order: (1) concluding that Peter A. Lang, d/b/a Safari West [hereinafter Respondent], violated section 2.131(a)(1) of the regulations (9 C.F.R. § 2.131(a)(1)) issued under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159); (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 a petition for reconsideration, which I denied. *In re Peter A. Lang*, 57 Agric. Dec. ___ (May 13, 1998) (Order Denying Pet. for Recons.).

On June 30, 1998, Respondent filed a Motion for Stay pending the outcome of proceedings for judicial review, and the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay. On June 30, 1998, counsel for the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed the Office of the Judicial Officer, by telephone, that Complainant does not oppose Respondent's Motion for Stay.

Respondent's Motion for Stay is granted. The Order issued in this proceeding on January 13, 1998, *In re Peter A. Lang*, 57 Agric. Dec. ___ (Jan. 13, 1998), 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: SOUTH CALHOUN FARM, INC.
AWA Docket No. 95-0042
Order Dismissing Complaint filed July 20, 1998.

Robert A. Ertman, for Complainant.
Robert A. Gilder, Southaven, Mississippi, for Respondent
Order Dismissing Complaint issued by James W. Hunt, Administrative Law Judge.

The parties joint "Stipulation and Motion to Dismiss," filed July 10, 1998, is granted. It is ordered that the complaint and order to show cause filed herein on April 11, 1995, be dismissed without prejudice as moot.

In re: STEVEN M. SAMEK AND TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Ruling Denying Steven M. Samek's Motion for Assistance With Appeal filed August 20, 1998.

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]; 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, a 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(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). 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. On May 4, 1998, Complainant filed Complainant's Response to Appeal of Decision and Order, 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 for appointment of a public defender. On May 12, 1998, I issued a Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek.

On May 19, 1998, Respondent filed a motion requesting that the Chief ALJ assist Respondent with Respondent's appeal of the Default Decision to the Judicial Officer [hereinafter Respondent's Motion for Assistance With Appeal]. Complainant made three requests for extensions of time to file a response to Respondent's Motion for Assistance With Appeal. I granted each of Complainant's

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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).

requests for extension of time,[2] and Complainant's response to Respondent's Motion for Assistance With Appeal was due August 17, 1998.[3] Complainant failed to file any response to Respondent's Motion for Assistance With Appeal on or before August 17, 1998, and on August 19, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion for Assistance With Appeal.

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 desires assistance of counsel in an agency proceeding bears the responsibility of obtaining counsel.[4] Further, a respondent who is unable to obtain counsel 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.[5]

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[2]Informal Order, filed June 11, 1998; Informal Order, filed July 8, 1998; Informal Order, filed July 31, 1998.

[3]*See* Informal Order, filed July 31, 1998 (granting Complainant an extension of time to August 17, 1998, to file a response to Respondent's Motion for Assistance With Appeal).

[4]*In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 8 (Aug. 17, 1998).

[5]*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

(continued...)

Moreover, the Act of September 6, 1966, as amended by the Act of March 27, 1978, provides that administrative law judges may not perform duties inconsistent with their duties and responsibilities as administrative law judges, as follows:

§ 3105. Appointment of administrative law judges

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. *Administrative law judges* shall be assigned to cases in rotation so far as practicable, and *may not perform duties inconsistent with their duties and responsibilities as administrative law judges.*

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[5](...continued)
deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st 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 Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 8-9 (Aug. 17, 1998) (stating that a respondent who is unable to obtain counsel 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 proceedings, such as those conducted under the Swine Health Protection Act); *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).

5 U.S.C. § 3105 (emphasis added).

One of the primary duties of the Chief ALJ is to act as an impartial decisionmaker in the United States Department of Agriculture's adjudicatory proceedings conducted in accordance with 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.27). While the Chief ALJ has completed his duties with respect to the instant proceeding (barring an order remanding the proceeding to the Chief ALJ), I find that the Chief ALJ's representation of Respondent on appeal of the Chief ALJ's Default Decision to the Judicial Officer would be inconsistent with the Chief ALJ's duty and responsibility to act as an impartial decisionmaker in the instant proceeding.

Therefore, Respondent's motion requesting that the Chief ALJ assist Respondent with Respondent's appeal of the Default Decision to the Judicial Officer, is denied.

In re: MARILYN SHEPHERD.
AWA Docket No. 96-0084.
Order Denying Petition for Reconsideration filed September 15, 1998.

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

Sharlene A. Deskins, 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 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. On September 15, 1997, Respondent filed a Brief. On October 8, 1997, Respondent filed a response to Complainant's Brief.

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 (Initial Decision and Order at 22).

On December 1, 1997, Respondent 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).[1] 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. On March 24, 1998, Respondent filed a response to Complainant's Appeal. On March 26, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On June 26, 1998, I issued a Decision and Order: (1) concluding that 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); (2) assessing Respondent a civil penalty of $2,000; (3) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (4) suspending Respondent's license under the Animal Welfare Act for a period of 7 days, or if Respondent is not licensed, disqualifying Respondent from becoming licensed under the Animal Welfare Act for a period of 7 days. *In re Marilyn Shepherd*, 57 Agric. Dec. ___, slip op. at 38, 60-62 (June 26, 1998). On

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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)).

July 6, 1998, Respondent was served with a copy of the June 26, 1998, Decision and Order and a letter dated June 29, 1998, from the Hearing Clerk.[2]

On July 17, 1998, 11 days after Respondent was served with the Decision and Order, Respondent filed Request Petition for Reconsideration of the Judicial Officers [sic] Decision [hereinafter Petition for Reconsideration]. On August 7, 1998, Complainant filed Complainant's Opposition to the Respondent's "Request Petition for Reconsideration of Judicial Officer Decision," and on August 11, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the June 26, 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.

7 C.F.R. § 1.146(a)(3).

The letter dated June 29, 1998, from the Hearing Clerk, expressly advises Respondent of the time for filing a petition for reconsideration, as follows:

> CERTIFIED RECEIPT REQUESTED
> June 29, 1998
>
> Marilyn Shepherd
> Route 2, Box 819
> Ava, MO 65608

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[2]Domestic Return Receipt for Article Number P 368 426 977.

Dear Ms. Shepherd:

Subject: In re: Marilyn Shepherd-Respondent
AWA Docket No. 96-0084

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. If you are not currently represented by an attorney, you may choose to seek legal advice regarding an appeal.

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

June 29, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Shepherd (emphasis in original).

Respondent's 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, Respondent's Petition for Reconsideration is denied.[3]

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[3]*See In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after respondents were served with the decision and order); *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
(continued...)

Since Respondent's Petition for Reconsideration was not timely filed, the Decision and Order filed June 26, 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 effective dates of the provisions of the Order in the June 26, 1998, Decision and Order, are not changed.

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

Order

Respondent's Petition for Reconsideration is denied.

In re: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Order Denying in Part and Granting in Part Petition for Reconsideration filed July 7, 1998.

Willful — Substantial evidence — Sanction.

The Judicial Officer denied in part and granted in part Respondent's Petition for Reconsideration. Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful violations. Respondent's failures to examine the drivers' licenses of persons who sold him dogs or cats do not constitute violations of 9 C.F.R. § 2.75(a)(1); however, Respondent's failure to fully and correctly maintain records which disclosed the names, addresses, and drivers' licenses of persons from whom he acquired animals are violations of 9 C.F.R. § 2.75(a)(1). "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The record contains substantial evidence of Respondent's willful violations of 7 U.S.C. § 2140 and 9 C.F.R.

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[3](...continued)
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).

§§ 2.75(a)(1), 2.100, 2.132, and 3.1(f). The facts establish that a 10-day suspension of Respondent's Animal Welfare Act license and the assessment of a $5,350 civil penalty against Respondent are warranted.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, 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 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.[1] On January 31, 1997, Respondent filed Proposed Findings of Fact, Proposed Conclusions of Law, and Memorandum in Lieu of Oral Closing Argument. On February 3, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof.

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.

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[1]On April 10, 1998, Jefferson D. Gilder, Esq., of Southaven, Mississippi, entered an appearance on behalf of Respondent (Entry of Appearance, filed April 10, 1998).

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).[2] 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. 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. On August 27, 1997, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

On March 20, 1998, I issued a Decision and Order: (1) assessing Respondent a civil penalty of $9,250; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) suspending Respondent's Animal Welfare Act license for 14 days. *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 71-72 (Mar. 20, 1998).

On April 10, 1998, Respondent filed Petition for Reconsideration and requested an extension of time within which to file a brief in support of his Petition for Reconsideration. On May 11, 1998, Respondent filed Respondent's Memorandum in Support of Petition to Reconsider [hereinafter Petition for Reconsideration]. On June 29, 1998, Complainant filed Complainant's Response to Petition for Reconsideration, and on June 30, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued March 20, 1998.

Complainant's Response to Petition for Reconsideration was filed late. Therefore, I have not considered Complainant's Response to Petition for Reconsideration, and Complainant's Response to Petition for Reconsideration forms no part of the record of this proceeding.

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARD

7 U.S.C.:

TITLE 7—AGRICULTURE

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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)).

. . . .

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.

7 U.S.C. §§ 2131, 2132(f), 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.

. . . .

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

. . . .

§ 2.132 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.

. . . .

(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.

9 C.F.R. §§ 1.1; 2.75(a)(1), .100(a), .132; 3.1(f) (footnote omitted).

Respondent raises seven issues in his Petition for Reconsideration. First, Respondent contends that the Judicial Officer's conclusion that Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.75(a)(1), 2.100, and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a)(1), .100, .132), and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) were willful, is error (Pet. for Recons. at 2, 6, 12-14).

I disagree with Respondent's contention that his violations of the Animal Welfare Act and the Regulations and Standards were not willful. The basis for my conclusion that Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful are fully explicated in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 24-25, 48-56.

Second, Respondent contends that:

> The Judicial Officer quotes in support of its records keeping facts "I don't understand how I can be asked to do anymore than that[]" (Tr. 269) which deals solely with random source bred and raised questions and not driver[]s['] licenses. (Order p. 50).

Pet. for Recons. at 5.

I agree with Respondent's point that Respondent's testimony at Tr. 269 ll. 5-6 was in response to a question relating to Respondent's acquisition of random source dogs from unauthorized sources and was not in response to a question regarding Respondent's failure to fully and correctly maintain records. Therefore, the following in *In re C.C. Baird, supra*, slip op. at 50, is deleted:

> 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.)

However, this error is harmless, and it does not cause me to change the findings of fact, conclusions of law, or the sanction imposed in *In re C.C. Baird, supra*.

Third, Respondent contends that:

> The overwhelming proof in this case and uncontradicted proof is that the Respondent did request to see drivers['] licenses of sellers. There is no requirement in the regulations clearly requiring inspection of the actual license of sellers nor clearly as to vehicle or drivers['] licenses of sellers could as easily be read to require that information of only purchasers read

literally.

Pet. for Recons. at 5.

I disagree with Respondent's contention that the evidence supports a finding that he examined the driver's license of each person from whom he purchased a dog or cat; however, I agree with Respondent that there is no requirement in the Regulations that he inspect the driver's license of each person from whom he acquires a dog or cat.

Section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) requires that each dealer make, keep, and maintain records or forms which fully and correctly disclose, *inter alia*, the name and address of the person from whom a dealer acquires a dog or cat and, if the person from whom a dog or cat is acquired is not registered or licensed under the Animal Welfare Act, the vehicle license number and state and the driver's license number and state of the person from whom the dog or cat is acquired. Considering the circumstances in this proceeding, particularly that some persons from whom Respondent acquired animals lied or were otherwise deceptive about their drivers' licenses and addresses, I found that, in order to comply with the recordkeeping requirements in section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)), Respondent was required to verify the information he received by looking at the sellers' drivers' licenses. *In re C.C. Baird, supra*, slip op. at 20. However, I did not find that Respondent's failures to examine the drivers' licenses of persons who sold him dogs or cats constitute violations of the Regulations. Instead, I based my conclusion that Respondent willfully violated the recordkeeping provisions of the Animal Welfare Act (7 U.S.C. § 2140) and the recordkeeping requirements of the Regulations (9 C.F.R. § 2.75(a)(1)) on Respondent's failure to fully and correctly maintain records which disclosed the names, addresses, and drivers' licenses of at least 23 persons from whom he acquired animals. *In re C.C. Baird, supra*, slip op. at 26.

Fourth, Respondent contends that the findings of fact in the Decision and Order "[a]re [n]ot [s]upported [b]y [s]ubstantial [e]vidence" (Pet. for Recons. at 6).

Except with respect to the number of Respondent's violations of 9 C.F.R. § 2.132, as discussed in this Order Denying in Part and Granting in Part Petition for Reconsideration, *infra*, I disagree with Respondent's contention that the findings of fact in the Decision and Order, *In re C.C. Baird, supra*, slip op. at 25-26, are not supported by substantial evidence.

The Administrative Procedure Act provides, with respect to substantial evidence, that:

§ 556. Hearings; presiding employees; powers and duties; 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" is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The record contains substantial evidence of Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.75(a)(1), 2.100, and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a)(1), .100, .132), and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), which substantial evidence is fully discussed in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 12-25, 28-41, 47-61.

Fifth, Respondent contends that in light of Complainant's contention that Respondent acquired a minimum of 29 random source dogs from unauthorized sources, it was error for the Judicial Officer to conclude that Respondent acquired a minimum of 67 random source dogs from unauthorized sources (Pet. for Recons. at 8-9).

I based my finding that Respondent acquired a minimum of 67 dogs from unauthorized sources on signed affidavits from 11 persons who sold random source

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[3]*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); *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); *Griffith v. Callahan*, 138 F.3d 1150, 1152 (7th Cir. 1998); *Beverly Enterprises, Inc. v. NLRB*, 139 F.3d 135, 140 (2d Cir. 1998); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 91 (2d Cir. 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); *Minnesota Mining & Mfg., Co. v. Coe*, 118 F.2d 593, 594 (D.C. Cir. 1940), *cert. denied*, 314 U.S. 624 (1942); *NLRB v. Arcade-Sunshine Co.*, 118 F.2d 49, 51 (D.C. Cir. 1940), *cert. denied*, 313 U.S. 567 (1941); *NLRB v. Empire Furniture Corp.*, 107 F.2d 92, 95 (6th Cir. 1939).

animals to Respondent (CX 152, 163, 171, 175, 179, 187, 192, 196, 198, 211, 218). These affidavits state that the affiants sold a minimum of 67 animals to Respondent. However, on further examination of the affidavits, I find that the affiants do not state that all of the animals sold to Respondent were random source dogs. Therefore, I agree with Respondent that my conclusion in *In re C.C. Baird, supra*, that 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), is error. Instead, I find, based on a careful examination of the 11 signed affidavits (CX 152, 163, 171, 175, 179, 187, 192, 196, 198, 211, 218), that Respondent willfully acquired a minimum of 28 random source dogs from unauthorized sources, in violation of section 2.132 of the Regulations (9 C.F.R. § 2.132), as alleged in paragraph III of the Complaint.[4]

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[4]Complainant alleges that from approximately January 1992 to approximately May 1993, Respondent acquired random source dogs in willful violation of section 2.132 of the Regulations (9 C.F.R. § 2.132) (Compl. ¶ III). Mr. Virgil Belding states in his affidavit that in 1992 he sold 23 dogs to Respondent and that he (Mr. Belding) only raised some of the dogs (CX 152). Therefore, I find that Respondent acquired at least 1 random source dog from Mr. Belding, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Julius Waller states that in 1992 he sold 3 dogs to Respondent and that he (Mr. Waller) "obtained these dogs from trading for them at different dog swaps" (CX 163). Therefore, I find that Respondent acquired 3 random source dogs from Mr. Waller, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. William P. Hillis states that on various dates he sold a number of dogs to Respondent and that they were not all raised by Mr. Hillis on Mr. Hillis' premises (CX 171). Since Mr. Hillis did not state the date on which he sold dogs to Respondent, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Hillis during the period from approximately January 1992 to approximately May 1993, as alleged in paragraph III of the Complaint. Mr. Jack Coomer states that in 1992 he sold 13 dogs to Respondent and that he (Mr. Coomer) acquired these dogs "from different individuals sometimes I pay for them or trade for them for hunting purposes" (CX 175). Therefore, I find that Respondent acquired 13 random source dogs from Mr. Coomer, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Shelby Sellerc states that on various dates he sold about 3 dogs to Respondent and that they were not all raised by Mr. Sellerc on Mr. Sellerc's premises (CX 179). Since Mr. Sellerc did not state the date on which he sold dogs to Respondent, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Sellerc during the period from approximately January 1992 to approximately May 1993, as alleged in paragraph III of the Complaint. Mr. Harold Odell states that on various dates in 1992 and 1993 he sold an unknown number of "dogs/cats" to Respondent and that they were not all raised by Mr. Odell on Mr. Odell's premises (CX 187). Since Mr. Odell did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Odell, as alleged in paragraph III of the Complaint. Mr. Clinton Stevenson states that in 1992 he sold 8 dogs to Respondent and that "most of the . . . dogs were given to me" and "most came from neighbor farmers" (CX 192). Therefore, I find that Respondent acquired at least 5 random source dogs from Mr. Stevenson, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. James

(continued...)

The $9,250 civil penalty which I assessed against Respondent and the 14-day period during which I suspended Respondent's Animal Welfare Act license in *In re C.C. Baird, supra*, were based, in part, on the number of Respondent's violations. Since I now conclude that Respondent acquired a minimum of 28 random source dogs from unauthorized sources, rather than a minimum of 67 random source dogs from unauthorized sources, I am reducing the civil penalty assessed against Respondent from $9,250 to $5,350 and the period of suspension of Respondent's Animal Welfare Act license from 14 days to 10 days.

Sixth, Respondent contends that Dr. Gregory Gaj, an Animal and Plant Health Inspection Service inspector, who inspected Respondent's facility, willfully allowed and encouraged Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and sections 2.75(a)(1) and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a), .132) (Pet. for Recons. at 10-13).

The record contains no evidence to support Respondent's contention that Dr. Gaj encouraged Respondent to violate either the Animal Welfare Act or the Regulations and Standards. Moreover, there is no evidence to support Respondent's contention that Dr. Gaj allowed Respondent to violate the recordkeeping provisions of the Animal Welfare Act (7 U.S.C. § 2140) or the recordkeeping requirements in the Regulations (9 C.F.R. § 2.75(a)). However, as fully discussed in the Decision and Order, the record reveals that Dr. Gaj knew of Respondent's violations of the regulation concerning the procurement of random-source dogs and cats (9 C.F.R. § 2.132), and instead of citing Respondent for the

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[4](...continued)
Hendershott states that in January 1993 he sold 2 dogs to Respondent and that he (Mr. Hendershott) "obtained both of these dogs - one from Glen Morton a farmer down the road and the other from a dog trader Darrell at the Poplar Bluff dog swap" (CX 196). Therefore, I find that Respondent acquired 2 random source dogs from Mr. Hendershott, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Michael G. Seets states that in October 1993 he sold 5 mixed breed "dogs/cats" to Respondent and that he (Mr. Seets) acquired these dogs/cats "from different individuals from local area" (CX 198). Since Mr. Seets did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Seets, as alleged in paragraph III of the Complaint. Mr. Felix Blevis states that he sold "dogs/cats" to Respondent and that the dogs/cats were not all raised by Mr. Blevis on Mr. Blevis' premises (CX 211). Since Mr. Blevis did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Blevis, as alleged in paragraph III of the Complaint. Mr. Lee L. Tharp states that he sold 4 random source dogs to Respondent about May 1992 and sold 7 random source dogs to Respondent on three other occasions (CX 218). Therefore, I find that, during the period relevant to this proceeding, Respondent acquired 4 random source dogs from Mr. Tharp, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint.

violations or reporting the violations to his superiors, Dr. Gaj merely advised Respondent that Respondent would be held accountable if the random-source regulation was enforced in the future. Even if I found that Dr. Gaj's failure to cite Respondent for violations of 9 C.F.R. § 2.132 constitutes "allowing" Respondent to violate 9 C.F.R. § 2.132, Dr. Gaj's failure to cite Respondent for violations would not be material to the issue of whether Respondent violated 9 C.F.R. § 2.132. My determination that Dr. Gaj's failure to cite Respondent for violations of 9 C.F.R. § 2.132 is immaterial is fully discussed in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 16-17, 21-22, 52-55.

Seventh, Respondent contends that the facts establish that the 14-day suspension of his Animal Welfare Act license is not warranted and that the $5,000 civil penalty assessed against Respondent by the ALJ is "more than adequate" (Pet. for Recons. at 15).

Based on my conclusion that Respondent willfully acquired a minimum of 28 random source dogs from unauthorized sources, rather than a minimum of 67 random source dogs from unauthorized sources, I agree with Respondent's contention that the facts do not establish that a 14-day suspension of Respondent's Animal Welfare Act license and the assessment of a $9,250 civil penalty against Respondent are warranted. Instead, I find that a cease and desist order, a 10-day suspension of Respondent's Animal Welfare Act license, and the assessment of a $5,350 civil penalty against Respondent are warranted.

For the foregoing reasons and the reasons set forth in the Decision and Order filed March 20, 1998, *In re C.C. Baird, supra*, Respondent'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.[5]

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[5]*In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110-11 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (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. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797-98 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (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.*,
(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the March 20, 1998, Decision and Order. Since Respondent's Petition for Reconsideration is granted in part, the Order in the Decision and Order, filed March 20, 1998, is not reinstated.

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 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 $5,350. 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, SW, 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 10 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

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[5](...continued)
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.).

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 10-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: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Stay Order filed December 17, 1998.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 20, 1998, I issued a Decision and Order: (1) concluding that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act] and the Regulations and Standards issued under the Animal Welfare Act; (2) assessing Respondent a civil penalty of $9,250; (3) suspending Respondent's Animal Welfare Act license for 14 days; and (4) ordering Respondent to cease and desist trom violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. *In re C.C. Baird*, 57 Agric. Dec. 127, 149, 184-85 (1998). Respondent filed a timely petition for reconsideration which automatically stayed the March 20, 1998, Decision and Order. I issued an Order Denying in Part and Granting in Part Petition for Reconsideration, in which the Order issued March 20, 1998, was not reinstated and an Order (1) assessing Respondent a civil penalty of $5,350, (2) suspending Respondent's Animal Welfare Act license for 10 days, and (3) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, was issued. *In re C.C. Baird*, 57 Agric. Dec., slip op. 18-21 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.).

On December 16, 1998, Respondent filed a Motion for Stay of Execution requesting a stay of the Order Denying in Part and Granting in Part Petition for Reconsideration, *nunc pro tunc*. On December 16, 1998, the Hearing Clerk

transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay of Execution.

Respondent states in his Motion for Stay of Execution that the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], "has no objection to the granting of [a Stay] Order." On December 16, 1998, counsel for Complainant informed the Office of the Judicial Officer that Complainant does not oppose Respondent's Motion for Stay of Execution.

Respondent's Motion for Stay of Execution is granted. The Order issued in this proceeding on July 7, 1998, *In re C.C. Baird*, 57 Agric. Dec. ___ (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.), is stayed, *nunc pro tunc*.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Order Lifting Stay and Modified Order filed December 18, 1998.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 20, 1998, I issued a Decision and Order: (1) concluding that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act] and the Regulations and Standards issued under the Animal Welfare Act; (2) assessing Respondent a civil penalty of $9,250; (3) suspending Respondent's Animal Welfare Act license for 14 days; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. *In re C.C. Baird*, 57 Agric. Dec. 127, 149, 184-85 (1998). Respondent filed a timely petition for reconsideration which automatically stayed the March 20, 1998, Decision and Order. I issued an Order Denying in Part and Granting in Part Petition for Reconsideration, in which the Order issued March 20, 1998, was not reinstated and an Order (1) assessing Respondent a civil penalty of $5,350, (2) suspending Respondent's Animal Welfare Act license for 10 days, and (3) ordering Respondent to cease and desist from

violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, was issued. *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. 18-21 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.).

On December 16, 1998, Respondent filed a Motion for Stay of Execution requesting a stay of the Order Denying in Part and Granting in Part Petition for Reconsideration, *nunc pro tunc*, and on December 17, 1998, I granted Respondent's Motion for Stay of Execution. *In re C.C. Baird*, 57 Agric. Dec. ___ (Dec. 17, 1998) (Stay Order).

On December 16, 1998, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], and Respondent filed a joint Motion to Lift Stay and Modify Suspension. On December 16, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's and Respondent's joint Motion to Lift Stay and Modify Suspension.

Complainant's and Respondent's December 16, 1998, joint Motion to Lift Stay and Modify Suspension is granted. The Stay Order issued December 17, 1998, *In re C.C. Baird*, 57 Agric. Dec. ___ (Dec. 17, 1998) is lifted, and the Order issued in *In re C.C. Baird*, 57 Agric. Dec. ___ (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.), is modified as set forth in Complainant's and Respondent's joint Motion to Lift Stay and Modify Suspension, as follows:

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 $5,350. 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, SW, 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 from December 19, 1998, through January 1, 1999, inclusive.

In re: SEVERIN PETERSON AND SHARON PETERSON.
EAJA-FSA Docket No. 99-0002.
Order Denying Late Appeal filed November 9, 1998.

Late appeal — EAJA application.

The Judicial Officer denied Applicants' late-filed appeal. The Judicial Officer has no jurisdiction to consider Applicants' appeal filed after Hearing Officer Michael W. Shea's Equal Access to Justice Act Application Determination became final. The Rules of Practice require that within 30 days after receiving service, a party may appeal by filing an appeal petition with the Hearing Clerk (7 C.F.R. § 1.145(a)) and 7 C.F.R. § 1.147(g) provides that any document authorized under the Rules of Practice to be filed, shall be deemed to be filed at the time it reaches the Hearing Clerk. Neither Applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of Applicants' appeal petition by the National Appeals Division, Eastern Regional Office, constitutes filing with the Hearing Clerk.

Dustan J. Cross, New Ulm, Minnesota, for Applicants.
Margit Halvorson, for Respondent.
Initial decision issued by Michael W. Shea, Hearing Officer.
Order issued by William G. Jenson, Judicial Officer.

Severin Peterson and Sharon Peterson [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by sending a letter, dated April 1, 1998 [hereinafter EAJA Application], to Mr. Michael W. Shea, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter Hearing Officer].

Applicants allege in their EAJA Application that: (1) the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], initially denied Applicants' entitlement to benefits for 1994 under the Disaster Payment Program for 1990 and Subsequent Crop Years [hereinafter the Disaster Payment Program]

(EAJA Application at 2); (2) after Applicants established their entitlement to benefits for 1994 under the Disaster Payment Program, Respondent substantially understated the amount of the benefits to which Applicants were entitled, and on July 16, 1997, Respondent took the position that Respondent's method of calculating the Applicants' 1994 benefits under the Disaster Payment Program was not appealable (EAJA Application at 4-5); (3) on November 7, 1997, the National Appeals Division, United States Department of Agriculture, concluded that Applicants have a right to appeal Respondent's method of calculating benefits due to Applicants for 1994 under the Disaster Payment Program (EAJA Application at 5); (4) on February 5, 1998, the Hearing Officer issued a determination that Respondent erred in its method of calculating benefits to which Applicants are entitled for 1994 under the Disaster Payment Program (EAJA Application at 5); (5) Respondent's positions regarding Applicants' entitlement to benefits for 1994 under the Disaster Payment Program were not substantially justified (EAJA Application at 2, 6); (6) Applicants are prevailing parties with respect to their request for benefits for 1994 under the Disaster Payment Program (EAJA Application at 6); (7) Applicants incurred attorney fees and other expenses totaling $5,637.65, in connection with the Applicants' appeals for benefits for 1994 under the Disaster Payment Program (EAJA Application at 1, 8); and (8) Applicants' net worth does not exceed $2,000,000 and Applicants do not employ more than 500 persons (EAJA Application at 7). Applicants request that the Hearing Officer issue an order directing Respondent to pay $5,637.65 to Applicants for attorney fees and other expenses which Applicants allege they incurred in connection with appeals for benefits for 1994 under the Disaster Payment Program (EAJA Application at 1, 8).

On April 23, 1998, Respondent issued Government's Answer to Application for Fees Under the Equal Access to Justice Act [hereinafter Answer]: (1) stating that it is not yet known whether Applicants are prevailing parties under the Equal Access to Justice Act, because Applicants' benefits for 1994 under the Disaster Payment Program have not yet been recalculated and it is not known whether the recalculation will result in Applicants' receiving greater benefits than those to which they were originally determined to be entitled (Answer at 4); (2) stating that Respondent's position regarding the method to calculate Applicants' benefits for 1994 under the Disaster Payment Program was substantially justified (Answer at 4-7); and (3) stating that the adversary adjudication at issue in this proceeding was instituted by Respondent's March 20, 1996, "adverse determination" advising Applicants of the amount of disaster payments for 1994 to which they were entitled and that if Applicants are entitled to any fees and expenses under the Equal Access to Justice Act incurred in connection with the Applicants' appeals for benefits for

1994 under the Disaster Payment Program, they are only entitled to those fees and expenses incurred on and after March 20, 1996 (Answer at 7). Respondent requests that the Applicants' EAJA Application be denied (Answer at 8).

The Hearing Officer presided over an evidentiary hearing on June 18, 1998, in Shakopee, Minnesota. Mr. Dustan J. Cross, Gislason, Dosland, Hunter & Malecki, P.L.L.P., New Ulm, Minnesota, represented Applicants, and Ms. Margit Halvorson, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On August 13, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicants' April 1, 1998, EAJA Application and Respondent's April 23, 1998, Answer were timely filed (Initial Decision and Order at 1); (2) found that Applicants are prevailing parties with respect to the disputed benefits for 1994 under the Disaster Payment Program (Initial Decision and Order at 3); (3) found that Respondent's actions and positions regarding the method of calculating Applicants' benefits for 1994 under the Disaster Payment Program were reasonable and substantially justified (Initial Decision and Order at 4); and (4) determined that since Respondent's actions and decision were substantially justified, the question of whether Applicants' fees and expenses are reasonable and justified is moot (Initial Decision and Order at 4-5).

On October 14, 1998, Applicants appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer on matters pertaining to the Equal Access to Justice Act in United States Department of Agriculture [hereinafter USDA] proceedings covered by the EAJA Rules of Practice (7 C.F.R. § 1.189).[1] On November 2, 1998, Respondent filed Response to Letter Petition for Review, and on November 3, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Applicable Statutory Provisions

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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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)).

. . . .

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

. . . .

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include

written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based[.]

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E) (1994 & Supp. II 1996).

Applicants assert that their attorney received the Initial Decision and Order on August 17, 1998, and that their appeal "is well within the 35 days for appeal provided for in 7 C.F.R. § 1.201(a)" (Letter dated September 16, 1998, to Regional Director, National Appeals Division, from Dustan J. Cross [hereinafter Appeal Petition] at 1).

I disagree with Applicants' contention that their Appeal Petition was timely filed. The Initial Decision and Order states, as follows:

> . . . If neither party seeks a review of this decision, it shall become a final decision of the Department 35 days after it is served upon the Applicant.
>
> A review of this decision must be requested in accordance with the provisions of 7 CFR 1.145 and 7 CFR 1.146.

Initial Decision and Order at 5.

Section 1.201(a) of the EAJA Rules of Practice provides, as follows:

> **§ 1.201 Department review.**
>
> (a) Except with respect to a proceeding covered by § 1.183(a)(1)(ii) of this part, either the applicant or agency counsel may seek review of the initial decision on the fee application, in accordance with the provisions of §§ 1.145(a) and 1.146(a) of this part. If neither the applicant nor agency counsel seeks review, the initial decision on the fee application shall become a final decision of the Department 35 days after it is served upon the applicant. If review is taken, it will be in accord with the provisions of §§ 1.145(b) through (i) and 1.146(b) of this part.

7 C.F.R. § 1.201(a).

Section 1.145(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter 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).

On October 14, 1998, 58 days after Applicants admit that they were served with the Initial Decision and Order, Applicants filed Applicants' Appeal Petition with the Hearing Clerk.[2] For the reasons set forth below, Applicants' Appeal Petition must be rejected as untimely.

In accordance with 7 C.F.R. § 1.201(a), the Initial Decision and Order became the final decision of USDA on September 21, 1998, 35 days after service on Applicants. Applicants' Appeal Petition, filed with the Hearing Clerk on October 14, 1998, was not filed within 35 days after service of the Initial Decision and Order on Applicants.[3] It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that

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[2]On October 13, 1998, the National Appeals Division provided the Office of the Judicial Officer with a file concerning the instant proceeding. After reviewing the file, I determined that it contained, *inter alia*, the original of Applicants' Appeal Petition. I then contacted the Hearing Clerk's office which informed me that neither Applicants nor Respondent had filed any documents in this proceeding and there was no record of this proceeding having been docketed with the Hearing Clerk. On October 14, 1998, I filed the entire file provided to the Office of the Judicial Officer by the National Appeals Division, including Applicants' Appeal Petition, with the Hearing Clerk.

[3]The record establishes that Applicants sent their Appeal Petition, dated September 16, 1998, to the Regional Director, National Appeals Division, 3500 DePauw Boulevard, Suite 2052, Indianapolis, Indiana 46268-0978, and that the Appeal Petition was received by the National Appeals Division, Eastern Regional Office, Indianapolis, Indiana, at 2:54 p.m., September 18, 1998 (Appeal Petition at 1). Section 1.145(a) of the Rules of Practice requires that appeal petitions must be filed with the Hearing Clerk (7 C.F.R. § 1.145(a)) and section 1.147(g) of the Rules of Practice provides that "[a]ny document . . . required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk" (7 C.F.R. § 1.147(g)). Neither Applicants' act of mailing the Appeal Petition to the Regional Director, National Appeals Division, nor the receipt of Applicants' Appeal Petition by the National Appeals Division, Eastern Regional Office, constitutes filing with the Hearing Clerk. Moreover, the National Appeals Division's act of delivering Applicant's Appeal Petition to the Office of the Judicial Officer does not constitute filing with the Hearing Clerk. *Cf. In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the hearing clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

is filed after an initial decision and order becomes final.[4] Therefore, the Judicial Officer no longer has jurisdiction to consider Applicants' Appeal Petition.

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, that:

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[4]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. ___ (May 13, 1998) (dismissing respondent's appeal, filed 58 days after the Initial Decision and Order became final), *appeal docketed*, No. 98-1991 (1st Cir. Sept. 10, 1998); *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 final); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became final); *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 and effective); *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).

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. . . .[5]

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[5] *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, *reh'g 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 court can neither waive nor extend).

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 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.[6]

Accordingly, Applicants' Appeal Petition must be denied since it is too late for the matter to be further considered.

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

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[6] *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).

Order

Applicants' Appeal Petition, filed October 14, 1998, is denied. The Equal Access to Justice Act Application Determination, issued by Hearing Officer Michael W. Shea on August 13, 1998, is the final Decision and Order in this proceeding.

In re: EVERFLORA, INC., FCFGPIA Docket No. 97-0001.
In re: FERRIS BROTHERS, INC., FCFGPIA Docket No. 97-0002.
In re: SUBURBAN WHOLESALE FLORISTS, INC., FCFGPIA Docket No. 97-0003.
In re: DUTCH FLOWER LINE, INC., FCFGPIA Docket No. 97-0004.
In re: FRANK W. MANKER WHOLESALE GROWER, INC., FCFGPIA Docket No. 97-0005.
In re: QUALITY WHOLESALE FLORIST, INC., FCFGPIA Docket No. 97-0006.
In re: HENRY C. ALDERS WHOLESALE, INC., FCFGPIA Docket No. 97-0007.
In re: HARRY M. VLACHOS, INC., FCFGPIA Docket No. 97-0008.
In re: MUELLER BROTHERS, INC., FCFGPIA Docket No. 97-0009.
In re: U.S. EVERGREENS, INC., FCFGPIA Docket No. 97-0010.
In re: GEORGE RALLIS, INC., FCFGPIA Docket No. 97-0011.
In re: MAJOR WHOLESALE FLORIST, INC., FCFGPIA Docket No. 97-0012.
In re: EVERFLORA-MIAMI, INC., FCFGPIA Docket No. 97-0013.
In re: HOLLAND FLOWER EXPRESS, INC., FCFGPIA Docket No. 97-0014.
Ruling Denying Respondents' Motion for Extension of Time filed August 6, 1998.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On June 29, 1998, Respondents in the above-captioned proceedings jointly requested that the time for filing appeal petitions be extended to August 3, 1998. On June 30, 1998, I granted Respondents' joint request and extended the time for

filing Respondents' appeal petitions to August 3, 1998. At 10:15 a.m., on August 4, 1998, Respondents in the above-captioned proceedings filed Consent Motion for Extension of Time to File Appeal [hereinafter Motion for Extension of Time] jointly requesting an extension of time, to September 7, 1998, within which to file appeal petitions in the above-captioned proceedings.[1]

Respondents' August 4, 1998, Motion for Extension of Time is denied. Chief Administrative Law Judge Palmer's [hereinafter Chief ALJ] decisions in the above-captioned proceedings[2] became final at 4:01, p.m., August 3, 1998,[3] prior to Respondents' filing Respondents' Motion for Extension of Time.

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.[4]

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[1]The date and time on which Respondents filed Respondents' Motion for Extension of Time is evidenced by the date and time stamped by the Office of the Hearing Clerk on the first page of Respondents' Motion for Extension of Time.

[2]*In re Everflora, Inc.*, FCFGPIA Docket No. 97-0001 (May 22, 1998); *In re Ferris Bros., Inc.*, FCFGPIA Docket No. 97-0002 (May 22, 1998); *In re Suburban Wholesale Florists, Inc.*, FCFGPIA Docket No. 97-0003 (May 22, 1998); *In re Dutch Flower Line, Inc.*, FCFGPIA Docket No. 97-0004 (May 22, 1998); *In re Frank W. Manker Wholesale Grower, Inc.*, FCFGPIA Docket No. 97-0005 (May 22, 1998); *In re Quality Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0006 (May 22, 1998); *In re Henry C. Alders Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0007 (May 22, 1998); *In re Harry Vlachos, Inc.*, FCFGPIA Docket No. 97-0008 (May 22, 1998); *In re Mueller Bros., Inc.*, FCFGPIA Docket No. 97-0009 (May 22, 1998); *In re U.S. Evergreens, Inc.*, FCFGPIA Docket No. 97-0010 (May 22, 1998); *In re George Rallis, Inc.*, FCFGPIA Docket No. 97-0011 (May 22, 1998); *In re Major Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0012 (May 22, 1998); *In re Everflora-Miami, Inc.*, FCFGPIA Docket No. 97-0013 (May 22, 1998); and *In re Holland Flower Express, Inc.*, FCFGPIA Docket No. 97-0014 (May 22, 1998).

[3]The Office of the Hearing Clerk closes for the purpose of filing documents in proceedings conducted under 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] at 4:00 p.m. Therefore, Respondents' failure to file their Motion for Extension of Time on or before 4:00 p.m., August 3, 1998, resulted in the Chief ALJ's decisions becoming final at 4:01 p.m., August 3, 1998. (*See In re Peter A. Lang*, 57 Agric. Dec. 59, 61 n.2 (1998) (denying complainant's motion for an extension of time to file a response to respondent's appeal because complainant's response was due September 26, 1997, and complainant's motion was orally submitted to the Judicial Officer at 4:13 p.m., September 26, 1997, 13 minutes after the Office of the Hearing Clerk closed).)

[4]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal filed 63 days after the Initial decision and Order became effective); *In re Gail Davis*, 56 Agric. Dec. 373 (continued...)

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, that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

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[4](...continued)
(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. . . .[5]

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

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[5] *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); *Jernigham 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 court can neither waive nor extend).

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 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.[6]

Accordingly, Respondents' Motion for Extension of Time is denied, since any appeal petitions filed in the above-captioned proceedings would be too late to be considered.

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[6] *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).

In re: OTTO WAGNER, JR.
FCIA Docket No. 98-0005.
Order Dismissing Disqualification Proceeding filed July 14, 1998.

Donald McAmis, for Complainant.
Tom Wilkins, McAllen, TX, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Counsels for Complainant and Respondent have filed a Joint Stipulation for Dismissal. The disqualification proceeding, *In re Otto Wagner, Jr.*, FCIA Docket Number 98-0005, is hereby dismissed.

In re: ROBERT SKLOSS, d/b/a ROBERT A. SKLOSS and B&A FARMS.
FCIA Docket No. 98-0012.
Order Dismissing Disqualification Proceeding filed July 14, 1998.

Donald McAmis, for Complainant.
Tom Wilkins, McAllen, TX, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Counsels for Complainant and Respondent have filed a Joint Stipulation for Dismissal. The disqualification proceeding, *In re Robert Skloss, d/b/a Robert A. Skloss and B&A Farms*, FCIA Docket Number 98-0012, is hereby dismissed.

In re: RAYMOND J. FULLER.
FCIA Docket No. 97-0008.
Order filed August 12, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The Complainant, Federal Crop Insurance Corporation, and Respondent, Raymond J. Fuller, having jointly moved that the disqualification action of Raymond J. Fuller, FCIA Docket No. 97-0008, be dismissed. It is so ordered.

In re: JAMES L. AULT.
FCIA Docket No. 98-0014.
Order of Dismissal filed November 12, 1998.

Donald McAmis, for Complainant.
Barry M. Barash, Galesburg, Il, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

On November 9, 1998, the parties filed a "Joint Stipulation for Dismissal." It is ordered that the Complaint, filed herein on July 23, 1998, is dismissed.

In re: HAWAIIAN MACADAMIA PLANTATION, INC.
P.Q. Docket No. 98-0011.
Complaint Dismissal filed August 12, 1998.

Howard Levine, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Motion therefor, filed August 10, 1998, the Complaint in the above entitled cause is hereby Dismissed.

Copies hereof shall be served upon the parties.

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: BEN MORA, d/b/a MORA FARMS, A SOLE PROPRIETORSHIP.
AMAA Docket No. 98-0002.
Decision and Order filed October 1, 1998.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (the "Act"), and the Marketing Orders for Nectarines Grown in California, 7 C.F.R. Part 916 (the "Nectarine Order"), and for Pears and Peaches Grown in California, 7 C.F.R. Part 917 (the "Peach Order"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondent Ben Mora, doing business as Mora Farms, a sole proprietorship, willfully violated the Order, and the Regulations.

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-.151). The respondent was informed in the accompanying 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. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, or at all, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Ben Mora is an individual whose mailing address is 1014 L Street, Reedley, California 93654. Respondent Mora does business as, and is the sole proprietor of, Mora Farms, located at the same address.

2. At all times mentioned herein, respondent Ben Mora, d/b/a Mora Farms, was a handler of California peaches and nectarines as defined in the Act, 7 U.S.C. § 608c(1), and the Peach and Nectarine Orders, 7 C.F.R. §§ 916.10 and 917.7.

3. Respondent willfully violated section 916.41 of the Nectarine Order, 7 C.F.R. § 916.41, by failing to remit to the Nectarine Administrative Committee $3,132.91 in assessments owed in the 1996 marketing season.

4. Respondent willfully violated section 916.60 of the Nectarine Order (7 C.F.R. § 916.60) by failing to file with the Nectarine Administrative Committee reports of the shipment of nectarines during the 1996 marketing season.

5. Respondent willfully violated section 917.37 of the Peach Order (7 C.F.R. § 917.37) by failing to remit to the Control Committee $2,131.39 in assessments owed in the 1996 fiscal period.

6. Respondent willfully violated section 917.50 of the Peach Order (7 C.F.R. § 917.50) by failing to file with the Control Committee reports of the shipment of peaches during the 1996 fiscal period.

Conclusions

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

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 916.41 and 916.60 of the Nectarine Order (7 C.F.R. §§ 916.41, .60) and sections 917.37 and 917.50 of the Peach Order (7 C.F.R. §§ 917.37, .50).

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. 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 the United States.

2. 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, from paying to the Nectarine Administrative Committee $3,132.91 in past due assessments for crop year 1996, and from paying to the Control Committee $2,131.39 in past due assessments for crop year 1996.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final November 12, 1998.-Editor]

ANIMAL WELFARE ACT

In re: PEGGY LEE MILLER
AWA Docket No. 96-0033.
Decision and Order filed May 29, 1998.

Default - Failure to file answer - Cease and desist order - Civil penalty - Disqualification order.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, 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 Peggy Lee Miller on April 11, 1996. 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 Peggy Lee Miller 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. Peggy Lee Miller, hereinafter referred to as respondent, is an individual whose address is Post Office Box 443, Blanco, Texas 78606.

2. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

3. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations, without having obtained a license, in willful

violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). After being warned that her premises would not pass a pre-licensing inspection and that she could not sell animals without being licensed, the respondent advertised and sold a baboon for use as a pet in February 1993. The respondent also maintained exotic animals for sale for exhibition or for pets and offered them for sale both on her own behalf and as a broker for others. The sale or offer for sale of each animal constitutes a separate violation.

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, 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 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 $2,500 which shall be paid by a certified check or money order made payable to the Treasurer of United States and shall be sent to Robert A. Ertman, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.
3. Respondent is disqualified for a period of one year from becoming licensed under the Act and regulations.

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.

[This Decision and Order became final July 20, 1998.-Editor]

In re: MARIANO V. RUGGERI, CYNTHIA V. RUGGERI, and CRANE LABORATORIES.
AWA Docket No. 98-0009.
Decision and Order filed June 15, 1998.

Failure to file an answer - Failure to comply with the regulations for the care of animals - Failure to permit APHIS inspectors to conduct inspections - Failure to maintain complete records - Civil penalty - Cease and desist order.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, 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 willfully violated the Act, and the regulations and standards 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-.151, were served upon respondents by certified mail on January 31, 1998. 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 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

1. Mariano V. Ruggeri and Cynthia V. Ruggeri, hereinafter referred to as the respondents, are individuals with a mailing address of 4711 S. Salina Street, Syracuse, New York 13205.

2. Respondent Crane Laboratories, Inc., is a corporation, and has the same mailing address.

3. The respondents, at all times material hereto, were licensed and operating as dealers as defined in the Act and the regulations and the actions of respondent Crane Laboratories, Inc., were directed, managed, and controlled by respondents Mariano V. Ruggeri and Cynthia V. Ruggeri.

4. On August 17, 1994, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

5. On August 17, 1994, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standard specified below:

(a) The interior surface of indoor housing facility was not impervious to moisture (9 C.F.R. § 3.26(d)).

6. On February 23, 1995, respondents 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 permit Animal and Plant Health Inspection Service employees to conduct a complete inspection of their animal facilities and records.

7. On May 3, 1995, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

8. On May 3, 1995, respondents willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

9. On May 3,1995, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Housing facilities for guinea pigs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.25(a));

(b) An effective program for the control of pests was not established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas (9 C.F.R. § 3.31(c));

(c) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(d) Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)).

10. On February 28, 1996, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and

assistance of a doctor of veterinary medicine.

11. On February 28, 1996, respondents willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

12. On February 28, 1996, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Housing facilities for guinea pigs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.25(a));

(b) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(c) Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)).

13. On March 18, 1996, respondents willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

14. On March 18, 1996, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Indoor housing facilities for guinea pigs were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation (9 C.F.R. § 3.26(b));

(b) Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.125(a));

(c) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(d) Primary enclosures were not kept clean, as required by (9 C.F.R. § 3.31(a)).

15. On March 20, 1996, respondents willfully violated of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to permit Animal and Plant Health Inspection Service employees to conduct a complete inspection of their animal facilities and records.

16. On January 2, 1997, respondents willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

17. On January 2, 1997, respondent willfully violated section 2.100(a) of the

regulations (9 C.F.R. § 2.100(a)) and the standard specified below:

(a) Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.125(a)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact and Conclusions of Law above, the respondent has violated the Act and the regulations and standards 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 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 maintain primary enclosures for animals in a clean and sanitary condition;

(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 maintain records of the acquisition, disposition, description and identification of animals, as required;

(e) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated; and

(f) Failing to provide animals with wholesome and uncontaminated food.

2. The respondents are jointly and severally 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 the United States.

3. Respondents' license is suspended for 30 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 sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142, .145.

[This Decision and Order became final August 12, 1998.-Editor]

In re: CHARLES CATHEY, d/b/a T-BO's LOUNGE.
AWA Docket No. 98-0006.
Decision and Order filed July 10, 1998.

Donald A. Tracy, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, 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-.151, were served upon respondent by certified mail on February 27, 1998. 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

1. A. Charles Cathey, hereinafter referred to as respondent, is an individual whose address is 725 John Street, Camden, Arkansas 71791.

B. The respondent, at all times material hereto, was operating as an exhibitor as defined in the Act and the regulations.

2. On or about July 16, September 3 and November 16, 1996, respondent operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1)). Each exhibition constitutes a separate violation.

3. On or about July 16, September 3 and November 16, 1996, respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the handling regulations specified below:

(A) During a public exhibition of dangerous animals, namely two cougars, the respondent failed to provide a sufficient distance or barrier between the animal and the general viewing public so as to assure the safety of the animal and the public (9 C.F.R. § 2.131(b)(1)).

(B) During a public exhibition of dangerous animals, namely two cougars, respondent failed to have the animals under the direct control and supervision of a knowledgeable and experienced animal handler (9 C.F.R. § 2.131(c)(3)).

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, 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:

(a) Engaging in any activity for which a license is required under the Act and regulations without being licensed as required;

(b) Failing, during public exhibition of dangerous animals, to have the animals under the direct control and supervision of a knowledgeable and experienced animal handler; and

(c) Failing, during public exhibition of dangerous animals, to have a sufficient distance or barrier between the animals and the general viewing public so as to assure the safety of the animals and the public.

2. The respondent is assessed a civil penalty of $3,000.00 which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified from obtaining a license under the Act and regulations for a period of six months.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 -.145.

[This Decision and Order became final September 24, 1998.-Editor]

In re: STEVEN M. SAMEK and TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Decision and Order filed August 22, 1997.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This proceeding was instituted under the Animal Welfare as amended (7 U.S.C. § 2131 *et seq.)*(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, alleging that respondents willfully violated the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.)*(the "Regulations" ans "Standards").

On February 21, 1997, APHIS investigator Kent Permentier personally served on respondent Steven M. Samek copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-.151). Said respondent was also informed in an accompanying letter of service from the Department's Office of the Hearing Clerk 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. The 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 by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

A. Respondents Steven M. Samek and Trina Joann Samek are individuals whose mailing address is 1984 W. State Road 10, Lake Village, Indiana 46349.

B. At all times mentioned herein, said respondents were licensed and operating as dealers as defined in the Act and the Regulations.

II

A. On July 14, 1995, APHIS inspected the respondents' facility and found that they:

1. Failed to provide for the removal and disposal of dead animals;
2. Housed rabbits in the same primary enclosure with pigs;
3. Housed hamsters in outdoor facilities;
4. Failed to ensure that housing facilities for rabbits, hamsters and other animals are structurally sound and maintained in good repair, to protect the animals from injury, to contain the animals and to restrict the entrance of other animals;
5. Failed to store supplies of food in facilities that adequately protect them from deterioration, mold or contamination by vermin;
6. Failed to provide shelter from sunlight and inclement weather to animals housed outdoors;
7. Failed to keep the buildings and grounds clean and in good repair in order to protect animals from injury and to facilitate prescribed husbandry practices; and
8. Failed to identify dogs as required.

B. On September 28, 1995, APHIS inspected the respondents' facility and found that they had placed a barrier at the entrance to their facility.

C. On July 14 and September 28, 1995, and March 6, 1996, APHIS inspected the respondents' facility and found that they:

1. Failed to maintain and have available complete and accurate records of the acquisition and disposition of animals;

2. Failed to ensure that housing facilities for animals are structurally sound and maintained in good repair, to protect the animals from injury, to contain the animals and to restrict the entrance of other animals; and

3. Failed to provide adequate veterinary care to animals, or to have a program of veterinary care available for review.

D. On September 28, 1995, and March 6, 1996, APHIS inspected the respondents' facility and found that they:

1. Failed to ensure that housing facilities for animals are structurally sound and maintained in good repair, to protect the animals from injury, to contain the animals and to restrict the entrance of other animals;

2. Failed to provide sufficient potable water to rabbits and pigs;

3. Failed to provide food of sufficient quantity and nutritive value to maintain animals in good health; and

4. Failed to keep the buildings and grounds clean and in good repair in order to protect animals from injury and to facilitate prescribed husbandry practices.

E. On March 6, 1996, APHIS inspected the respondents' facility and found that they:

1. Failed to hire a sufficient number of adequately trained employees to maintain the required level of husbandry practices;

2. Failed to provide sufficient potable water to a lion;

3. Failed to construct and maintain enclosures so that they provide sufficient space to allow the lion to make normal postural adjustments with adequate freedom of movement;

4. Failed to provide outdoor shelter to protect the lion from inclement weather and to prevent discomfort; and

5. Failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animal contained therein and to minimize disease hazards and to reduce odors.

Conclusions

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

2. By reason of the facts set forth in the Findings of Fact above, respondent Steven M. Samek has violated sections 10 and 11 of the Act (7 U.S.C. §§ 2140, 2141), sections 2.40, 2.50, 2.75, 2.100 and 2.126 of the Regulations (9 C.F.R. §§ 2.40, .50, .75, .100, .126), and sections 3.1(e), 3.4(b), 3.25(a), 3.25(c), 3.25(d), 3.27(a), 3.31(b), 3.50(a), 3.50(c), 3.52(a), 3.52(b), 3.55, 3.56(c), 3.58(a), 3.125(a), 3.125(c), 3.125(d), 3.127(a), 3.127(b), 3.128, 3.129, 3.130, 3.131(a), 3.131(c), and

3.132 of the Standards (9 C.F.R. §§ 3.1(e), .4(b), .25(a), .25(c), .25(d), .27(a), .31(b), .50(a), .50(c), .52(a), .52(b), .55, .56(c), .58(a), .125(a), .125(c), .125(d), .127(a), .127(b), .128, .129, .130, .131(a), .131(c), and .132)

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent Steven M. Samek is assessed a civil penalty of $15,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States;

2. Respondent Steven M. Samek's license is suspended for a period of 30 days, and continuing thereafter until APHIS determines that said respondent is in full compliance with the Act and the Regulations and Standards, and has paid the civil penalty assessed herein; and

3. Respondent Steven M. Samek, 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.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice.

BEEF PROMOTION AND RESEARCH ACT

In re: GERALD MURNION.
BPRA Docket No. 98-0001.
Decision and Order filed October 1, 1998.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Beef Promotion and Research Order (7 C.F.R.§§ 1260.101-1260.217)("Order"), issued pursuant to the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2901 *et seq.*)("Act"), and the Rules and Regulations issued pursuant to the Act and Order (7 C.F.R. §§ 1260.301-316)("Regulations"), by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, alleging that the Respondent violated the Act, Order and Regulations.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130 - .151, were served on said Respondent by the Hearing Clerk by regular mail on or about December 12, 1998. The Respondent was informed in the accompanying 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.

The 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 by the 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. Gerald Murnion, hereinafter referred to as the respondent, is an individual whose mailing address is HCR 62, Box 53, Jordan, Montana 59337.

2. The Respondent, at all material times herein, was engaged in the business of selling and purchasing cattle. The Respondent was the collecting person and therefore was required by the Act, Order and Regulations to remit assessments for

cattle he purchased or sold in the manner provided in the Order and Regulations.

3. The Respondent willfully violated section 1260.172 of the Order and Sections 1260.311 and 1260.312 of the Regulations (7 C.F.R §§ 1260.172, .311, .312) in that the respondent as the collecting person failed to remit the assessments due for the purchase and sale of 573 head of cattle. Each transaction constitutes a separate violation.

Conclusion

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, said Respondent violated the Act, Order and Regulations thereunder.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. The respondent is assessed a civil penalty of $5,500. The payments shall be made by certified check or money order made payable to the Treasurer of the United States and shall be sent to Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Stop 1417, 1400 Independence Ave., S.W., 20250-1417.

2. The respondent shall pay his past-due assessments and accrued late-payment charges to the Montana Beef Council. The amount of past-due assessments and late-payment charges is $962.82. The payment shall be made by certified check or money order and shall be sent to the Montana Beef Council, P. O. Box 5386 Helena, Montana 59601.

3. The respondent, his agents and employees, successors and assigns, directly, indirectly or through any corporate or other device, shall cease and desist from violating the Order and regulations and in particular, shall cease and desist from :

(a) failing to remit all assessments when due; and

(b) failing to remit overdue assessments and late payment charges thereof.

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 sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142, .145.

Copies of this decision shall be served upon the parties.

FEDERAL CROP INSURANCE ACT

In re: EDWARD E. SHOOK.
FCIA Docket No. 98-0009.
Decision and Order filed June 25, 1998.

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 Proceedings Instituted by the Secretary, the Answer filed by Edward E. Shook is an admission of the allegations contained in the Complaint and an agreement to accept disqualification from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Federal Crop Insurance Act, as amended (7 U.S.C. § 1501 *et seq.*) for a period of two years' judgment. Since the allegations in the Complaint are 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 2 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 August 24, 1998.-Editor]

In re: RICHARD WAYNE HARP.
FCIA Docket No. 97-0016.
Decision and Order filed July 30, 1998.

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 Proceedings Instituted by the Secretary, failure of respondent, Richard Wayne Harp, 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 § 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 September 11, 1998.-Editor]

In re: ROBERT L. "BILLY" BURKS.
FCIA Docket No. 98-0006.
Decision and Order filed July 30, 1998.

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 Proceedings Instituted by the Secretary, failure of respondent, Robert

L. "Billy" Burks, 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 § 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 September 11, 1998.-Editor]

In re: DONALD B. ALDERMAN.
FCIA Docket No. 98-0008.
Decision and Order filed July 31, 1998.

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 Proceedings Instituted by the Secretary, failure of respondent, David B. Alderman, 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 § 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 September 12, 1998.-Editor]

In re: HENRY KRUP.
FCIA Docket No. 98-0011.
Decision and Order filed August 12, 1998.

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 Proceedings Instituted by the Secretary, failure of respondent, Henry Krup, 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 2 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 September 19, 1998.-Editor]

In re: EDWARD LEROY BREHM.
FCIA Docket No. 98-0003.
Decision and Order filed August 12, 1998.

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 Proceedings Instituted by the Secretary, failure of respondent, Edward Leroy Brehm, 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 § 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 September 21, 1998.-Editor]

In re: JIMMY HALL "PETE" BURKS.
FCIA Docket No. 98-0007.
Decision and Order filed July 30, 1998.

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 Proceedings Instituted by the Secretary, failure of respondent, Jimmy

Hall "Pete" Burks, 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 § 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 October 21, 1998.-Editor]

In re: CHARLES WILKERSON, d/b/a WILKERSON & WILKERSON.
FCIA Docket No. 98-0013.
Decision and Order filed September 29, 1998.

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 Proceedings Instituted by the Secretary, failure of respondent, Charles Wilkerson, d/b/a Wilkerson & Wilkerson, 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 disqualifications 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 November 9, 1998.-Editor]

PLANT QUARANTINE ACT

In re: FRANCISCO IVITZ ABAN.
P.Q. Docket No. 98-0010.
Decision and Order filed June 12, 1998.

Rick Herndon, 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 importation of guavas, sapodillas and star apples into the United States from Mexico, 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 Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj)(Acts) and the regulations promulgated thereunder, by a complaint filed on January 15, 1998, 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. Francisco Ivitz Aban is an individual with a mailing address of 1230 Myrtle Avenue, Inglewood, California 90301.

2. On or about February 18, 1997, respondent imported eight guavas, ten sapodillas and three star apples into the United States from Mexico in violation of 7 C.F.R. § 319.56.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56). Therefore, the following Order is issued.

Order

The 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 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
(612) 370-2221

Respondent shall indicate that payment is in reference to P.Q. Docket No. 98-0010.

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 July 24, 1998.-Editor]

In re: FRANK SHORTER (FRANK STREETER), d.b.a KAPOHA PALMS, RARE PALMS & CYCADS.
P.Q. Docket No. 98-0009.
Decision and Order filed July 17, 1998.

James A. Booth, 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 fresh fruit from Hawaii to the continental United States (7 C.F.R. § 318.13 *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 January 14, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about November 4, 1996, respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 21.4 pounds of fresh pulpy palm seeds from Hawaii to the continental United States, without a certificate or permit, in violation of section 318.13(b) of the regulations (7 C.F.R. § 318.13(b)).

The return receipt accompanying the Complaint was signed on January 21, 1998. 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. Frank Shorter (Frank Streeter), d.b.a. Kapoho Palms, Rare Palms & Cycads, herein referred to as the respondent, is an individual whose mailing address is 25 Lakeview Avenue, Cambridge, Massachusetts 02138.

2. On or about November 4, 1996, respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 21.4 pounds of fresh pulpy palm seeds from Hawaii to the continental United States, without a certificate or permit, in violation of section 318.13(b) of the regulations (7 C.F.R. § 318.13(b)).

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. § 318.13 et seq.). Therefore, the following Order is issued.

Order

Respondent, Frank Shorter (Frank Streeter), d.b.a. Kapoho Palms, Rare Palms & Cycads, 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 on the certified check or money order that payment is in reference to P.Q. Docket No. 98-0009.

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.

In re: SUNDER KISHINGHAND GANGLANI.
P.Q. Docket No. 98-0012.
Decision and Order filed August 12, 1998.

Sheila Hogan Novak, 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 fruits and vegetables into

the United States (7 C.F.R. §§ 319.56 *et seq.* and 319.28 *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 by a compliant filed on March 4, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 16, 1997, at Boston, MA, the respondent imported into the United States approximately one fresh cucumber from India in violation of 7 C.F.R. § 319.56-2(e) and two fresh citrus fruits from India in violation of 7 C.F.R. § 319.28 because the cucumber was not accompanied by a permit and was not treated, as required, and because the importation of fresh citrus fruit from India 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 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 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).

Findings of Fact

1. Sunder Kishinghand Ganglani is an individual with a mailing address of 130 Commerce Way, Woburn, MA 01801.

2. On or about August 16, 1997, at Boston, MA, respondent imported into the United States approximately one fresh cucumber from India in violation of 7 C.F.R. § 319.56-2(e) and two fresh citrus fruits from India in violation of 7 C.F.R. § 319.28 because the cucumber was not accompanied by a permit and was not treated, as required, and because the importation of fresh citrus fruit from India is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. §§ 319.28 and 319.56-2(e). Therefore, the following Order is issued.

Order

The 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 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. 98-0012.

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 Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicble to this proceeding. (7 C.F.R. § 1.145)

[This Decision and Order became final September 21, 1998.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Torres Date Packing, a general partnership; Guadalupe E. Torres, an individual; Fernando Torres, an individual; Jose Luis Torres, an individual; and Rogelio Torres, an individual. AMAA Docket No. 97-0001. 7/23/98.

Almond Valley Nut Co., a general partnership; John Avila, an individual; and Brent Zehrung, an individual. AMAA Docket No. 97-0005. 11/24/98.

ANIMAL QUARANTINE and RELATED LAWS

Gaston C. Herrera, M.D. A.Q. Docket No. 98-0006. 10/13/98.

ANIMAL WELFARE ACT

Alex Marion Chambers, d/b/a Road Runner Pets and Supplies. AWA Docket No. 96-0063. 7/6/98.

Feld Entertainment, Inc., d/b/a Ringling Bros. & Barnum & Bailey Circus. AWA Docket No. 98-0020. 7/15/98.

John D. Woodmark, d/b/a Depoe Bay Aquarium. AWA Docket No. 98-0016. 7/16/98.

Deerpath Animal Haven and Zoological Park, Inc. AWA Docket No. 98-0021. 7/21/98.

Max Lapp and Patricia Lapp, d/b/a Lapp Kennels. AWA Docket No. 97-0016. 7/22/98.

LaVerne and Sandra Baker, d/b/a LaSan Kennel. AWA Docket No. 95-0038. 8/4/98.

Heidi Berry Riggs and Bridgeport Nature Center, Inc. AWA Docket No. 98-0034. 8/19/98.

City of Gainsville, Texas, d/b/a Frank Buck Zoo. AWA Docket No. 98-0024. 8/25/98.

Sandy Keast. AWA Docket No. 98-0029. 8/31/98.

Carl Minneci, d/b/a M&M Exotics. AWA Docket No. 98-0025. 9/10/98.

Craig Collier and Elaine Collier, d/b/a Santa's Forest Zoo. AWA Docket No. 97-0011. 9/10/98.

Ross Wilmoth, d/b/a Wild Wilderness Safari. AWA Docket No. 95-0072. 9/15/98.

US Airways, Inc. AWA Docket No. 97-0032. 9/22/98.

Gregg Holland, d/b/a Animal Arts. AWA Docket No. 98-0027. 10/5/98.

Topeka Zoological Park. AWA Docket No. 98-0041. 11/3/98.

Navis Carlisle and Diana Carlisle, Delana Darrow, d/b/a Friends of Man. AWA Docket No. 98-0038. 12/1/98.

Boise City Zoo. AWA Docket No. 98-0035. 12/24/98.

FEDERAL CROP INSURANCE ACT

Bobby Harold Higgins. FCIA Docket No. 98-0010. 12/7/98.

FEDERAL MEAT INSPECTION ACT

Thorn Apple Valley/Walker West, Thorn Apple Valley/Grand Rapid and Gary L. Hosteter. FMIA Docket No. 97-0003. 7/30/98.

B&R Quality Meats, Inc. FMIA Docket No. 98-0004. 9/9/98.

HORSE PROTECTION ACT

Consent Decision as to Wayne E. Yoder, and Lois M. Yoder. HPA Docket No. 97-0008. 9/18/98.

Consent Decision as to Claude D. Johnson. HPA Docket No. 97-0008. 9/18/98.

Consent Decision and Order as to Ben L. Cate and Leslie L. Cate. HPA Docket No. 98-0007. 9/22/98.

Consent Decision and Order as to Franklin LaRue McWaters. HPA Docket No. 94-0038. 10/8/98.

Consent Decision and Order as to Franklin LaRue Mcwaters. HPA Docket No. 98-0002. 10/8/98.

Consent Decision and Order as to Margaret Y. Baird. HPA Docket No. 98-0010. 11/19/98.

Consent Decision and Order as to Charles Baldwin, Jr. HPA Docket No. 98-0002. 11/25/98.

PLANT QUARANTINE ACT

Steve Leffler. P.Q. Docket No. 97-0024. 9/30/98.

Puerto Rico Aviation Co., Inc. P.Q. Docket No. 97-0005. 12/17/98.

POULTRY PRODUCTS INSPECTION ACT

Thorn Apple Valley/Walker West, Thorn Apple Valley/Grand Rapid and Gary L. Hosteter. PPIA Docket No. 97-0003. 7/30/98.

B&R Quality Meats, Inc. PPIA Docket No. 98-0002. 9/9/98.

AGRICULTURE DECISIONS

Volume 57

July - December 1998
Part Two (P&S)
Pages 1353 - 1457

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 statues 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

JULY - DECEMBER 1998

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDER

DEFAULT DECISIONS

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: IBP, inc.
P&S Docket No. D-95-0049.
Decision and Order filed July 31, 1998.

Discriminatory — Preference — Advantage — Prejudice — Disadvantage — Harm to competitors — Harm to competition — Authority under Packers and Stockyards Act — Weight given administrative law judge findings and credibility determinations — Complaint adequacy — Cease and desist order.

The Judicial Officer reversed Chief Administrative Law Judge Victor W. Palmer's Decision. The Judicial Officer concluded that Respondent's right of first refusal under an agreement between Respondent and nine feedlots (Beef Marketing Agreement) obviates Respondent's need to bid competitively for cattle at those nine feedlots; and therefore violates section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) because the right of first refusal has the effect or potential effect of reducing competition. The Packers and Stockyards Act gives the Secretary of Agriculture broad power, including the power to regulate Respondent's use of the agreements that it has with feedlots and to impose sanctions against Respondent, if the Secretary finds that Respondent's use of the agreement causes any harm which the Packers and Stockyards Act is designed to prevent. The Judicial Officer is not bound by an administrative law judge's credibility, legal, and factual determinations, but gives great weight to the findings by and the credibility determinations of an administrative law judge. Formalities of court pleading are not applicable in administrative proceedings, and the complaint apprised Respondent that all the terms of the Beef Marketing Agreement were at issue in the proceeding. Respondent's failure to make the terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice, but Complainant failed to prove that Respondent's failure to make the terms available to all feedlots in Kansas is unjustly discriminatory in violation of section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). Similarly, while the Beef Marketing Agreement gives nine feedlots a preference and an advantage and subjects other similarly situated feedlots in Kansas to a prejudice and a disadvantage, Complainant failed to prove that the preference, advantage, prejudice, or disadvantage was undue or unreasonable in violation of section 202(b) of the Packers and Stockyards Act (7 U.S.C. § 192(b)).

JoAnn Waterfield, for Complainant.
Charles W. Douglas, William H. Baumgartner, Jr., Sheila B. Hagen, and Nathan A. Hodne, for Respondent.
Initial Decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act,

1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards 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 and Notice of Hearing [hereinafter Complaint] on August 3, 1995.

The Complaint alleges that, during the period February 1994 through the present, IBP, inc. [hereinafter Respondent], purchased cattle under an exclusive marketing agreement, known as the Beef Marketing Agreement, in violation of section 202(a) and (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) (Compl. ¶ II(a)). Specifically, the Complaint alleges that Respondent's use of the Beef Marketing Agreement gives an undue or unreasonable preference to a group of feedlots located in Kansas [hereinafter the Beef Marketing Group]* by guaranteeing a high price for livestock purchased from the Beef Marketing Group and subjecting similarly situated feedlots in Respondent's procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these similarly situated feedlots under the same terms made available to the Beef Marketing Group (Compl. ¶ II). On August 28, 1995, Respondent filed Answer of IBP, inc. [hereinafter Answer], in which Respondent: (1) admits that it is subject to the Packers and Stockyards Act; (2) admits that beginning in February 1994, and continuing to the present, it purchased cattle placed with the Beef Marketing Group under the Beef Marketing Agreement; (3) admits that it has refused to purchase cattle placed with two feedlots on the same basis as offered by the Beef Marketing Group; and (4) denies that its use of the Beef Marketing Agreement violates section 202(a) and (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) (Answer).

On December 6, 1996, Complainant filed Complainant's Prehearing Memorandum and Respondent filed Prehearing Memorandum of IBP, inc. Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] conducted a hearing in Kansas City, Missouri, from January 29, 1997, through February 7, 1997; in Washington, D.C., from February 12, 1997, through February 21, 1997; in Sioux City, Iowa, from March 10, 1997, through March 12, 1997; and in Washington, D.C., from April 14, 1997, through April 15, 1997. JoAnn

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*The Complaint alleges: (1) that the Beef Marketing Group consists of (A) Knight Feedlot, Inc., Lyons, Kansas; (B) Ward Feedyard, Larned, Kansas; (C) Barton County Feeders, Inc., Elingwood, Kansas; (D) Golden Belt Feeders, St. John, Kansas; (E) Pawnee Valley Feeders, Inc., Hanston, Kansas; (F) Great Bend Feeding, Inc., Great Bend, Kansas; and (G) Carl Dudrey, St. John, Kansas; and (2) that at one time two additional feedlots were part of the Beef Marketing Group (A) Pratt Feeders, Inc., Pratt, Kansas; and (B) Mull Farms and Feeding, Inc., Pawnee Rock, Kansas. (Compl. ¶ II(a) n.1.)

Waterfield, Esq., and Timothy Morris, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Charles W. Douglas, Esq., and William H. Baumgartner, Jr., Esq., of Sidley & Austin, Chicago, Illinois, and Lonnie O. Grigsby, Esq., and Nathan A. Hodne, Esq., of IBP, inc., Dakota City, Nebraska, represented Respondent.

On June 17, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order and Respondent filed IBP, inc[.]'s Proposed Findings of Fact and Post-Hearing Memorandum. On July 22, 1997, Complainant filed Complainant's Reply Brief and Respondent filed IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order. On September 25, 1997, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] concluding that Respondent did not violate section 202(a) or (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) and dismissing the Complaint (Initial Decision and Order at 10, 30).

On November 5, 1997, 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 United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).** On November 28, 1997, Respondent filed Response of IBP, inc. to Agency's Appeal Petition and Brief [hereinafter Respondent's Response] and Request of IBP, inc. for Oral Argument.

On April 24, 1998, I issued a Ruling Granting Motions for Oral Argument. On June 8, 1998, oral argument was heard in Washington, D.C. JoAnn Waterfield, Esq., appeared on behalf of Complainant. William H. Baumgartner, Jr., Esq., appeared on behalf of Respondent. On July 1, 1998, Respondent filed Motion of IBP, INC. To Correct Record [hereinafter Motion to Correct Transcript], and on July 2, 1998, Complainant filed Complainant's Proposed Corrections to the Transcript. On July 20, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Correct Transcript and Complainant's Proposed Corrections to the Transcript and a decision.

On July 22, 1998, I issued a Ruling Granting in Part and Denying in Part Respondent's Motion to Correct Transcript and Complainant's Proposed

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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)).

Corrections to Transcript.

Based upon a careful consideration of the record in this proceeding, I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because Respondent's right of first refusal has the effect or potential effect of reducing competition. While I disagree with the Chief ALJ's conclusion that Respondent did not violate the Packers and Stockyards Act, I agree with most of the Chief ALJ's findings of fact and discussion. Therefore, except with respect to the Chief ALJ's conclusion and order, I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order in this proceeding. 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.

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

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 9—PACKERS AND STOCKYARDS

. . . .

SUBCHAPTER II—PACKERS GENERALLY

§ 191. "Packer" defined

When used in this chapter the term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

§ 192. Unlawful practices enumerated

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer or any live poultry dealer, or buy or otherwise receive from or for any other packer or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

§ 193. Procedure before Secretary for violations

(a) Complaint; hearing; intervention

Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this subchapter, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. . . .

(b) Report and order; penalty

If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this subchapter covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. 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.

. . . .

§ 223. Responsibility of principal for act or omission of agent

When construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or

employed by any packer, any live poultry dealer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer, any live poultry dealer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

7 U.S.C. §§ 191, 192, 193(a), (b), 223.

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

. . . . [Footnote 1 omitted.]

Findings of Fact

1. Respondent, IBP, inc., is a Delaware corporation with its headquarters located in Dakota City, Nebraska. [Respondent's mailing address is Box 515, Dakota City, Nebraska 68731.] Respondent is, and at all times material to this proceeding was, a packer within the meaning of the Packers and Stockyards Act [and subject to the provisions of the Packers and Stockyards Act] (Answer).

2. Respondent began operations in 1961 with one plant in Denison, Iowa. Subsequently, Respondent added 10 fed cattle packing plants in the United States and entered the pork and non-fed cattle businesses as well. (Tr. 3352-55.)

3. [Respondent typically ranks between 80 and 95 on the *Fortune* 500 list of the 500 largest corporations in the United States.] In 1996, Respondent had total sales of approximately $13 billion. Sales of products derived from fed cattle account for approximately 80 percent of Respondent's sales. (Tr. 3357-58.)

4. Respondent's primary competitors . . . are Monfort, Inc. (a subsidiary of Conagra, Inc.), Excel Corporation (a subsidiary of Cargill, Inc.), and National Beef Packing Company (a subsidiary of Farmland Foods). Together with Respondent, these packers collectively account for between 70 and 80 percent of the fed cattle slaughtered in the United States. (Tr. 3364.)

5. [Respondent maintains two packing facilities in Kansas. Respondent's Holcomb plant, also known as the Finney County plant, is located in the western portion of Kansas (Tr. 511).] Respondent purchased its Emporia plant in eastern Kansas in 1968 and began operations there in 1969. Since [1969,] the plant's capacity has increased from 2,800 cattle per day to 4,000 cattle per day. (Tr. 2890, 3499-3500.) Respondent's Emporia, Kansas, plant generally operates 11 shifts

[each week], two shifts each day[, Monday through Friday,] and one shift on Saturday. To operate a packing plant at a profit, a packer must generally operate the plant at near capacity. (Tr. 3368-69.) Respondent's Emporia, Kansas, plant employs between 2,500 and 2,600 workers. Each person is guaranteed 40 hours of work per week, even if Respondent is unable to acquire enough cattle to run complete shifts. (Tr. 3501-03.)

6. Before cattle are sold to packers in Kansas, the cattle are typically sent to feedlots, where high energy rations are fed to them in order to add flecks of fat to the animals' muscle, known as marbling; thereby improving the taste and tenderness of the beef. While in the feedlot, cattle typically gain about 3 pounds per day. One pound of gain requires approximately 7 pounds of feed. Cattle generally remain at the feedlot for between 120 and 150 days, until reaching a weight of approximately 1,200 pounds. At that point, [the cattle] are sold to a packer. (Tr. 3339-44.)

7. The standard practice in Kansas is for cattle to be delivered [to the slaughter plant] within 7 days of the sale (Tr. 134). Cattle are typically slaughtered on the same day they arrive at the plant (Tr. 3473).

8. Packers in Kansas generally purchase fed cattle using one of the following four methods: (1) live; (2) flat, in the beef; (3) grade and yield sales; or (4) forward contracts (Tr. 3458-60).

9. In live cattle sales, packers pay for cattle based on their weight while they are alive. Cattle are usually weighed at the feedlot on the day the cattle are picked up for delivery to the slaughter plant. Bids are expressed in dollars per hundredweight. (Tr. 3458.)

10. In the traditional method of selling cattle on a live basis, packer buyers visit feedlots, where they are presented with a show list identifying the pens of cattle that are for sale that week. The [packer] buyers evaluate the cattle and bid on the pens of interest. Feedlots often must call the cattle owner to determine whether the cattle will be sold at the price bid by the packer buyer. A series of telephone calls with counterproposals between the packer buyer, the feedlot, and the owner may ensue. (Tr. 132, 3746.)

11. Feedlots usually allow the first buyer who arrives at the feedlot to place the first bid. Also, a feedlot will usually sell the cattle to the first buyer to bid the price at which the cattle owner is ultimately willing to sell. For example, if every buyer bids $70 on a pen of cattle, the feedlot will sell the pen to the first buyer who bid. It is, therefore, important for the packer buyer to be the first bidder at the feedlot, and it is not uncommon for a buyer to arrive at the feedlot as early as the night before [the sale]. (Tr. 466-68, 3530, 3690-91.)

12. With flat, in the beef sales, packers pay the cattle owners based on the

actual carcass weight of the animals at the packing plant after slaughter, rather than the total live weight of the animal at the feedlot (Tr. 3458). In grade and yield sales, packers pay cattle owners based on a formula that takes into account both the actual carcass weight of the animals and the grade assigned to the carcass (Tr. 3459). A forward contract fixes the price to be paid for cattle several weeks or months in advance of the delivery date (Tr. 3459).

13. Respondent purchases cattle using all [four methods of purchase: (1) live; (2) flat, in the beef; (3) grade and yield sales; and (4) forward contracts] (Tr. 3458-60).

14. The Beef Marketing Group consists of nine feedlots in central Kansas that joined together in 1988 to develop more effective marketing methods for their cattle (Tr. 3713-14). The original Beef Marketing Group members are: Barton County Feeders, Inc.; [Carl] Dudrey Cattle Company; Golden Belt Feeders; Great Bend Feeding, Inc.; Knight Feedlot, Inc.; Mull Farms and Feeding, Inc.; Pawnee Valley Feeders, Inc.; Pratt Feeders, Inc.; and Ward Feedyard. Additional feedlots have been included based on an ownership interest of the original members. (Tr. 454.)

15. In 1990, the Beef Marketing Group entered into a marketing arrangement with Excel under which Beef Marketing Group members were entitled to sell cattle to Excel on a forward contract basis, which guaranteed Beef Marketing Group members the highest basis that Excel paid any producer for fed cattle delivered under forward contracts for the period in question. In return, Beef Marketing Group members agreed to supply Excel with a specified minimum number of cattle. (Tr. 3726-27.) Most of the cattle subject to the agreement [between the Beef Marketing Group and Excel] were Holstein cattle (Tr. 3720-21; CX 2 at 22).

16. The arrangement between the Beef Marketing Group and Excel resulted in Excel buying a substantial portion of the cattle sold by Beef Marketing Group [members] and Beef Marketing Group [members] feeding substantially more Holsteins. Holsteins are primarily used as dairy cattle and provide lesser quality cuts of beef. Respondent has little interest in purchasing Holsteins. (Tr. 3721, 3731.)

17. In September 1993, the agreement between the Beef Marketing Group and Excel was effectively terminated (Tr. 3729-30). In January 1994, Beef Marketing Group representative, Lee Borck approached Respondent's head buyer, Bruce Bass, with a proposal for a marketing agreement (Tr. 3732). Respondent's competitors had already expressed an interest in participating in a marketing agreement with the Beef Marketing Group (Tr. 582, 618, 624, 3737). In February 1994, Respondent and the Beef Marketing Group entered into the Beef Marketing

Agreement under terms essentially proposed by the Beef Marketing Group (Tr. 3733).

18. The Beef Marketing Agreement provides terms for live cattle sales which differ . . . from traditional methods for purchasing cattle in Kansas. Instead of bidding in dollars per hundredweight, bids are made using a basis that is adjusted for quality. The basis [originally] used was the highest price paid in Kansas for at least 500 . . . cattle in a given week, as reported by the United States Department of Agriculture (the Kansas practical top). Cattle which are top quality receive bids of "par" or "even," and Respondent pays the Kansas practical top price for that pen. Cattle of lesser quality receive discounted bids, for example, "minus fifty," and Respondent pays $0.50 per hundredweight less than the Kansas top price. [Respondent can bid] over the basis, for example, "plus fifty," for superior cattle, although this rarely occurs. (Tr. 3511, 3743-44.)

19. Under the Beef Marketing Agreement, bids [originally] were made on Monday and had to be accepted or rejected by Wednesday (Tr. 3513). In deciding whether to accept or reject bids, producers do not have to consider any potential changes in the market during that week. Since the bids are keyed to the Kansas practical top price for the week, producers receive the benefit of any increase in the market value during the week, but are not be affected by any decline in value. A producer, however, would still have to consider the potential for market changes from week to week. For example, a producer might opt to sell a pen of cattle either before or after the animals reach their ideal weight, if there is some indication the price will be high enough in a given week to make up for a discount on light cattle, or for the cost of feeding the cattle for an extra week.

20. The Beef Marketing Agreement also includes several non-price terms. Respondent committed to bid on every pen of cattle and is entitled to offer a separate price for each pen (Tr. 3513, 3742, 3747-48). Respondent [originally] had until Saturday of the following week to pick up the cattle, giving Respondent 3 days more than the customary period [to pick up cattle] (Tr. 3513). Respondent [originally] had a right of first refusal for all cattle on which it bid even or better (Tr. 462, 830, 1595, 3231-32, 3511-14, 3734). Respondent agreed to share slaughter information with [Beef Marketing Group members] (Tr. 3514).

21. In August 1994, the basis for bidding under the Beef Marketing Agreement was changed to the reported Kansas top price for 2,500 cattle or more. The time to accept or reject bids was moved back from Wednesday to Tuesday, and the pick up date was moved back from Saturday to Friday. In addition, the day for buyers to look at cattle was moved back from Monday to Thursday of the prior week (Tr. 3515-16).

22. Further changes were made to the Beef Marketing Agreement in

November 1995. A new grade and yield option was added. Also, for cattle sold on a live weight basis, penalties and premiums were added for cattle yielding under or over specified amounts. The right of first refusal was expanded to include pens on which Respondent bid at least the Kansas top price minus 50 cents. The basis for bidding was changed to a negotiated middle point between the Kansas top price for 2,500 cattle or more and the Kansas top price paid during the week by Respondent (in weeks when the two prices were different). (Tr. 3515-16, 3656.)

23. Two Beef Marketing Group members stopped selling . . . cattle [to Respondent] under the terms of the Beef Marketing Agreement, although they have remained members of the Beef Marketing Group (Tr. 537, 3766). Pratt Feeders, Inc., stopped selling cattle to Respondent under the terms of the Beef Marketing Agreement in February 1995 (Tr. 537). Pawnee Valley Feeders, Inc., stopped selling cattle to Respondent under the terms of the Beef Marketing Agreement in August or September 1996 (Tr. 3767).

24. Respondent has continued to purchase cattle from other Kansas feedlots under traditional methods of purchase. Other packers have continued to purchase cattle from feedlots other than those that are members of the Beef Marketing Group. Feedlots other than those that are members of the Beef Marketing Group have continued to receive competitive prices for . . . cattle after the institution of the Beef Marketing Agreement between Respondent and the Beef Marketing Group (Tr. 3168, 3185-86, 3195-96).

25. Testimony received from owners and operators of feedlots that are not members of the Beef Marketing Group failed to show that they were harmed by the Beef Marketing Agreement. . . . [Sellers Feedlot] expanded in 1994 and 1996 (Tr. 960-61). Ottawa County Cattle Associat[es] grew from April 1994 through October 1994 (Tr. 1171). Mann's ATP, [Inc.,] purchased a neighboring feedlot expanding capacity by 6,000 cattle, and has not had any difficulty filling pens. The number of its customers has doubled since 1994. (Tr. 1228-30.) Mid-America Feedyards has grown in capacity and occupancy over the last 3 years (Tr. 1728-32).

26. The types of marketing options available at a given feedlot is a factor cattle owners consider in determining where to place cattle; however, it is not as important as other factors, such as a feedlot's reputation, cost of gain, or pen availability (Tr. 1778, 1807, 1925, 3708-11, 3932-33).

[27. Respondent's right of first refusal under the Beef Marketing Agreement provides that Respondent may obtain cattle placed in feedlots that are members of the Beef Marketing Group by matching the previous high bid, rather than by bidding a higher price than previously bid.

28. Respondent's right of first refusal allows Respondent to enter a bid, await, but not participate in, any additional bidding, and obtain cattle merely by

matching any bid that may be higher than Respondent's bid.

29. Respondent's right to acquire cattle by matching the previous high bid not only has the potential of discouraging others from bidding on cattle, but also necessarily restricts competition because Respondent's right of first refusal obviates Respondent's need to bid competitively with those bidders not discouraged from bidding for cattle placed at Beef Marketing Group feedlots, in order to obtain those cattle.

30. The effect or potential effect of Respondent's right of first refusal under the Beef Marketing Agreement is to reduce competition.]

Conclusion of Law

[Respondent's right of first refusal under the Beef Marketing Agreement violates section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) because it has the effect or potential effect of reducing competition.]

Discussion

A. Applicable Law.

. . . .

Complainant maintains that Respondent['s refusal to offer the terms of the Beef Marketing Agreement to all feedlots in Kansas that are similar to members of the Beef Marketing Group: (1) gives Beef Marketing Group members an undue or unreasonable preference or advantage; (2) subjects Kansas feedlots that are not members of the Beef Marketing Group to an undue or unreasonable prejudice or disadvantage; and (3)] constitutes an unfair or unjustly discriminatory practice, in violation of section 202 of the Packers and Stockyards Act [(7 U.S.C. § 192).***] The legislative history of [the Packers and Stockyards Act establishes] that Congress intended the legislation to have a more far-reaching effect than existing

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[***The Complaint alleges that Respondent subjects similarly situated feedlots in Respondent's procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these feedlots under the same terms made available to the Beef Marketing Group (Compl. ¶ II(d)). While the evidence does not establish the boundaries of Respondent's procurement area, the record establishes that Respondent has procured cattle at feedlots located outside Kansas. Complainant, however, changed its position during the proceeding and asserts that Respondent subjects similarly situated feedlots in Kansas, rather than similarly situated feedlots in Respondent's procurement area, to an undue or unreasonable prejudice or disadvantage.]

antitrust statutes, such as the Sherman [Antitrust Act,] Clayton Act[, the Federal Trade Commission Act, and the Interstate Commerce Act]. *See Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962). [For example, one of the Congressional sponsors of H.R. 6320, the bill that was later enacted as the Packers and Stockyards Act, described the breadth of the bill and the scope of the Secretary of Agriculture's authority under the bill, as follows:

> Mr. Haugen. . . .
>
> It gives the Secretary complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith.
>
> The bill further coordinates the duties of the Secretary of Agriculture so that it prevents overlapping of authority and duplication of jurisdiction of the departments of Government having regulatory power which previously existed. The object sought is to preserve and hold on to all powers granted to regulate and prevent abuse and unfair practices, or, in other words, not to weaken but to strengthen existing laws.
>
> It provides for ample court review of any of the orders or regulations of the Secretary of Agriculture so as to protect the industry from any mistakes of judgment or unwarranted use of the power thus delegated.
>
> Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of the war emergency measures, and possibly the interstate commerce act.

61 Cong. Rec. 1801 (1921).

Moreover, the language of the Packers and Stockyards Act does not limit the Secretary of Agriculture's jurisdiction, as expressed by Mr. Haugen. Therefore, I find the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act includes the authority to examine agreements between packers and feedlots and to impose sanctions authorized by the Packers and Stockyards Act if such agreements result in or may potentially result in the harm which the Packers and Stockyards Act is designed to prevent.]

. . . . [Footnote 2 omitted.]

B. Complainant failed to prove the existence of $0.43 per hundredweight price difference.

The Complaint alleges that: "Respondent gives an undue or unreasonable

preference to the Beef Marketing Group by guaranteeing a high price for livestock purchased from the Beef Marketing Group while refusing to make the same terms of purchase available to similarly situated sellers of comparable livestock." (Compl. ¶ II(c).) [Footnote 3 omitted.] Specifically, Complainant contends that Respondent provided Beef Marketing Group members with a price preference of $0.43 per hundredweight.[4] Complainant failed to . . . prove that $0.43 per hundredweight accurately represents the price difference that . . . resulted from the Beef Marketing Agreement.

The alleged $0.43 per hundredweight preference was derived from an analysis by the Industry Analysis Staff, Packers and Stockyards Programs, which examined Respondent's transactions for a 20-week period in late 1993 and early 1994, that encompassed the 10 weeks before and the 10 weeks after the Beef Marketing Agreement went into effect.

The Industry Analysis Staff began with an examination of simple statistics surrounding the transactions. Statistics, however, only examine factors in isolation; and therefore, [do] not . . . show whether any price change was actually caused by the Beef Marketing Agreement or by some other factor. Recognizing the limited value of a purely statistical analysis, the Industry Analysis Staff developed a multiple regression model. Multiple regression is a statistical technique which can be used to examine the simultaneous effects of several factors on a single variable, if the model complies with various assumptions. Using the regression model, the Industry Analysis Staff economists concluded that the price difference attributable to the Beef Marketing Agreement was $0.43 per hundredweight. The Industry Analysis Staff model, however, suffers from a number of defects which render this conclusion unreliable.

Due to the complicated nature of the econometric study, [Complainant and Respondent] presented expert testimony to explain and analyze the study and its results. Dr. Gerald Grinnell and Dr. Warren Preston, two of the economists involved in the study, testified on behalf of [Complainant]. Dr. Grinnell and Dr. Preston are both agricultural economists employed by the United States Department of Agriculture. Although both have considerable expertise in the field of agricultural economics, neither has any specialized training or expertise in the

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[4]Complainant also presented testimony from [operators of feedlots, which are not members of the Beef Marketing Group,] who estimated that the value of the Beef Marketing Agreement ranged from $1 to $3 per hundredweight (Tr. 772, 931, 987). These estimates were purely speculative, with no factual support . . . and were made by individuals who were not aware of all the terms of the Beef Marketing Agreement. This testimony, therefore, is of scant probative value and merits no further discussion.

field of econometrics. [(Tr. 1961-67, 2591-95.)]

Professor Jerry Hausman testified on behalf of Respondent. Professor Hausman is a recognized expert in the field of econometrics. He is a professor at the Massachusetts Institute of Technology where he teaches econometrics. [Professor Hausman] is a former editor of the journal *Econometrica*; and he is the author of numerous publications on the subject. He developed a method of testing models for bias commonly known among econometricians as the "Hausman Specification Test." [(Tr. 3943-47.)]

According to Professor Hausman, the Industry Analysis Staff model is biased and unreliable (Tr. 3948). With non-randomized experiments, such as the one conducted by the Industry Analysis Staff, there is a critical assumption that the variable being tested is not correlated with all factors not accounted for by the developed model. The Industry Analysis Staff failed to test this assumption, and when Professor Hausman tested it, the model failed.

Professor Hausman explained that BMGAFTER (the variable of interest in the study) is a "catch-all," which would capture [not only the effect of the Beef Marketing Agreement on Beef Marketing Group prices, but also the effect of other factors not included in the regression that impacted Beef Marketing Group prices differently in the post-Beef Marketing Agreement period than prices at feedlots that are not members of the Beef Marketing Group (RX 46 at 15)]. The Industry Analysis Study assumes that these unaccounted-for factors are not correlated with the characteristics of the transactions that are included in the model; and also that the unaccounted-for factors had the same effect on price throughout the study. Professor Hausman employed two tests[, the Hausman Specification Test and the Chow Test,] to verify these assumptions. Based on [the results of the Hausman Specification Test, Professor Hausman found that it cannot be assumed that the unaccounted-for factors are not correlated with the characteristics of the transactions that are included in the regression model. Moreover, Professor Hausman found that the assumption that the unaccounted-for factors had the same effect on price throughout the study was rejected by the Chow Test data.] Professor Hausman . . . concluded that the [Industry Analysis Staff's] regression analysis was [not scientifically valid, and no conclusion could be drawn from the regression analysis]. (RX 46 at 11-20; Tr. 3969-70, 3979.)

Complainant failed to introduce any evidence to show that its model does pass the Hausman Specification Test or the Chow Test. Instead, Complainant disputed the applicability of the Hausman Specification Test and challenged Professor Hausman's method of performing the Chow Test, as well as his interpretation of the results. The arguments made by Complainant are unpersuasive. Professor Hausman is a noted econometrician with considerable expertise in conducting these

tests, particularly the Hausman Specification Test, which he developed. I found him to be a most credible witness and have consequently afforded great weight to his analysis of the econometric study.

. . . .

Professor Hausman also pointed out that the model is not reliable in that it fails to account for non-price conditions of sale. . . . The model does include a variable to account for extended delivery when it was taken; however, no variable is included to test the value of the option of extended delivery. Failure to include important variables which are related to the variable of interest can create bias in the results (Tr. 3958). In fact, Complainant admits that any price difference resulting from [non-price conditions of sale] would appear in the $0.43 per hundredweight price difference (Complainant's Reply Brief at 16). Omission of the [option of extended delivery], therefore, calls into question the accuracy of the results, since it cannot be determined from the [Industry Analysis Staff's] regression [analysis] whether or not it was this factor that actually caused the price difference.

. . . [T]estimony of industry witnesses contradicting certain [Industry Analysis Staff] test results [is an indicator of] the inaccuracy of the Industry Analysis Staff model. The regression results suggest that whether a pen is predominantly heifer or steer has a greater effect on the price of cattle than does the per centum of the pen that grades prime or choice (Tr. 2406-11; CX 10 at 3, CX 25 at 72-73). Industry witnesses testified that the per centum of a pen grading prime or choice is an important factor in determining price and . . . that there is currently no real price distinction between steers and heifers (Tr. 668-70, 737, 942, 1011-12, 1102, 1162, 1222-23, 1287-88, 1556-57, 1727-28).

Finally, even if the [Industry Analysis Staff] regression results were accepted as accurate for the period studied, that period cannot be found to be representative of the period covered by the Complaint. The Industry Analysis Staff model only observed the effects of the Beef Marketing Agreement for the first 10 weeks that it was in effect. Several industry witnesses testified that the market was volatile during this time period (Tr. 772, 975, 1339). Complainant introduced evidence that the market fluctuated in 10 out of the 12 weeks between February 14, 1994, and May 7, 1994 (Tr. 654-55). . . .

Complainant admits that the market was volatile in 1994 (Complainant's Proposed Findings of Fact, Conclusions and Order, Finding of Fact No. 13), but claims that such volatility was not unusual. There was no evidence introduced, however, suggesting that [the market was] volatile [in 1995 or 1996]. To the contrary, Complainant never looked at market changes during any other time period or made any attempt to discover whether the period selected for the study

would provide an accurate representation of the effects of the Beef Marketing Agreement.

Complainant asserts that the study does not need to be representative of the entire time period at issue [because the econometric findings for the period studied, standing alone, are sufficient to prove a price preference (Complainant's Reply Brief at 13-14). I agree with Complainant that, if the Industry Analysis study was reliable, the study would establish that Respondent gave members of the Beef Marketing Group a price preference; however, if the 10-week period studied was more volatile than the entire period during which the Beef Marketing Agreement was in effect, the amount of the price preference shown by the 10-week study would be higher than the actual price preference caused by the Beef Marketing Agreement during the entire period the Beef Marketing Agreement was in effect.]

The evidence does indicate that Respondent must have, on average, paid a higher price for cattle purchased under the terms of the Beef Marketing Agreement than it did on other transactions. Under the terms of the Beef Marketing Agreement, Beef Marketing Group members were able to receive the benefit of any increase in the market value of their cattle, but were not subject to any downward fluctuation of the market. . . . [T]herefore, [I find that Respondent paid, on average,] a higher price for cattle [placed] at Beef Marketing Group feedlots than [Respondent paid for cattle placed at feedlots that are not members of the Beef Marketing Group].[5] The [difference between the price Respondent paid for cattle at feedlots that are members of the Beef Marketing Group and the price Respondent paid for cattle at feedlots that are not members of the Beef Marketing Group], however, is uncertain and unproven. . . .

C. [Respondent received benefits under the Beef Marketing Agreement for its payment of higher prices for cattle.]

Although Respondent . . . paid higher prices [for cattle purchased] under the terms of the Beef Marketing Agreement [than it paid for similar cattle placed at feedlots that were not members of the Beef Marketing Group], Respondent was not only paying for cattle, it was also paying for [two] bargained-for non-price conditions of sale. Respondent obtained valuable benefits under the Beef

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[5]The conclusion that Respondent must have paid somewhat more for cattle under the Beef Marketing Agreement is also consistent with the fact that Respondent received superior non-price terms of sale under the Beef Marketing Agreement which would not likely have been offered for free. See the discussion at part C [in this Decision and Order, *infra*].

Marketing Agreement. . . .

1. Right of First Refusal

Under the Beef Marketing Agreement, Respondent initially had a right of first refusal on all cattle for which it bid even or better. Subsequently, the right was expanded to include cattle on which Respondent bid [at least] "minus 50."

Complainant asserts that Respondent did not have a right of first refusal under the Beef Marketing Agreement, citing testimony from cattle producers who fed cattle at Great Bend Feeding, Inc., and Pratt Feeders, Inc., who did not know about [Respondent's right of first refusal (Complainant's Proposed Findings of Fact, Conclusions and Order at 80-83)]. It is true that several producers were unaware that the right [of first refusal] existed; however, most of them were also unaware of the extended delivery term, the existence of which Complainant does not dispute (Tr. 1764-65, 1789-90, 1824-25, 1874, 1944-45). The former assistant feedlot manager at Great Bend Feeding, Inc., explained that he did not provide producers with all of the details of the Beef Marketing Agreement because he did not want them to be unnecessarily confused (Tr. 3913). Pratt Feeders, Inc., sold under the terms of the Beef Marketing Agreement for only 1 year[; therefore,] it is unlikely that all of its customers would be aware of every term.

Complainant also maintains that the right of first refusal did not exist because it was not enumerated in a one-page summary of terms signed by Lee Borck and Bruce Bass (CX 2 at 2). Complainant refers to the memorandum as the "Beef Marketing Agreement," and insists that it represents the Beef Marketing Agreement in its entirety.[6] Complainant, however, cannot bypass the intent of the parties and unilaterally decide that the memorandum [is] a complete integration of the terms of the Beef Marketing Agreement.[7] Complainant did not offer any evidence to show that terms [of the Beef Marketing Agreement] are limited to those contained in the memorandum, and in fact, the evidence establishes that the Beef Marketing

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[6]. . . The memorandum was not presented to Complainant as anything more than a summary of terms. When Respondent [transmitted a facsimile] of the memorandum to Complainant, it bore the notation: "Keith, This would be the *general guidelines* on how the purchases are occurring." (CX 2 at 1 (emphasis added).) . . . .

[7]*Cf. Battery Steamship Corp. v. Refineria Panama, S.A.*, [5]13 F.2d 735, 739 (2d Cir. 1975); *United States v. Clementon Sewerage Authority*, 365 F.2d 609, 613 (3d Cir. 1966); *Greenberg v. Tomlin*, 816 F. Supp. 1039, 1052 (E.D. Pa. 1993); *Monon Corp. v. Wabash Nat. Corp.*, 780 F. Supp. 577[, 582-83] (N.D. Ind. 1991).

Agreement between the Beef Marketing Group and Respondent is intended to, and does, contain additional terms, including a right of first refusal.

Several witnesses, including those testifying for [Complainant], stated that the right of first refusal exists. Bruce Bass and Lee Borck, who negotiated the Beef Marketing Agreement, both testified that there is a right of first refusal (Tr. 3512-13, 3734). Jerry Bohn, the general manager of Pratt Feeders, Inc., testified for [Complainant] that the right of first refusal is part of the Beef Marketing Agreement and explained that a disagreement over that term caused Pratt Feeders, Inc., to stop selling under the Beef Marketing Agreement (Tr. 462[-63]). Ray Palenske, a [cattle buyer for Respondent], and Marvin Stilgenbauer[, a cattle buyer for Excel], also testified for [Complainant] that there is a right of first refusal (Tr. 830, 1595). Finally, Jay Johnson, Chief of the Packer Branch[, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration], testified as a representative of the agency that Respondent has a right of first refusal and that the right has a value. He further stated that he knew the right existed at least as early as January 1995. (Tr. 3231-32.) Assertions that the right does not exist are, therefore, inconsistent with the evidence of record.

Complainant further argues that even if the right of first refusal does exist, it is not worth any extra payment. On the contrary, the right of first refusal is quite valuable. Along with [Respondent's] commitment to make a good faith bid on every pen, [the right of first refusal] helps Respondent maintain a steady supply of high quality cattle, close to Respondent's Emporia plant. After the Beef Marketing Agreement went into effect, [Respondent's] purchases from Beef Marketing Group [members] nearly doubled, and capacity utilization at Emporia increased by 66 head per week. Increased capacity utilization translates into increased profits since labor and other fixed costs remained constant with the increase. In the first 10 weeks of the Beef Marketing Agreement, the added cattle accounted for an additional contribution of $17,609 from the slaughter division and an additional $23,765 from the processing division, for a total increase in profits of $41,374. (Tr. 3825-32; RX 8.)

The right of first refusal also allows Respondent's [cattle] buyers to be the first bidder at Beef Marketing Group [feedlots] without having to arrive at dawn, or sooner, and it eliminates repeated telephone calls and trips to the feedlots during the negotiating process (Tr. 881-82, 3467-68). Increased efficiency certainly has value, even if it [cannot be] quantified. Complainant recognized this value in its econometric study, which hypothesizes that price would increase with the number of cattle in each lot due to increased efficiency related to purchasing larger lots (CX 25 at 54).

In the alternative, Complainant asserts that even if the right of first refusal is a

valuable benefit that Respondent received from the Beef Marketing Agreement, it is anti-competitive and unlawful under the Packers and Stockyards Act, and, therefore, should not be considered. [As discussed in this Decision and Order, *infra*, I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because it has the effect or potential effect of reducing competition. However, even if Respondent's right of first refusal is not considered, Respondent's right under the Beef Marketing Agreement to extended delivery is a valuable benefit which can be considered.]

2. Extended Delivery

Under the Beef Marketing Agreement, Respondent is able to delay its pick up of cattle as many as three extra days. Delivery can be scheduled as many as 10 days following the sale, instead of the customary 7 days. Complainant argues that this term does not have value because packers could sometimes get extended delivery without the Beef Marketing Agreement.

The record evidence shows that even though feedlots do, at times, give extended delivery, such extensions are not normal practice (Tr. 447, 918, 944-47, 1132-33, 1226-27, 1733-36). Ray Palenske[, a cattle buyer for Respondent,] testified that he could normally get one extra day from a feedlot if he begged. He also testified, however, that it is "very, very, very difficult" to get more than one extra day . . . (Tr. 837). Excel [cattle] buyer, Robert Albrecht, testified that feedlots would give him an extra day approximately 50 percent of the time that he asked for one (Tr. 1633). The record further shows that some feedlots are particularly resistant to the practice of extending delivery. Kenneth Wiens, of Central Feeders, for example, testified that, although he sometimes gives extra days, he "frowns on" the practice, and he has some customers who never allow extra time (Tr. 739-40). Allen Sents, of McPherson County Feeders, testified that he tries to avoid giving extended delivery (Tr. 970). Wend[e]ll Zimmerman, of Zimm's Feedlot, testified that he "very seldom" allows delivery beyond 7 days (Tr. 1077-78). Lowell Sawyer, of O.K. Corral, testified that he is opposed to giving extended delivery terms and will only allow it "very occasionally" (Tr. 1289-90). None of the feedlot operators testified that they would guarantee 10-day delivery on all sales, for free.

There is a difference between being able to obtain extended delivery sometimes and having the right to take extra days on any transaction, for any reason. This difference is of economic value to Respondent.

The availability of extra days benefitted Respondent by allowing greater flexibility in scheduling delivery of cattle for slaughter. [Respondent slaughters] approximately 4,000 [cattle] each day [at its Emporia plant], and the cattle are

generally slaughtered on the same day they arrive at the plant (Tr. 3474). The scale house coordinator must schedule daily shipments in a way which accommodates Respondent's inventory without overburdening the plant. Having three extra days [during which cattle shipments can be scheduled] helps to ease scheduling pressures, while enabling Respondent to maximize its inventory.

Also, it is unlikely that feedlots would grant three extra days as a matter of right without some compensation for the cost of feeding the animals those additional days. Steve Sellers, of Sellers Feedlot, testified that after 7 days it can cost $0.50 per hundredweight or more to feed an animal for a single day [(Tr. 945-47). Lowell Sawyer, of the O.K. Corral, testified that later in the feeding cycle the cost of gain is higher than the cost of gain earlier in the feeding cycle and one would lose money by having to feed cattle extra days, even taking into account the extra weight gained by the cattle] (Tr. 1308-09). Jerry Anderson, of Mid-America Feedyards, testified that a 10-day delivery period could cost as much as $5 per hundredweight more than a 7-day delivery period (Tr. 1736). Furthermore, the cattle owner bears the risk of any type loss, which would include death, injury, or weight loss, during the extra days. In high risk situations, such as when a storm is forecast, an owner would likely deny extended delivery terms under a regular sale, but would be unable to refuse . . . Respondent [extended delivery of cattle placed at Beef Marketing Group feedlots]. (Tr. 1013-14.) Due to the extra risk and cost to the feedlots, it is to be expected that they would impose a compensatory charge. Complainant's econometric study recognizes this fact: "Feedlot managers are reluctant to hold cattle beyond the standard delivery period since delayed delivery increases costs to the feedlot. Thus, we expected that feedlots would demand additional compensation to hold cattle for extended delivery and IBP, inc. would incur higher costs of cattle." (CX 25 at 58.)

Complainant also argues that extended delivery is not worth $0.43 because it is rarely used. This argument fails for two reasons. First, an option has value whether exercised or not. Second, the option was exercised. Complainant's expert witness, Dr. Gerald Grinnell, testified that Respondent took delivery from Beef Marketing Group members after 7 days more than 50 percent of the time (Tr. 2077-78). Complainant's statistical analysis further shows that the average number of days between the sale and delivery of cattle from Beef Marketing Group feedlots increased by almost 2 days after initiation of the Beef Marketing Agreement (CX 9 at I31). [Moreover, even if Complainant's assertion that Respondent's right of extended delivery is not worth $0.43 per hundredweight is correct, Complainant did not prove that Respondent paid $0.43 per hundredweight more for cattle placed at Beef Marketing Group feedlots than for similar cattle placed at similar feedlots in Kansas that are not members of the Beef Marketing Group.]

3. Pen-by-Pen Bidding

Respondent also advances the Beef Marketing Agreement provision for pen-by-pen bidding as a valuable right. Although it is possible that this term may have some value to Respondent, such value is not unequivocally established by the record. Although feedlots may have traditionally tied lesser quality pens of cattle to higher quality pens, it appears that currently, in Kansas, pen-by-pen bidding is consistently available without the Beef Marketing Agreement. In any case, it is not necessary for the potential value of the pen-by-pen bidding term to be established, since the . . . extended delivery term is sufficient to account for [Respondent's payment of a higher price for cattle placed at Beef Marketing Group feedlots than it paid for similar cattle placed at similarly situated feedlots in Kansas that are not members of the Beef Marketing Group].

D. Complainant failed to prove that Respondent provided a preference which was *undue* or *unreasonable*.

[Although] Complainant ha[s] proven that Respondent afforded the Beef Marketing Group members a preference . . . in the form of a . . . price advantage, Complainant failed to prove that such a preference [is] "undue" or "unreasonable."

The [Packers and Stockyards] Act does not specify what constitutes "undue" or "unreasonable," instead those terms must be defined according to the facts of each case. *See Capitol Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965). The facts of this case do not conclusively establish that [Respondent's payment of a higher price for cattle placed at Beef Marketing Group feedlots, than Respondent pays for similar cattle placed at feedlots that are not members of the Beef Marketing Group, is] . . . "undue" or "unreasonable."

The $0.43 per hundredweight price advantage [which Complainant asserts Respondent paid for cattle at Beef Marketing Group feedlots] on a typical 1,200-pound animal would amount to approximately $5 per head. At the time of the econometric study, Respondent's average live cost for cattle was approximately $75 per hundredweight (CX 12 at 58), or $900 for a typical 1,200-pound animal. Consequently, a $0.43 per hundredweight difference represented only about one-half of one percent of the purchase price of a typical animal.

Complainant asserts that $0.43 per hundredweight is undue or unreasonable because it is significant in comparison to producer profits and bidding increments. Some witnesses testified that on average, in 1994, they suffered losses on their cattle ranging from $1.50 to $8 per hundredweight (Tr. 556-57, 1000, 1085, 1194). [T]estimony [was also given] that, although bids in Kansas are currently made in

increments of $1 per hundredweight, in 1994, increments of $0.50 per hundredweight were more common and sometimes bids [were in increments of] as little as $0.10 per hundredweight (Tr. . . . 916-17, 968-69, 1083, 1260).

On the other hand, the cost of gain at feedlots can vary as much as $15 to $30 per hundredweight (Tr. 3709-11). In comparison, it is questionable whether a difference of $0.43 per hundredweight would significantly affect either [producer] profits or placement of cattle by producers. This conclusion is supported by testimony from producers which indicates that the Beef Marketing Agreement had little if any impact on any of their decisions on where to place cattle, as well as by the fact that Pratt Feed[ers, Inc.,] and Pawnee Valley Feeders[, Inc.,] withdrew from the Beef Marketing Agreement, while remaining members of the Beef Marketing Group. Whatever price advantage the Beef Marketing Agreement afforded, it was not sufficient to induce [Pratt Feeders, Inc., and Pawnee Valley Feeders, Inc.,] to continue under its terms.

. . . .

E. Respondent['s failure to offer terms of the Beef Marketing Agreement to all feedlots in Kansas does not violate the Packers and Stockyards Act].

Complainant alleges that Respondent [subjects similarly situated feedlots in Kansas to an undue or unreasonable prejudice or disadvantage,] in violation of section 202[(b) of the Packers and Stockyards Act], by failing to offer the terms of the Beef Marketing Agreement to all feedlots in Kansas [that are similar to the feedlots that are members of the Beef Marketing Group].[8] . . . In *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995), the United States Court of Appeals for the Eighth Circuit held:

> [The agency's] claim, in essence, is that § 202 of the PSA . . . statutorily creates an entitlement to obtain the same type of contract that Swift Eckrich may have offered to other independent growers. We are convinced that the purpose behind § 202 of the PSA . . . was not to so upset the traditional principles of freedom of contract. The PSA was designed to promote efficiency, not frustrate it.

Id. at 1458. *See also Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 202

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[8]See note ***.

(E.D.N.C. 1996).

Consequently, it is not enough for Complainant to show that Respondent buys cattle [placed at Beef Marketing Group members] using different methods and different terms of sale [than it uses at feedlots that are not members of the Beef Marketing Group]. In order to show a violation of the Packers and Stockyards Act, Complainant is required to prove that [Respondent's failure to offer the terms of] the Beef Marketing Agreement [to all similarly situated feedlots in Kansas] causes the kind of harm that the Packers and Stockyards Act is designed to prevent. This distinction was explained nearly 60 years ago:

> Differences or variations in prices, or in the terms of credit, or amounts of discount, or in practices do not come within the ban of the [Packers and Stockyards A]ct unless they in fact constitute engaging in or using an unfair or unjustly discriminatory or deceptive practice or device in commerce or unless they constitute a making or giving, in commerce, of an undue or unreasonable preference or advantage, or result in undue or unreasonable prejudice or disadvantage as between persons or localities.

Swift & Co. v. Wallace, 105 F.2d 848, 853 (7th Cir. 1939). In *Armour & Co.*, the court stated again that price differences are not illegal, absent anti-competitive intent, quoting the following passage from a United States Court of Appeals for the Seventh Circuit anti-trust decision:

> "[T]he object of the anti-trust law is to encourage competition. Lawful price differentiation is a legitimate means for achieving the result. It becomes illegal only when it is tainted by the purpose of unreasonably restraining trade or commerce or attempting to destroy competition or a competitor, thus substantially lessening competition, or when it is so unreasonable as to be condemned as a means of competition. The price reduction here has none of these stigmata."

Armour & Co. v. United States, 402 F.2d 712, 720 (7th Cir. 1968) (citing *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 807 (S.D. Cal. 1952)), *aff'd*, 231 F.2d 356 (9th Cir.), *cert. denied*, 350 U.S. 991 (1955). *See also Central Coast Meats, Inc. v. United States Dep't of Agric.*, 541 F.2d 1325, 1327 (9th Cir. 1976). [While I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because it has the effect or potential effect of reducing competition, I do not find that Respondent's failure to

offer the same terms to all similarly situated feedlots in Kansas constitutes a violation of section 202 of the Packers and Stockyards Act.]

F. Complainant failed to prove that the Beef Marketing Agreement caused [injury to competitors].

In addressing the type of harm which must be shown under section 202 of the Packers and Stockyards Act, courts have disagreed on whether there is a requirement that there be an injury to competition, or whether injury to competitors is enough. Some cases have held that because the Packers and Stockyards Act is broader than general antitrust law, that injury to competitors is sufficient. *See Swift & Co. v. United States*, 393 F.2d 247[, 253] (7th Cir. 1968); *Wilson & Co. v. Benson*, 286 F.2d 891[, 895] (7th Cir. 1961). [Other cases,] however, . . . have focused on whether there was actual or likely injury to competition. *See, e.g., Farrow v. United States Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985); *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968); *Aikins v. United States*, [282 F.2d 53] (10th Cir. 1960); *Berigan v. United States*, 257 F.2d 852 (8th Cir. 1958); *Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir. 1939).

[I find that harm to competition can be proven by showing harm to competitors and that the Packers and Stockyards Act does not require that the person harmed be a direct competitor of the person causing the harm, *viz.*, it would be a violation of the Packers and Stockyards Act if it were shown that a packer caused harm, which the Packers and Stockyards Act is designed to prevent, to a feedlot or a livestock producer. However, Complainant failed to prove that Respondent's failure to offer the terms of the Beef Marketing Agreement to feedlots in Kansas that are not members of the Beef Marketing Group injured those feedlots or the cattle producers who placed cattle at those feedlots.]

Central Feeders, Ottawa County Cattle Associat[es], Mann's ATP, [Inc.,] and Mid-America Feedyards all expanded after the Beef Marketing Agreement between the Beef Marketing Group and Respondent went into effect. Although some feedlot operators suspected that they lost some business as a result of the Beef Marketing Agreement, there is no evidence to substantiate these suspicions (Tr. 987, 1197-98, 1266-67, 1348). To the contrary, the testimony from producers indicates that membership in the Beef Marketing Group was not of particular concern to them in making cattle placement decisions.

Kim Goracke testified that, when selecting a feedlot, he relies primarily on the recommendations of his nutritionist and that he feeds at Pratt [Feeders, Inc.,] even though the terms of the Beef Marketing Agreement are no longer available there (Tr. 1750, 1763). Lynn Rock testified that he was not concerned enough about the

Beef Marketing Agreement to ask a feedlot whether it was a Beef Marketing Group member before placing cattle there. He further testified that although he would rather [place cattle with] a Beef Marketing Group member than [with] a [feedlot that was not a] Beef Marketing Group [member] if all else were equal, all else is not equal among feedlots. (Tr. 1803.) Lynn Kauffman testified that the Beef Marketing Agreement has not affected his placement decisions in the last several years and that although he sold to Pratt [Feeders, Inc.,] under the terms of the Beef Marketing Agreement in 1994, he continued to sell at Pratt [Feeders, Inc.,] after the Beef Marketing Agreement was no longer available (Tr. 1814.) When deciding where to place cattle, Mr. Kauffman testified that he considers pen availability, cost of gain, feed supply, general appearance of the feedlot, and trust and friendship with the feedlot operators (Tr. 1817-22). Walter Krier testified that he places his cattle based on friendship and loyalty and who does the best job with feeding and marketing (Tr. 1860-61). Ralph Hembree testified that he decides where to place cattle based on recommendations from other people in the cattle business, such as feed salesmen. Mr. Hembree was not sure whether or not all of the feedlots where he fed his cattle were Beef Marketing Group members. (Tr. 1921, 1938-39.)

Furthermore, Complainant admits that [feedlots that are not members of] the Beef Marketing Group continue to receive competitive prices despite the Beef Marketing Agreement (Complainant's Reply Brief at 68). Jerry Bohn, the general manager of Pratt Feeders, [Inc.,] testified that he continued to receive the best price available each week after withdrawing from the Beef Marketing Agreement (Tr. 540). In fact, [Mr. Bohn] stated that Pratt [Feeders, Inc.,] benefitted from the existence of the Beef Marketing Agreement after it withdrew, because there was greater interest from Respondent's competitors (Tr. 539).

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises seven issues in Agency's Appeal Petition and Brief [hereinafter Complainant's Appeal Petition].

First, Complainant contends that the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to regulate the manner in which packers conduct business, including livestock procurement methods, such as Respondent's use of the Beef Marketing Agreement (Complainant's Appeal Pet. at 7-10).

I agree with Complainant. The Packers and Stockyards Act was described by

its sponsors as one of the most comprehensive regulatory measures ever enacted.[9] Similarly, the House Report applicable to the bill that was later enacted as the Packers and Stockyards Act (H.R. 6230), states, as follows:

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

H.R. Rep. No. 67-77, at 2 (1921).

The Conference Report applicable to H.R. 6230 states that "Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits[.]" H.R. Conf. Rep. No. 67-324, at 3 (1921).

Further, Congress has repeatedly broadened the Secretary of Agriculture's authority under the Packers and Stockyards Act.[10] The primary purpose of the

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[9]61 Cong. Rec. 1801 (1921) (By Mr. Haugen: "Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of war emergency measures, and possibly the interstate commerce act."); 61 Cong. Rec. 4783 (1921) (By Mr. Haugen: "It gives the Secretary of Agriculture complete visitorial, inquisitorial, supervisory, and regulatory power over the packers and stockyards. It extends over every ramification of the packers and stockyard transactions in connection with the packing business. It provides for ample court review. The bill is designed to supervise and regulate and thus safeguard the public and all elements of the packing industry, from the producer to the consumer, without injury or to destroy any unit in it. It is the most far-reaching measure and extends further than any previous law into the regulation of private business—with few exceptions, the war emergency measure and possibly the interstate commerce act.").

[10]For example, in 1924, the Packers and Stockyards Act was broadened to authorize the Secretary of Agriculture to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460 (codified at 7 U.S.C. § 204)). The Packers and Stockyards Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649 (codified at 7 U.S.C. §§ 192, 218b, 221, 223)). In 1958, the Packers and Stockyards Act was broadened to give the Secretary of Agriculture "jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 85-1048, at 5 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5216). In 1976, the Packers and Stockyards Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary of Agriculture prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

Packers and Stockyards Act was described in a House Report, in connection with a major amendment of the Packers and Stockyards Act enacted in 1958, as follows:

> The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.[11]

H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213.

Courts that have examined the Packers and Stockyards Act have uniformly described the Act as constituting a broader grant of authority to regulate than previous legislation.[12] Moreover, the Packers and Stockyards Act is remedial

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[11]*Accord In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1130-31 (1996); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1056-57 (1990); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988); *In re Gary Chastain*, 47 Agric. Dec. 395, 420 (1988), *aff'd per curiam*, 860 F.2d 1086 (8th Cir. 1988) (unpublished), *printed in* 47 Agric. Dec. 1395 (1988); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 299 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 233-34 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); Donald A. Campbell, The Packers and Stockyards Act Regulatory Program, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1989 Cum. Supp.)

[12]*See, e.g., Swift & Co. v. United States*, 393 F.2d 246, 253 (7th Cir. 1968) (stating that the statutory prohibitions of section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Antitrust Act or even section 5 of the Federal Trade Commission Act); *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (stating that the legislative history shows that Congress understood that section 202 of the Packers and Stockyards Act is broader in scope than antecedent legislation, such as the Sherman Antitrust Act, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act, and section 3 of the Interstate Commerce Act); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) (stating that from the legislative history it is a fair inference that, in the opinion of Congress, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act and the prohibitions in the Sherman Antitrust Act were not broad enough to the meet the public needs as to business practices of packers; section 202(a) and (b) of the Packers and Stockyards Act was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest).

legislation and should be liberally construed to effectuate its purposes,[13] and its purposes have been variously described.[14] Therefore, I find that Respondent's use

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[13]*Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985); *Rice v. Wilcox*, 630 F.2d 586, 589 (8th Cir. 1980); *Travelers Indem. Co. v. Manley Cattle Co.*, 553 F.2d 943, 945 (5th Cir. 1977); *Central Coast Meats v. United States Dep't of Agric.*, 541 F.2d 1325, 1328 (9th Cir. 1976); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966); *Lich v. Cornhusker Casualty Co.*, 774 F. Supp. 1216, 1221 (D. Neb. 1991); *Cook v. Hartford Accident & Indem. Co.*, 657 F. Supp. 762, 767 (D. Neb. 1987) (memorandum opinion); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1470 (N.D.N.Y. 1984) (memorandum decision); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion); *In re Frosty Morn Meats, Inc.*, 7 B.R. 988, 1013 (M.D. Tenn. 1980); *Arnold Livestock Sales Co. v. Pearson*, 383 F. Supp. 1319, 1323 (D. Neb. 1974) (memorandum opinion); *Folsom-Third Street Meat Co. v. Freeman*, 307 F. Supp. 222, 225 (N.D. Cal. 1969); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1132 (1996); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748, 799 (1985).

[14]*See Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (per curiam) (stating that the chief evil at which the Packers and Stockyards Act is aimed is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys); *Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n*, 356 U.S. 282, 289 (1958) (stating that the Packers and Stockyards Act is aimed at all monopoly practices, of which discrimination is one); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1460 (8th Cir. 1995) (stating that the Packers and Stockyards Act has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (stating that the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to deal with any practices that inhibit the fair trading of livestock by stockyards, marketing agencies, and dealers); *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (stating that one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating that one purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock); *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 718 (10th Cir. 1977) (stating that one purpose of the Packers and Stockyards Act is to make sure that farmers and ranchers receive true market value for their livestock and to protect consumers from unfair practices in the marketing of meat products); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369 (7th Cir. 1976) (stating that the Packers and Stockyards Act is a statute prohibiting a variety of unfair business practices which adversely affect competition); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974) (stating that the chief evil sought to be prevented or corrected by the Packers and Stockyards Act is monopolistic practices in the livestock industry); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972) (stating that the purpose of the Packers and Stockyards

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[14](...continued)
Act is to prevent economic harm to producers and consumers), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971) (stating that the purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats and other products); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) (stating that the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); *United States Fidelity & Guaranty Co. v. Quinn Brothers of Jackson, Inc.*, 384 F.2d 241, 245 (5th Cir. 1967) (stating that one of the basic objectives of the Packers and Stockyards Act is to impose upon stockyards the nature of public utilities, including the protection for the consuming public that inheres in the nature of a public utility); *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 956 (D.C. Cir. 1966) (stating that the purpose of the Packers and Stockyards Act is to prevent economic harm to the growers and consumers through the concentration in a few hands of the economic function of the middle man); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating that one of the purposes of the Packers and Stockyards Act is to ensure proper handling of shipper's funds and their proper transmission to the shipper); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932) (stating that one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996) (stating that the Packers and Stockyards Act was enacted to regulate the business of packers by forbidding them from engaging in unfair, discriminatory, or deceptive practices in interstate commerce, subjecting any person to unreasonable prejudice therein, or doing any of a number of acts to control prices or establish a monopoly in the business); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to give all possible protection to suppliers of livestock); *United States v. Hulings*, 484 F. Supp. 562, 567 (D. Kan. 1980) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to protect farmers and ranchers from receiving less than fair market value for their livestock and to protect consumers from unfair practices); *Guenther v. Morehead*, 272 F. Supp. 721, 725-26 (S.D. Iowa 1967) (stating that the thrust of the Packers and Stockyards Act is in the direction of stemming monopolistic tendencies in business; the unrestricted free flow of livestock is to be preserved by the elimination of certain unjust and deceptive practices disruptive to such traffic; the Packers and Stockyards Act deals with undesirable modes of business conduct by livestock concerns which are made possible by the disproportionate bargaining position of such businesses); *De Vries v. Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951) (stating that the Packers and Stockyards Act was passed for the purposes of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; controlling prices to prevent monopoly; eliminating unfair, discriminatory, and deceptive practices in the meat industry; and regulating rates for services rendered in connection with livestock sales), *aff'd*, 199 F.2d 677 (8th Cir. 1952), *cert. denied*, 344 U.S. 934 (1953); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95 (D. Minn. 1945) (stating that by the Packers and Stockyards Act, Congress sought to eliminate the unfair and monopolistic practices that existed; one of the chief objectives of the Packers and Stockyards Act is to stop collusion of packers and market agencies; Congress made an effort to provide a market where farmers could sell
(continued...)

of the Beef Marketing Agreement is well within the jurisdiction of the Secretary of Agriculture to regulate or prohibit under the Packers and Stockyards Act and that if Respondent's use of the Beef Marketing Agreement causes any harm, which the Packers and Stockyards Act is designed to prevent, even if that harm is not to Respondent's direct competitors, the Secretary may impose against Respondent any of the sanctions provided under the Packers and Stockyards Act.

Second, Complainant contends that the Judicial Officer is not bound by credibility, legal, or factual determinations made by the Chief ALJ (Complainant's Appeal Pet. at 10-11).

I agree with Complainant that the Judicial Officer is not bound by the Chief ALJ's credibility, legal, or factual determinations, and the Judicial Officer must make his own independent findings. The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

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[14](...continued)
livestock and where they could obtain actual value as determined by prices established at competitive bidding); *Bowles v. Albert Glauser, Inc.*, 61 F. Supp. 428, 429 (E.D. Mo. 1945) (stating that government supervision of public stockyards has for one of its purposes the maintenance of open and free competition among buyers, aided by sellers' representatives); *In re Petersen*, 51 B.R. 486, 488 (Bankr. D. Kan. 1985) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to ensure proper handling of shippers' funds and their proper transmission to shippers); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 B.R. 781, 793 (Bankr. E.D. Ark. 1984) (memorandum opinion) (stating that one of the primary purposes of the Packers and Stockyards Act and its regulations is to protect the welfare of the public by assuring that the sellers and buyers who are customers of the market agencies and dealers are not victims of unfair trade practices); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990) (stating that the primary objective of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true value of their livestock); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988) (stating that the primary purpose of the Packers and Stockyards Act is to assure not only fair competition, but also, fair trade practices in livestock marketing and meat packing); Harold M. Carter, The Packers and Stockyards Act, 10 Harl, *Agricultural Law* § 71.05 (1983) (stating that among the more important purposes of the Packers and Stockyards Act are to prohibit particular circumstances which might result in a monopoly and to induce healthy competition; prevent potential injury by stopping unlawful practices in their incipiency; prevent economic harm to livestock and poultry producers and consumers and to protect them against certain deleterious practices of middlemen; assure fair trade practices in order to safeguard livestock producers against receiving less than the true value of livestock as well as to protect consumers against unfair meat marketing practices; insure proper handling of funds due sellers for the sale of their livestock; and assure reasonable rates and charges by stockyard owners and market agencies in connection with the sale of livestock; and assure free and unburdened flow of livestock through the marketing system unencumbered by monopoly or other unfair, unjustly discriminatory, or deceptive practices).

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

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(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

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.[15]

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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[15]*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. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (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).

[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 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. 640, 687-88 (1998), *appeal*
(continued...)

While I disagree with the Chief ALJ's conclusion that Respondent did not violate the Packers and Stockyards Act, I agree with most of the Chief ALJ's findings of fact and discussion and the Chief ALJ's credibility determinations. Therefore, except with respect to the Chief ALJ's conclusion and order and the other minor changes noted in this Decision and Order, *supra*, I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order in this proceeding.

Third, Complainant contends that the Chief ALJ erroneously refused to

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[19](...continued)
docketed, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (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), *cert denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (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) (stating that the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating that agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating that while considerable deference is owed to credibility findings by an administrative law judge, 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) (stating that the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating that 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) (stating that 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).

consider evidence that multiple regression analyses using a pricing model for fed cattle are routinely utilized (Complainant's Appeal Pet. at 50). Even if I were to find that the Chief ALJ erred by refusing to consider evidence regarding the frequency of the utilization of multiple regression analyses using pricing models for fed cattle, I would find that the error is harmless. The Chief ALJ based his conclusion that Complainant failed to prove that Respondent gives Beef Marketing Group feedlots a $0.43 per hundredweight price preference on his finding that the Industry Analysis Staff's multiple regression model is unreliable. Even if the Chief ALJ had found that multiple regression analyses using a pricing model for fed cattle are routinely utilized, it does not appear that such a finding would alter the Chief ALJ's conclusion that Complainant failed to prove that Respondent gives Beef Marketing Group feedlots a $0.43 per hundredweight price preference.

Fourth, Complainant contends that the Chief ALJ erroneously excluded non-price preferences from consideration based on the Chief ALJ's ruling that Complainant did not allege in the Complaint that Respondent's making non-price preferences available only to members of the Beef Marketing Group violated the Packers and Stockyards Act (Complainant's Appeal Pet. at 62-65).

I agree with Complainant that the Chief ALJ's exclusion of non-price preferences from consideration, based on the Chief ALJ's finding that the non-price preferences are not alleged in the Complaint to be in violation of the Packers and Stockyards Act, is error.

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**
>
> . . . .
>
> (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 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.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or 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.

. . . .

§ 1.135 Contents of 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)(1), .135 (1996) (emphasis added).

It is well settled that the formalities of court pleading are not applicable in

administrative proceedings.[20] It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the absence of a showing that some party was misled.[21] Therefore, in order to comply with the Administrative Procedure 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.

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[20] *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).

[21] *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. United States Dep't. Agric.*, 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 Marilyn Shepherd*, 57 Agric. Dec. 242, 276-77 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 91, 104 (1998) (Order Denying Pet. for Recons.); *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 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).

The Complaint alleges that:

II

(a) Respondent, IBP, inc., beginning in February 1994, and continuing through to the present, purchases livestock from a group of feedlots located in Kansas, hereinafter referred to as the "Beef Marketing Group", pursuant to an exclusive marketing agreement, hereinafter referred to as "Beef Marketing Agreement" or "BMA". Beginning on or about February 7, 1994, and ending on or about August 31, 1994, respondent guaranteed the "Kansas Practical Top" price, adjusted to reflect the quality of the purchased livestock, for all livestock purchased on a live weight basis from the Beef Marketing Group. Beginning on or about September 1, 1994, and continuing through to the present, respondent guarantees the average of the "Kansas Practical Top" price and respondent's top price, adjusted to reflect the quality of the purchased livestock, for all livestock purchased on a live weight basis from the Beef Marketing Group.

(b) Other feedlots have approached respondent seeking to sell livestock under the same terms available to the Beef Marketing Group. Although these feedlots are similarly situated to the feedlots of the Beef Marketing Group and sell comparable quality livestock, respondent has refused to make the BMA terms of purchase available to them.

(c) Respondent gives an undue or unreasonable preference to the Beef Marketing Group by guaranteeing a high price for livestock purchased from the Beef Marketing Group while refusing to make the same terms of purchase available to similarly situated sellers of comparable livestock.

(d) Respondent subjects similarly situated feedlots in its procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these feedlots under the same terms made available to the Beef Marketing Group.

III

By reason of the facts alleged in paragraph II herein, respondent, IBP, inc., has violated sections 202(a) and (b) of the Act (7 U.S.C. §§ 192 (a),(b)).

Compl. ¶¶ II, III (footnote omitted).

I find the Complaint apprises Respondent that all of the terms of the Beef Marketing Agreement are at issue in the proceeding and that the Chief ALJ erred by failing to consider every preference and advantage Respondent gives to Beef Marketing Group members and their producer customers and every prejudice and disadvantage to which Respondent subjects other similarly situated feedlots and their producer customers.

Fifth, Complainant contends that Respondent's use of the Beef Marketing Agreement is a discriminatory practice and that Respondent's use of the Beef Marketing Agreement gives a preference or advantage to the Beef Marketing Group and subjects similarly situated feedlots in Kansas to a prejudice or disadvantage (Complainant's Appeal Pet. at 12-65).

I agree with Complainant. The Packers and Stockyards Act does not define the word *discriminatory* as used in section 202(a) or the terms *preference or advantage* and *prejudice or disadvantage* as used in section 202(b). When not defined by the statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.[22]

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[22]*See Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) (stating that in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating that when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating that courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating that in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating that in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating that words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating that Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating that in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation); *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating that the legislature must be presumed to use words in their known and ordinary signification); *De Ganay*
(continued...)

While the word *discriminatory* varies depending on the context in which it is used, the common meaning of the word *discriminatory* includes "applying or favoring discrimination in treatment" (Webster's Collegiate Dictionary 332 (10th ed. 1997)) and the common meaning of the word *discrimination* means "a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored" (Black's Law Dictionary 467 (6th ed. 1990)).[23] I find that, under section 202(a) of the Packers and Stockyards Act, treating similar entities differently is a discriminatory practice.

Webster's Collegiate Dictionary defines the word *preference* as "the act, fact,

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[22](...continued)
v. Lederer, 250 U.S. 376, 381 (1919) (stating that unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating that the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. The Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating that the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions). *See also In re The Lubrizol Corp.*, 51 Agric. Dec. 1198, 1205 (1992) (stating that the term *used* is not defined in the Plant Variety Protection Act; therefore, it must be accorded its ordinary, dictionary meaning).

[23]*See also United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744, 751 (11th Cir. 1991) (stating that *discrimination* may be defined as a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored); *Richmond, Fredericksburg & Potomac R.R. v. Department of Taxation*, 762 F.2d 375, 380 n.4 (4th Cir. 1985) (stating that in essence, *discrimination* is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored); *Hocking Valley Ry. v. United States*, 210 F. 735, 740 (6th Cir.) (stating that *discrimination* in ordinary understanding and definition is the act of treating differently; it is the antithesis of advantage; one who enjoys an advantage over another at the hands of one with whom he has common dealing has his fellow within a corresponding discrimination), *cert. denied*, 234 U.S. 757 (1914); *Baker v. California Land Title Co.*, 349 F. Supp. 235, 238 (C.D. Cal. 1972) (stating that *discrimination* is a term well understood in the law; it is, in general, a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored), *aff'd*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *In re Grievance of Towle*, 665 A.2d 55, 60 (Vt. 1995) (stating, with respect to state employee disciplinary proceedings, we have defined *discrimination* as the unequal treatment of individuals in the same circumstances).

or principle of giving advantages to some over others" (Webster's Collegiate Dictionary 918 (10th ed. 1997));[24] the word *advantage* as "a factor or circumstance of benefit to its possessor" (Webster's Collegiate Dictionary 17 (10th ed. 1997));[25] the word *prejudice* as "injury or damage resulting from some judgment or action of another in disregard of one's rights" (Webster's Collegiate Dictionary 919 (10th ed. 1997));[26] and the word *disadvantage* as "loss or damage" (Webster's Collegiate Dictionary 329 (10th ed. 1997)).[27] I find that, under section 202(b) of the Packers and Stockyards Act, giving an advantage to any person and not to other similarly situated persons is making or giving a preference; that conferring a benefit on any

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[24]*See also Andrew v. Farmers' & Merchants' State Bank*, 247 N.W. 797, 799 (Iowa 1933) (stating that the word *preference* has been defined, when used in a general sense, as the act of preferring one thing above another; choice of one thing rather than another; estimation of one thing more than another; the state of being preferred or chosen before others); *Choctaw, O. & G. Ry. v. State*, 84 S.W. 502, 503 (Ark. 1904) (stating that the idea conveyed by the word *preference* is that, as between two persons occupying the same situation or relation, one has been preferred over the other, or granted certain privileges or facilities that were not extended to the other); *Keller v. State*, 31 S.E. 92, 95 (Ga. 1898) (stating that *preference* means the act of preferring one thing above another; estimation of the thing more than another; choice of one thing rather than another); *Weir v. Baker*, 29 A.2d 269, 272 (Ct. App. Md. 1942) (stating that, in a general sense, *preference* is the act of preferring one thing above another; choice of one rather than another; the state of being chosen or preferred before others).

[25]*See also In re Lakeland Development Corp.*, 152 N.W.2d 758, 767 (Minn. 1967) (stating that the word *advantage* affirmatively connotes elements of opportunity, benefit, or profit, and negatively suggests absence of sacrifice, harm, or loss); *State v. Cloud*, 176 So.2d 620, 622 (La. 1965) (stating that the word *advantage* means gain, benefit, profit, superiority, or favored position); *In re Krause's Estate*, 21 P.2d 268, 270 (Wash. 1933) (stating that benefit simply means profit, fruit, *advantage*); *Dubow v. Gottinello*, 149 A. 768, 769 (Conn. 1930) (stating that the word benefit means *advantage*, gain, or profit); *Ferrigino v. Keasbey*, 106 A. 445, 447 (Conn. 1919) (stating that word benefit means *advantage*, gain, or profit); *Winthrop Co. v. Clinton*, 46 A. 435, 437 (Pa. 1900) (stating that the word benefit means *advantage*, gain, or profit; its manifest signification is anything that works to the *advantage* or gain of the recipient); *Stowell v. Stowell's Executor*, 8 A. 738, 740 (Vt. 1887) (stating that the word *advantage* is a synonym of *benefit*); *Duvall v. State*, 166 N.E. 603, 604 (App. Ct. Ind. 1929) (stating that the word *advantage* is defined as any state, condition, circumstance, opportunity, or means favorable to success, prosperity, interest, reputation, or any desired end).

[26]*See also Benedict v. State*, 89 N.W.2d 82, 85 (Neb. 1958) (citing Black's Law Dictionary (1891 ed.) as defining *prejudice* as meaning injury or loss); *State v. Caporale*, 89 A. 1034, 1035 (N.J. 1914) (stating that the word *prejudice* in its generic sense means to cause any harm or damage or loss).

[27]*See generally State v. Nelson*, 504 P.2d 211, 214 (Kan. 1972) (stating that this court has defined *prejudicial* as "hurtful," "injurious," "*disadvantageous*"); *Prunty v. Consolidated Fuel & Light Co.*, 108 P. 802, 803 (Kan. 1910) (stating that "[i]n Webster's Universal Dictionary, . . . as synonyms of `prejudicial' are given `hurtful,' `injurious,' `*disadvantageous*.'" (Emphasis added.))

person and not on all similarly situated persons is making or giving an advantage; that subjecting any person to any injury or damage and not subjecting all similarly situated persons to the same injury or damage is subjecting the injured or damaged person to prejudice; and subjecting any person to any loss or damage and not subjecting all similarly situated persons to the same loss or damage is subjecting the person who suffers the loss or damage to a disadvantage.

Respondent has refused to purchase cattle under the terms of the Beef Marketing Agreement at feedlots other than feedlots that are members of the Beef Marketing Group (Answer at 3; Tr. 591-604, 980, 1143, 1198, 1341-43, 1703, 3549, 3648-50). Respondent's refusal to purchase cattle under the terms of the Beef Marketing Agreement from feedlots other than those in the Beef Marketing Group is not based on any characteristic unique to the members of the Beef Marketing Group. Mr. Borck, the Beef Marketing Group's founder, testified that Beef Marketing Group members are diverse, are not required to meet any qualifications for membership, and are not required to meet any qualifications for continued membership (Tr. 3773-76). Moreover, Respondent's refusal to purchase cattle under the terms of the Beef Marketing Agreement at feedlots that are not members of the Beef Marketing Group is not the consequence of any difference between the quality of cattle available from Beef Marketing Group members and the quality of cattle available from other feedlots. The terms of the Beef Marketing Agreement do not impose any quality specifications on cattle to be purchased by Respondent (CX 2 at 2; Tr. 1766, 1792, 1813-14, 1878, 1935, 1947, 3814), and the record establishes that the cattle that Respondent purchased at feedlots that are not members of the Beef Marketing Group were comparable to cattle purchased at feedlots that are members of the Beef Marketing Group (CX 9 at 44, 56, 68, 80, 104; Tr. 455, 586, 2060-66).

I agree with Complainant that Respondent's failure to make the terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice because Respondent, by its failure to offer the terms of the Beef Marketing Agreement to all similarly situated feedlots, is treating similar entities differently.

Further, I agree with Complainant that the pricing terms of the Beef Marketing Agreement, the testimony of industry witnesses, and exhibits introduced into evidence by Complainant establish that Respondent paid more for cattle at feedlots that are members of the Beef Marketing Group than Respondent paid for similar cattle at feedlots that are not members of the Beef Marketing Group. Thus, Respondent conferred a preference or advantage on Beef Marketing Group members and their producer customers and subjected similarly situated feedlots that are not members of the Beef Marketing Group and their producer customers

to a prejudice or disadvantage. Specifically, cattle purchased under the terms of the Beef Marketing Agreement were priced using the highest price paid in Kansas for 500 cattle during the week of sale ("Kansas practical top"), as reported by the United States Department of Agriculture (CX 2 at 2, Cash Contract ¶ A), adjusted for quality.[28] Respondent's expert witness, Jerry Hausman, admitted that Respondent paid the Kansas practical top price or more for cattle placed at Beef Marketing Group feedlots, 80 percent of the time (RX 18 at 3, RX 46 at 3; Tr. 4010-11). Thus, under the terms of the Beef Marketing Agreement, Respondent guaranteed members of the Beef Marketing Group and their producer customers a price based on the top price for the week no matter when the top price was established. Respondent did not offer this advantage to feedlots that were not members of the Beef Marketing Group.

Feedlot operators testified that Respondent paid higher prices for cattle placed with Beef Marketing Group members than Respondent paid for cattle placed at other feedlots (Tr. 772-73, 780-81, 784, 931, 979), and Respondent's data establishes that Respondent gave the members of the Beef Marketing Group and their producer customers a pricing advantage after the Beef Marketing Agreement went into effect (CX 5 at 65-66, CX 9 at 10-12; Tr. 2019-22).

Complainant further contends that in addition to preferential prices, Respondent gives three non-price advantages to members of the Beef Marketing Group, *viz.*: (1) a powerful marketing technique; (2) additional time in which to accept or reject bids; and (3) detailed carcass information (Complainant's Appeal Pet. at 58-62).

I agree with Complainant. When selecting a feedlot at which to place cattle, producer customers consider the marketing options available through each feedlot (Tr. 1786, 1860-61), including whether the feedlot has entered into the Beef Marketing Agreement with Respondent (Tr. 1750, 1814). One cattle producer testified that he would select a feedlot that had entered into the Beef Marketing Agreement with Respondent if choosing between two otherwise equal feedlots (Tr. 1779, 1795). Thus, Respondent gives feedlots that are members of the Beef Marketing Group a marketing technique that is not available to feedlots that are not members of the Beef Marketing Group. This marketing technique provides feedlots that are members of the Beef Marketing Group with a competitive advantage over feedlots that are not members of the Beef Marketing Group.

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[28]In August 1994, the basis for bidding under the Beef Marketing Agreement was changed to the reported Kansas top price for 2,500 cattle or more, and in November 1995, the basis for bidding was again changed to a negotiated middle point between the Kansas top price for 2,500 cattle or more and the Kansas top price paid during the week by Respondent (in weeks when the two prices were different) (Tr. 3515-16, 3656).

Further, the Beef Marketing Agreement provides that members of the Beef Marketing Group and their producer customers have at least 3 days to accept or reject bids made by Respondent (Tr. 1766-67). Feedlots that are not members of the Beef Marketing Group and their producer customers are required to accept bids made by Respondent during a period that ranges from immediately after the bid is made to overnight (Tr. 693-94, 969, 1084-85, 1260, 1699, 1767, 1861, 1936-37).

The extended period within which Respondent's bids for cattle placed at feedlots that are members of the Beef Marketing Group could be accepted has value (Tr. 975, 1084, 1138-39, 1193, 1260, 1767, 3744-45), and this extended period for the acceptance of bids provides members of the Beef Marketing Group and their producer customers with a competitive advantage over feedlots that are not members of the Beef Marketing Group and their producer customers.

Moreover, under the Beef Marketing Agreement, Respondent provides Beef Marketing Group members with detailed carcass performance information (Tr. 3514, 3749-50). Although carcass performance information is sometimes made available to feedlot operators and cattle producers who request it (Tr. 986, 1078-79, 1134, 1188, 1256, 1335, 1585, 1619, 1694, 1812), Respondent provides more extensive carcass performance information to Beef Marketing Group members and their producer customers, and provides it on a more routine basis, than such information is available to feedlots that are not members of the Beef Marketing Group (Tr. 3750). Feedlot operators and producers seeking the same carcass performance information as Respondent gives to members of the Beef Marketing Group at no cost, must purchase the information at a cost of between $4 and $6 per head (Tr. 1694, 3811-12). Beef Marketing Group members and their producer customers are able to use the carcass performance information to reduce the number of days they feed cattle by more than 11 days (Tr. 3813-14); thereby reducing feed and other costs associated with feeding cattle at a feedlot.

Thus, Respondent's use of the Beef Marketing Agreement gives members of the Beef Marketing Group and their customers a preference and an advantage and subjects feedlots which are not members of the Beef Marketing Group and their producer customers to a prejudice and a disadvantage.

Sixth, Complainant contends that the Chief ALJ erred when he failed to find that Respondent's refusal to offer the terms of the Beef Marketing Agreement to similarly situated feedlots in Kansas is unjustly discriminatory and the preferences and advantages given to Beef Marketing Group members and their producer customers are undue and unreasonable and the prejudices and disadvantages to which feedlots that are not members of the Beef Marketing Group and their producer customers are subjected are undue and unreasonable (Complainant's Appeal Pet. at 65-94).

The term *unjustly discriminatory* as used in section 202(a) of the Packers and Stockyards Act and the terms *undue or unreasonable preference or advantage* and *undue or unreasonable prejudice or disadvantage* as used in section 202(b) of the Packers and Stockyards Act are not defined in the Packers and Stockyards Act. Instead, the meaning of these terms must be determined according to the facts of each case within the purposes of the Packers and Stockyards Act.[29]

This case is close and I find that Respondent's failure to make terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice and that Respondent gives members of the Beef Marketing Group a preference and an advantage and subjects feedlots that are not members of the Beef Marketing Group to prejudice and disadvantage. However, as discussed in this Decision and Order, *supra*, Complainant has failed to prove that Respondent's use of the Beef Marketing Agreement harmed feedlots that are not members of the Beef Marketing Group or their producer customers, and I agree with the Chief ALJ that Complainant has not proven by a preponderance of the evidence that Respondent's use of the Beef Marketing Agreement is *unjustly* discriminatory or that Respondent gives Beef Marketing Group members an *undue* or *unreasonable* preference or advantage or subjects feedlots that are not members of the Beef Marketing Group to an *undue* or *unreasonable* prejudice or disadvantage.

Seventh, Complainant contends that the Chief ALJ erred when he concluded that the Beef Marketing Agreement does not cause the type of harm that the Packers and Stockyards Act is designed to prevent (Complainant's Appeal Pet. at 94-104).

I agree with Complainant that the Chief ALJ erred when he concluded that the Beef Marketing Agreement does not cause the type of harm that the Packers and Stockyards Act is designed to prevent. Specifically, I find that Respondent's right of first refusal under the Beef Marketing Agreement has the effect or potential effect of reducing competition.

Respondent argues and the Chief ALJ found that Beef Marketing Group members give Respondent the right of first refusal under the Beef Marketing

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[29]*See Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1454 (10th Cir. 1988); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 930 (10th Cir. 1974); *Capitol Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965); *Swift & Co. v. Wallace*, 105 F.2d 848, 854-55 (7th Cir. 1939); *Rowse v. Platte Valley Livestock, Inc.*, 604 F. Supp. 1463, 1466 (D. Neb. 1985) (memorandum opinion); *United States v. Hulings*, 484 F. Supp. 562, 566-67 (D. Kan. 1980); *Guenther v. Morehead*, 272 F. Supp. 721, 728 (S.D. Iowa 1967).

Agreement.[30]

While Complainant contends that Respondent does not have a right of first refusal under the Beef Marketing Agreement, Respondent states that the evidence fully supports that it has the right of first refusal under the Beef Marketing Agreement and that the right of first refusal is important to Respondent, as follows:

> It is clear, based on the evidence in the record, that the right of first refusal exists and that it has significant value to IBP. The [Complainant's] own witnesses recognized not only that the right exists, but also that it has a value that accounts for some, if not all, of the 43 cent per cwt. price difference pointed to by the [Complainant]. (PFF, ¶¶ 69-71).
>
> The right of first refusal should have come as no surprise to [GIPSA]. IBP's head cattle buyer, Bruce Bass, explained to [GIPSA] investigators as early as January 5, 1995[,] that IBP had a right of first refusal at BMG feedyards, and that the failure of Mull Feedyards and Pratt Feeders to adhere scrupulously to the right led to disputes between them and IBP. This information was recorded in a contemporaneous memorandum by [GIPSA] investigators and forwarded to the Chief of the Packers Branch, Jay Johnson, who acted as [GIPSA's] representative during all twenty days of the hearing. (RX-19).
>
> Nevertheless, [Complainant] asserts that "there was no right of first refusal under the Beef Marketing Agreement." (Complainant's Proposed Findings of Fact, p. 79). In support of this astounding position, [Complainant] cites the testimony of producers who placed their cattle at two of the BMG feedyards (Great Bend Feeders and Pratt Feeders) and were unaware of the right of first refusal to IBP. All of their testimony proves that <u>they</u> did not know about the right. Given that a producer's sale negotiation is normally conducted by the feedyard, and not by the producer, the ignorance of some producers concerning the right of first refusal is hardly surprising.

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[30]See Prehearing Memorandum of IBP, inc., at 13, 17; IBP, inc[.]'s Proposed Findings of Fact and Post-Hearing Memorandum at 31-34; IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order at 10-14; Initial Decision and Order at 17-20; Oral Argument of June 8, 1998 (Tr. 65, 67, 71, 75-76).

In any event, the testimony cited by the [Complainant] does not even fully support its position. For example, one of the producer witnesses cited by the [Complainant], Walter Krier, admitted that he knew IBP had a right of first refusal on certain BMG cattle; he was simply unsure about the parameters of that right. When questioned by the Chief Administrative Law Judge, Mr. Krier testified as follows:

> Q. IBP gives you a bid of whatever, a par bid.
>
> A. A par bid.
>
> Q. You do not like it. You say I am not going to take that. Another packer gives you a bid 50 cents higher. At that point in time, before you accept the other packer's bid does IBP have a right to come back and say okay, we will give you the 50 cents?
>
> A. I don't know.
>
> Q. You don't know?
>
> A. I don't know about that, Your Honor. I don't know.

(Krier Tr. 1874).

David May (the former assistant feedyard manager at Great Bend Feeders) explained why all of his customers may not have known about the right of first refusal. As May testified:

> Q. Now would you expect that all of those cattle owners who fed cattle at Great Bend would be aware of IBP's right of first refusal?
>
> A. No, not necessarily. We did -- this was not a circumstance that arose very often and we really did not try to confuse the owners with a lot of the details of this program that was relatively new to them so we would not necessarily have made a point of saying now we have to give IBP the right of first refusal.
>
> Q. Did IBP ever actually exercise its right of first refusal?

A. Yes, I believe they did.

(May Tr. 3913).

With respect to producers with cattle at Pratt Feeders, they were even less likely to be made aware of the right of first refusal: Pratt's involvement with the BMG arrangement lasted only a short time and ended because Pratt did not comply with the right. (PFF, ¶ 73). IBP's strict enforcement of its right of first refusal with Pratt clearly highlights both its existence and its importance to IBP. This information was supplied to [GIPSA] in January 1995, and it was confirmed in this proceeding by the testimony of Jerry Bohn (the operator of Pratt), Lee Borck (the leader of the BMG), and by Bruce Bass (IBP's head cattle buyer). (RX-19) (Bohn Tr. 463) (PFF, ¶ 73).

Witnesses in the best position to know the terms of the BMG arrangement, such as the negotiators of the agreement (Lee Borck and Bruce Bass) testified, without contradiction, that the right did indeed exist. (PFF, ¶¶ 69, 72, 75). [Complainant] argues the right of first refusal did not exist because it was "inferred." In support, [Complainant] cites Lee Borck, who acknowledged the right does not appear in a cursory, one-page summary of the arrangement. (Complainant's Proposed Findings of Fact, p. 79). Yet Mr. Borck testified time and time again that the right of first refusal did exist even if it was not set forth in the partial summary. (Borck Tr. 3734-38, 3755-57, 3796-99, 3802-04).

It should hardly surprise [GIPSA] that the full terms of the BMG arrangement were never recorded in a single writing. [GIPSA] knew as early as January 5, 1995[,] that most of IBP's special arrangements with feedyards are based on oral agreements. (RX-19). [Complainant] also recognizes in other contexts that the partial written summary was incomplete. Thus, [Complainant] maintains that "[a]lthough the Beef Marketing Arrangement is silent with respect to exclusivity, IBP refused to make its terms available to sellers of cattle who did not belong to the Beef Marketing Group." (Complainant's Proposed Findings of Fact, p. 22). The record is clear that the BMG arrangement <u>in practice</u> included the right of first refusal, regardless of what the summary says.

IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order at 10-14 (emphasis in original).

The Chief ALJ rejected Complainant's argument that Respondent did not have the right of first refusal under the Beef Marketing Agreement and found that the evidence supports a finding that Respondent has a right of first refusal, as follows:

1. Right of First Refusal

Under the agreement, Respondent initially had a right of first refusal on all cattle for which it bid even or better. Subsequently, the right was expanded to include cattle on which Respondent bid "minus 50."

Complainant asserts that Respondent did not have a right of first refusal under the agreement, citing testimony from cattle producers who fed cattle at Great Bend Feeders and Pratt Feeders, who did not know about that term. It is true that several producers were unaware that the right existed; however, most of them were also unaware of the extended delivery term, the existence of which Complainant does not dispute. (Tr. 1764-65, 1789-90, 1824, 1874, 1944-45). The former assistant feedlot manager at Great Bend explained that he did not provide producers with all of the details of the agreement because he did not want them to be unnecessarily confused. (Tr. 3913). Pratt sold under the terms of the agreement for only one year, so it is unlikely that all of its customers would be aware of every term.

Complainant also maintains that the right of first refusal did not exist because it was not enumerated in a one page summary of terms signed by Lee Borck and Bruce Bass. (CX 2 at 2). Complainant refers to the memorandum as the "Beef Marketing Agreement," and insists that it represents the Beef Marketing Agreement in its entirety. Complainant, however, cannot bypass the intent of the parties, and unilaterally decide that the memorandum was a complete integration of the terms of the agreement. Complainant did not offer any evidence to show that terms are limited to those contained in the memorandum; and, in fact, the evidence establishes that the agreement between BMG and Respondent was intended to, and did, contain additional terms, including a right of first refusal.

Several witnesses, including those testifying for the government, stated that the right of first refusal existed. Bruce Bass and Lee Borck, who negotiated the agreement both testified that there was a right of first refusal. (Tr. 3512-13, 3734). Jerry Bohn, the general manager of Pratt feedyards testified for the government that the right of first refusal was part of the

agreement; and explained that a disagreement over that term caused Pratt to stop selling under the agreement. (Tr. 462). Ray Palenske, an IBP buyer, and Marvin Stilgenbauer an Excel buyer, also testified for the government that there was a right of first refusal. (Tr. 830, 1595). Finally, Jay Johnson, Chief of the Packer Branch, of P&S, testified as a representative of the agency that IBP had a right of first refusal, and that the right had a value. He further stated that he knew the right existed at least as early as January 1995. (Tr. 3231-32). Assertions that the right did not exist are, therefore, inconsistent with the evidence of record.

Initial Decision and Order at 17-18 (footnotes omitted).

While I made minor changes to the Chief ALJ's discussion regarding Respondent's right of first refusal, I agree with Respondent and the Chief ALJ that Respondent has the right of first refusal under the Beef Marketing Agreement.

Moreover, I agree with Complainant that the right of first refusal, as explained by Respondent, suppresses the bidding process (competition); and therefore constitutes an unfair practice in violation of the Packers and Stockyards Act.

Two of Respondent's witnesses testified that Respondent's right of first refusal under the Beef Marketing Agreement suppresses the bidding process. Bruce Bass, head cattle buyer for Respondent, testified, as follows:

BY MR. BAUMGARTNER:

Q. The government has suggested that IBP could buy all the cattle it wanted in Kansas simply by bidding more. Would simply bidding more have put you in the same position that the Beef Marketing Group arrangement did?

A. No.

Q. Can you explain that?

A. It -- it would -- it would -- the right of first refusal allowed us to not have to bid more. I mean, it might -- we might have to bid more than maybe our initial bid, but we didn't have to bid more than the top bid. And in any other set of circumstances, the ethics of the business is such that sometimes they'll let you buy them for a quarter more per hundred weight, but usually it takes at least 50 cents. And -- so if -- like our last example, if Monfort said, you know, "I'll give you 67," and if he decided, "Well, I

think I'll try this one more time," if the owner was a non-BMG group and we didn't have the first right of refusal and he said, "I think I'll try this more one [sic] time," he might call IBP and say, you know, "I bid 67. Would you give me 68"? And if we said, "No, but I'll give you 67," he'd say, "Too bad. If I'm going to sell them for 67, I'm going to sell them to Monfort because they bid it first." Wherein, you know, the other way around if it were a Beef Marketing Group feedyard and, you know, we had bid even or better on the cattle, they would have to come back to us and offer them to us at 67. Therein we wouldn't have to pay that extra $25, $50, whatever it was that feedyard owner determined that he should have more than that bid in order to make it worth his while to sell them to someone else.

Tr. 3526-27.

Jerry Hausman, a recognized expert in the field of econometrics, called by Respondent, states in his written testimony that Respondent's right of first refusal suppresses bidding, as follows:

> . . . by agreeing to give IBP a right of first refusal on pens of cattle that were judged by the IBP buyer as being of equal or better quality to cattle being sold at the Kansas top price, BMG members reduced the likelihood of aggressive bidding for these pens by other packers.

RX 46 at 5.

Similarly, Professor Hausman testified that Respondent's right of first refusal suppresses competition, as follows:

> [BY MR. BAUMGARTNER:]
>
> Q. I place on the easel RX-I and what I'd like to ask you to do is go through this exhibit and compare for us the BMG arrangement with the traditional method of buying cattle from the standpoint of the non-price conditions of sale.
>
> A. Okay. Well, the first one that I referred to would be number two and that is that IBP had the right of first refusal in all cattle which was even or better so that's helpful to IBP that it's going to reduce competition from other packers and it's also going to allow them to utilize their personnel better to buy cattle from other yards and to reduce haggling at the BMG yards so that's certainly something of value to IBP.

Tr. 3949-50.

Further, Jay Johnson, Chief of the Packer Branch, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, testified that Respondent has a right of first refusal, and that the right has a value (Tr. 3231-32). Mr. Johnson further testified that Respondent's right of first refusal under the Beef Marketing Agreement stifles competition, as follows:

[BY MS. WATERFIELD:]

Q. Now, we've heard some testimony throughout this hearing about the right of first refusal. Are you familiar with that term?

A. Yes, I am.

Q. Is there a traditional or customary right of first refusal in the cattle industry?

A. Yes.

Q. What is your understanding of the customary right of first refusal?

A. Normally, what's customary in the cattle industry is for a right of first refusal if IBP was to go out and offer $65 for some cattle and a competitor came in and offered $65.50, the seller then would go back to IBP and say do you want those cattle at $66 which would have been the next 50 cent increment. And that is typically how right of first refusal is in the cattle business. That means that they will go back to them and give them an opportunity to bid one more time at the next increment.

Q. Now, have you been present for all the testimony in this hearing?

A. Yes, I have.

Q. Were you present when testimony was given with respect to the right of first refusal under the terms of the Beef Marketing Agreement?

A. Yes, I was.

Q. Is the, well, first of all, would you describe the right of first refusal

under the terms of the Beef Marketing Agreement as you understand it?

A. As I understand the Beef Marketing Groups and IBP's relationship as far as the right of first refusal, using a similar scenario as I just discussed, that if IBP, there's two different ways actually.

One is if IBP had offered $65 for the cattle earlier in the week and a competitor came in and offered $65.50, then the seller was obligated to go back to the feedlot and offer those cattle to IBP at $65.50 or the same thing as their competitor. Just a matching of the price, not a one upping of the price.

And I think also the way it was described as well is if IBP had offered to buy cattle under the terms of the agreement and, for instance, offered a par bid or even a par or 50 cents above bid on cattle and when the commitment deadline ended, which during the early portion of the agreement back in 1994 was that it was Wednesday.

Once the cattle feeder decided that he did not want to accept that even bid and then someone came in later in the week and offered them a specific dollar amount of for say $65 again, under the terms of the agreement, as I understand it, IBP had opportunity to go back and get those cattle at $65. All they had to do was match the competitors, not increase the bid.

Q. And does the Agency consider the right of first refusal under the terms of the Beef Marketing Agreement to be the same as the customary right of first refusal?

A. No, we do not.

Q. What's different about the right of first refusal under the agreement?

A. We believe that under the agreement, that the right of first refusal is a violation of the Packers and Stockyards Act and is unfair, an unfair practice.

Q. Why?

A. Because it results in -- it's an anti-competitive activity that does not promote competition, but in fact stifles competition.

Q. Does the Agency have a position with respect to whether the right of first refusal as included in the terms of the Beef Marketing Agreement would justify a 43 cent preference?

A. Could you ask me that again, please?

Q. Does the Agency have a position with respect to the right of first refusal under the terms of the agreement as to whether or not that right of first refusal would justify a 43 cent preference?

A. Yes, we do.

Q. What is the position, sir?

A. The position is that this would be an unlawful act. Therefore, it would not justify the price difference.

. . . .

JUDGE PALMER: Well, let me bore in here a little bit. Can you give any reason why -- strike that. Can you give any background, anything that would make you say the right of first refusal is an unfair practice? I don't care where you get it from. You can get it from another industry. You get it from other practices here in Packers and Stockyards, anything at all that says that a right of first refusal is an unfair practice.

THE WITNESS: My basis for making the statement that it's an unfair practice is that it precludes them from competing. If I could make an illustration of if you were going out to buy land, there was two parcels of land out there, and the first parcel of land comes up and you walk over to the other guy over there and you say, you know.

Rather than me bid and you bid and we raised the price up, you take this one and I'll take that one. Or you bid as high as you want to bid and then I will come in and I'll match the same price. So we both pay the same price.

So the auction starts. There's nobody really pushing the price. The price stays stagnant at a level and you're both able to get your needs. And rather than if you both were going head-to-head competing for that initial piece of land, the competition would in theory drive the price up if you both wanted that same building. Demand would increase.

Tr. 4412-15, 4439-40.

I find that the effect or potential effect of Respondent's right of first refusal under the Beef Marketing Agreement is to suppress competition. Respondent's right of first refusal under the Beef Marketing Agreement provides that Respondent may obtain cattle placed in feedlots that are members of the Beef Marketing Group by matching the previous high bid, rather than by bidding a higher price than previously bid. Respondent's right to acquire cattle by matching the previous high bid has the potential of discouraging others from bidding on cattle and necessarily restricts competition because Respondent's right of first refusal obviates Respondent's need to compete for cattle placed at Beef Marketing Group feedlots in order to obtain those cattle. Instead, Respondent's right of first refusal allows Respondent to enter a bid, await, but not participate in, any additional bidding, and obtain cattle merely by matching any bid that may be higher than Respondent's bid. Therefore, Respondent's right of first refusal under the Beef Marketing Agreement violates section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) because it has the effect or potential effect of reducing competition.[31]

For the foregoing reasons the following Order should be issued.

Order

Respondent, IBP, inc., it agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from

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[31] *See generally Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (holding that an agreement by a packer and dealer not to compete for the purchase of hogs whereby the dealer purchased the hogs without competition and the packer purchased the hogs from the dealer at the price paid by the dealer to the original seller was a practice in violation of section 202 of the Packers and Stockyards Act because the essential nature and necessary result of the arrangement or practice was to eliminate competition); *In re San Jose Valley Veal, Inc.*, 34 Agric. Dec. 966, 985 (1975) (holding that a packer that permits a person with whom the packer should be competing for the purchase of livestock to purchase livestock for the packer's account, violates section 202(a) and 202(e) of the Packers and Stockyards Act (7 U.S.C. § 192(a), (e)) since such arrangement has the effect or potential effect of restricting competition, whether or not such purpose was intended by the purchasing arrangement).

entering into or continuing any agreement, contract, arrangement, or understanding containing a right of first refusal which provides that Respondent may obtain livestock by matching the highest previous bid for the livestock.

The provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

In re: HINES AND THURN FEEDLOT, INC., d/b/a THURN & HINES LIVESTOCK, JAMES L. THURN, AND DERYL D. HINES.
P&S Docket No. D-96-0046.
Decision and Order filed August 24, 1998.

Cease and desist order — Registration order — NSF checks — Failing to pay — Failing to pay when due — Admissions — Failure to file timely answer — Mitigating circumstances — Sanction.

The Judicial Officer affirmed the decision by Judge Baker (ALJ) ordering Respondents to cease and desist from failing to pay for livestock; failing to pay, when due, for livestock; and issuing NSF checks in payment for livestock. The Order provides that Respondents shall not be registered to engage in business for 5 years. Respondents failed to file a timely answer and admitted the material allegations of fact contained in the complaint in their untimely answer; therefore, a default order was properly issued. Given the large number of Respondents' violative transactions and the dollar amounts involved, the sanction imposed is appropriate. Further, the sanction imposed was recommended by administrative officials and is consistent with other cases involving failures to pay for livestock. The hardship to Respondents' creditors, which might result from a suspension order, is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock industry prevails over the interests of creditors who might be damaged as a result of a suspension order.

Andre Allen Vitale, for Complainant.
William D. Werger, Manchester, Iowa, for Respondents.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; the regulations promulgated under the Packers and Stockyards Act (9 C.F.R. §§ 201.1-.200) [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 August 16, 1996.

The Complaint alleges that: (1) James L. Thurn [hereinafter Respondent Thurn] and Deryl D. Hines [hereinafter Respondent Hines] are the *alter egos* of Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock [hereinafter Corporate Respondent] (Compl. ¶ III); and (2) Respondent Thurn, Respondent Hines, and Corporate Respondent [hereinafter Respondents] willfully violated sections 312(a) and 409(a) of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b(a)) by: (a) issuing insufficient funds checks in payment for livestock; (b) failing to pay the full purchase price for livestock; and (c) failing to pay, when due, the full purchase price for livestock (Compl. ¶ II).

Respondents were served with the Complaint on August 24, 1996. Respondents filed an Answer to the Complaint on September 16, 1996, admitting: (1) the jurisdictional allegations of paragraph I of the Complaint; (2) that Respondent Thurn was president of Corporate Respondent, owner of 50 percent of its outstanding shares, and responsible, in combination with Respondent Hines, for the direction, management, and control of Corporate Respondent; (3) that Respondent Hines was vice-president of Corporate Respondent, owner of 50 percent of its outstanding shares, and responsible, in combination with Respondent Thurn, for the direction, management, and control of Corporate Respondent; (4) that insufficient funds checks were issued in payment for Corporate Respondent's livestock purchases; (5) that Corporate Respondent failed to pay, when due, for its livestock purchases; and (6) that $853,266.06 of the amounts alleged in the Complaint was unpaid (Answer to Complaint).

Respondents' Answer to Complaint was filed late; and therefore, Respondents are deemed to have admitted the material allegations in the Complaint and waived their right to a hearing, pursuant to sections 1.136(c) and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136(c), .139). Moreover, Respondents admit the material allegations of fact contained in the Complaint in their Answer to Complaint. The admission of the material allegations of fact contained in a complaint constitutes a waiver of hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On November 12, 1997, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a proposed Decision Without Hearing by Reason of Admissions and moved for its adoption. On April 2, 1998, Respondents filed Objection to Motion for Decision Without Hearing.

On April 30, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued a Decision Without Hearing by Reason of Admissions [hereinafter Default Decision] in which the ALJ: (1) concluded that Respondent Thurn and Respondent

Hines are the *alter egos* of Corporate Respondent; (2) concluded that Respondent Thurn, Respondent Hines, and Corporate Respondent willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) and section 201.43 of the Regulations (9 C.F.R. § 201.43); (3) ordered Respondent Thurn, Respondent Hines, and Corporate Respondent to cease and desist from (a) issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented, (b) failing to pay, when due, the full purchase price of livestock purchases, and (c) failing to pay the full purchase price for livestock purchases; and (4) suspended Respondent Thurn, Respondent Hines, and Corporate Respondent as registrants under the Packers and Stockyards Act (7 U.S.C. §§ 181-229) for 5 years (Default Decision at 8-9).

On May 29, 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 [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* On June 17, 1998, Complainant filed Objections to Respondents' Petition for Appeal, and the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

Pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), and based upon a careful consideration of the record in this proceeding, I adopt the Default Decision as the final Decision and Order. Additions or changes to the Default Decision 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.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

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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)).

CHAPTER 9—PACKERS AND STOCKYARDS

SUBCHAPTER III—STOCKYARDS AND STOCKYARD DEALERS

§ 201. "Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined

. . . .

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

§ 213. Prevention of unfair, discriminatory, or deceptive practices

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. 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.

SUBCHAPTER V—GENERAL PROVISIONS

§ 228b. Prompt payment for purchase of livestock

(a) Full amount of purchase price required; methods of payment

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided,* That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

7 U.S.C. §§ 201(c)-(d), 213, 228b(a).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

. . . .

CHAPTER II—GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMINISTRATION (PACKERS AND STOCKYARDS PROGRAMS),

DEPARTMENT OF AGRICULTURE

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

ACCOUNTS AND RECORDS

. . . .

§ 201.43 Payment and accounting for livestock and live poultry.

(a) *Market agencies to make prompt accounting and transmittal of net proceeds.* Each market agency shall, before the close of the next business day following the sale of any livestock consigned to it for sale, transmit or deliver to the consignor or shipper of the livestock, or the duly authorized agent, in the absence of any knowledge that any other person, or persons, has any interest in the livestock, the net proceeds received from the sale and a true written account of such sale, showing the number, weight, and price of each kind of animal sold, the date of sale, the commission, yardage, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.

9 C.F.R. § 201.43(a).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

Respondents' Answer [to Complaint] constitutes the admission of the material allegations of fact contained in the Complaint. The admission of the material allegations of fact contained in a complaint 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 Default Decision.

On April 2, 1998, Respondents filed Objection to Motion for Decision Without Hearing, wherein [Respondents again admitted] violations of the [Packers and Stockyards] Act. . . . However, Respondents requested oral hearing for the purpose of presenting evidence regarding willfulness and the appropriate sanction. The matters of concern in Respondents' Objection [to Motion for Decision Without Hearing] have been duly considered.

No useful purpose would be served by an oral hearing. . . . [I]t is well settled that a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts, even if the conduct resulted from careless disregard for statutory and regulatory requirements. *Butz v. Glover*, 411 U.S. 182 (1973); *In re Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654 (1994). Even if done unintentionally, the issuance of insufficient funds checks, failures to pay, and failures to pay when due for livestock purchases are violations of sections 312(a) and 409 of the [Packers and Stockyards] Act (7 U.S.C. §§ 213(b), 228b), and section 201.43 of the Regulations (9 C.F.R. § 201.43).

Respondents' Objection to [Motion for] Decision [Without Hearing] focused, among other things, upon what they considered mitigating circumstances: They have made significant repayments against amounts owed the creditors; failure to pay was not intentional and willful; and work is being done with other registrants in the hope of paying more back to the creditors.

The Judicial Officer accords deference to the sanction [recommended] by the [administrative] officials who are charged with enforcement of the [Packers and Stockyards] Act. The mitigating circumstances put forth by Respondents have been considered by [administrative officials charged with enforcement of the Packers and Stockyards Act] and by the [ALJ]. The law is clear in this instance, and there is no basis for an oral hearing.

Accordingly, [this] 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).

Findings of Fact

1. [Respondent] Hines and Thurn Feedlot, Inc., doing business as Thurn & Hines Livestock, . . . is a corporation with a business mailing address of Rural Route 2, Box 55, Edgewood, Iowa 52042.

2. [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock,] is, and at all times material [to this proceeding] was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account or for the account of others;

(b) Engaged in the business of a market agency buying livestock on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock on commission.

3. [Respondent] James L. Thurn . . . is an individual whose business mailing address is Rural Route 2, Box 55, Edgewood, Iowa 52042.

4. Respondent [James L.] Thurn is, and at all times material [to this

proceeding] was:

(a) President of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock];

(b) Fifty percent stockholder of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock]; and

(c) Responsible, in combination with Respondent Deryl D. Hines, for the direction, management, and control of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock].

5. [Respondent] Deryl D. Hines . . . is an individual whose business mailing address is Rural Route 2, Box 55, Edgewood, Iowa 52042.

6. Respondent [Deryl D.] Hines is, and at all times material [to this proceeding] was:

(a) Vice-President of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock];

(b) Fifty percent stockholder of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock]; and

(c) Responsible, in combination with [Respondent] James L. Thurn, for the direction, management, and control of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock].

7. Under the direction, management, and control of Respondent [James L.] Thurn and Respondent [Deryl D.] Hines, [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock], on or about the dates in the transactions set forth [in this paragraph of the Findings of Fact,] purchased livestock and in purported payment [of the livestock,] issued checks which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Purchase Date	Seller	Check Amount	Check Date	Check Number
10/09/95	Zumbrota Livestock Auction Market, Inc.	$ 214,818.66	10/09/95	11824
10/11/95	Zumbrota Livestock Auction Market, Inc.	$ 7,793.97	10/12/95	11865

10/12/95	Equity Cooperative Livestock Sales Association	$ 16,804.36	10/12/95	11857
10/12/95	Walnut Auction Sales, Inc.	$ 55,201.57	10/12/95	11858
10/12/95	Kalona Sales Barn, Inc.	$ 14,022.45	10/12/95	11860
10/13/95	Lanesboro Sales Commission, Inc.	$ 60,814.85	10/13/95	11870
10/17/95	Equity Cooperative Livestock Sales Association	$ 156,473.06	10/17/95	7776
10/17/95	Equity Cooperative Livestock Sales Association	$ 20,842.82	10/17/95	11900

8. Under the direction, management, and control of Respondent [James L.] Thurn and Respondent [Deryl D.] Hines, [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock], on or about the dates in the transactions set forth in Finding of Fact 7 and on or about the dates in the transactions set forth [in this paragraph of the Findings of Fact,] purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	**Seller**	**Purchase Amount**	**Due Date**
10/19/95	Aplington Sales Commission, Inc.	$ 31,057.73	10/20/95
10/19/95	Aplington Sales Commission, Inc.	$ 10,507.72	10/20/95
10/16/95	Cresco Livestock Market	$ 21,767.09	10/17/95

Purchase Date	Seller	Purchase Amount	Due Date
10/16/95	Belle Plaine Livestock Exchange, Inc.	$ 35,784.41	10/17/95
10/16/95	Dolan Lundeman Sunderland & Co.	$ 8,792.55	10/17/95
10/09/95	Farmers Livestock Auction Market	$ 70,431.56	10/10/95
10/14/95	Farmers Livestock Auction Market	$ 34,692.74	10/15/95
10/16/95	Farmers Livestock Auction Market	$ 74,953.35	10/17/95
10/10/95	Galesburg Livestock Sales, Inc.	$ 11,416.03	10/11/95
10/17/95	Galesburg Livestock Sales, Inc.	$ 66,226.18	10/18/95
10/16/95	H.D. Copeland	$ 18,277.42	10/17/95
10/16/95	H.D. Copeland	$ 18,774.92	10/17/95
10/14/95	John E. Connery	$ 24,256.78	10/15/95
10/16/95	John E. Connery	$ 275.90	10/17/95
10/17/95	John E. Connery	$ 31,979.37	10/18/95
10/18/95	John E. Connery	$ 32,594.39	10/19/95
10/19/95	John E. Connery	$ 12,626.69	10/20/95
10/19/95	Kalona Sales Barn, Inc.	$ 5,472.26	10/20/95
10/12/95	Kane Livestock Sales, Inc.	$ 2,765.78	10/13/95
10/16/95	Kane Livestock Sales, Inc.	$ 12,336.73	10/17/95
10/16/95	Kane Livestock Sales, Inc.	$ 4,670.35	10/17/95
10/17/95	Kane Livestock Sales, Inc.	$ 10,810.18	10/18/95
10/17/95	Kane Livestock Sales, Inc.	$ 7,480.70	10/18/95
10/18/95	Kane Livestock Sales, Inc.	$ 2,322.60	10/19/95
10/19/95	Kane Livestock Sales, Inc.	$ 12,084.15	10/20/95
10/18/95	Lanesboro Sales Commission, Inc.	$ 174,848.72	10/19/95

Purchase Date	Seller	Purchase Amount	Due Date
10/18/95	Lanny R. Minnaert	$ 26,853.76	10/19/95
10/17/95	Manchester Livestock Auction	$ 125,324.95	10/18/95
10/17/95	Manchester Livestock Auction	$ 2,511.36	10/18/95
10/10/95	Michigan Livestock Exchange	$ 38,533.30	10/11/95
10/16/95	Michigan Livestock Exchange	$ 18,446.43	10/17/95
10/04/95	Northern Michigan Livestock Association	$ 14,296.90	10/05/95
10/18/95	Northern Michigan Livestock Association	$ 18,287.27	10/19/95
10/10/95	O and S Cattle Company	$ 8,509.32	10/11/95
10/12/95	O and S Cattle Company	$ 10,923.82	10/13/95
10/13/95	O and S Cattle Company	$ 33,873.14	10/16/95
10/16/95	O and S Cattle Company	$ 12,619.54	10/17/95
10/17/95	O and S Cattle Company	$ 9,907.25	10/18/95
10/16/95	Tama Livestock Auction Co.	$ 10,879.90	10/17/95
10/18/95	Tama Livestock Auction Co.	$ 8,955.24	10/19/95
10/19/95	Walnut Auction Sales, Inc.	$ 28,543.88	10/20/95
10/16/95	Zumbrota Livestock Auction Market, Inc.	$ 269,275.28	10/17/95
10/16/95	Zumbrota Livestock Auction Market, Inc.	$ 52,758.74	10/17/95

9. As of September 16, 1996, $853,266.06[1] of the amounts due from the

[1]In [Answer to Complaint,] Respondents contend that $1,107,235.70 of the amounts alleged in the Complaint had been paid. Respondents admit that the balance of $853,266.06 of the amounts alleged [in the Complaint] is unpaid. No evidence was presented to verify or disprove Respondents' contention (continued...)

transactions set forth in Findings of Fact 7 and 8 remained unpaid.

Conclusions [of Law]

[1. The Secretary has jurisdiction in this matter.]

[2.] By reason of Findings of Fact 4 and 6, Respondent [James L.] Thurn and Respondent [Deryl D.] Hines are the *alter egos* of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock].

[3.] By reason of Findings of Fact 7, 8, and 9, Respondent [James L.] Thurn, Respondent [Deryl D.] Hines, and [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock], willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) and section 201.43 of the Regulations (9 C.F.R. § 201.43).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise two issues in Respondents' Petition for Appeal to Judicial Officer [hereinafter Respondents' Appeal Petition], and request that I vacate the ALJ's Default Decision.

First, Respondents contend that the ALJ should have granted Respondents' April 2, 1998, request for an oral hearing to provide Respondents with an opportunity to present evidence regarding the appropriate sanction to be imposed against Respondents (Respondents' Appeal Pet. at 1).

I disagree with Respondents' contention that the ALJ should have granted Respondents' April 2, 1998, request for an oral hearing in this proceeding. Respondents were served with the Complaint on August 24, 1996, but did not file Respondents' Answer to Complaint until September 16, 1996, 23 days after they were served with the Complaint.

Sections 1.136, 1.139, and 1.141 of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint

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[1](...continued)
that [they] paid the . . . $1,107,235.70 . . . . Respondents' admission that $853,266.06 is unpaid is sufficient to compel a finding that Respondents failed to pay livestock debt in violation of the Packers and Stockyards Act.

. . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint, served on Respondents on August 24, 1996, clearly informs Respondents of the consequences of failing to file an answer in accordance with the Rules of Practice, as follows:

Respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with

the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 7.

Likewise, the letter from the Hearing Clerk accompanying the Complaint and the Rules of Practice served August 24, 1996, on Respondents, provides:

CERTIFIED RECEIPT REQUESTED

August 19, 1996

Hines and Thurn Feedlot, Inc.
d/b/a Thurn & Hines Livestock
Mr. James L. Thurn
Mr. Deryl D. Hines
Rural Route 2, Box 55
Edgewood, Iowa 52042

Gentlemen:

Subject: In re: Hines and Thurn Feedlot, Inc. d/b/a Thurn & Hines Livestock, James L. Thurn and Deryl D. Hines, Respondents
P&S Docket No. D-96-0046

Enclosed is a copy of a Complaint, which has been filed with this office under the Packers and Stockyards Act, 1921.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and five copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain

each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appear on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated August 19, 1996, from Joyce A. Dawson, Hearing Clerk, to Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock, James L. Thurn, and Deryl D. Hines (emphasis in original).

Despite the express statements in the Complaint, the Rules of Practice, and the cover letter from the Hearing Clerk, that a failure to file a timely answer in this proceeding is deemed an admission of the allegations in the Complaint and could result in the entry of a default decision against Respondents, Respondents failed to file a timely answer.

Moreover, Respondents admit the material allegations of the Complaint in their untimely Answer to Complaint and pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the admission of the material allegations contained in

the Complaint constitutes a waiver of hearing. Specifically, Respondents admit: (1) issuing insufficient fund checks for the purchase of livestock; (2) failing to pay, when due, for livestock; and (3) failing to pay for livestock purchases (Answer to Complaint). Respondents reiterate these admissions in Respondents' Objection to Motion for Decision Without Hearing and Respondents' Appeal Petition.

Respondents proffer that their violations of the Packers and Stockyards Act were precipitated by Northwestern Cattle's failures to pay for livestock purchased from Respondents (Objection to Motion for Decision Without Hearing).[2] The ALJ considered that factor and Respondents' asserted lack of intent to violate the Packers and Stockyards Act and concluded that Respondents failed to present meritorious objections to warrant an oral hearing (Default Decision at 2-3). The ALJ ruled that "[n]o useful purpose would be served by an oral hearing" and stated that the "Department of Agriculture's policy and precedent clearly establish that it is well settled that a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts, even if the conduct resulted from careless disregard for statutory or regulatory requirements" (Default Decision at 3).

I agree with the ALJ. 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.[3] Respondents'

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[2]Respondents were middlemen in a series of cattle transactions over several years. Corporate Respondent would purchase cattle from various sources and resell those cattle to John Ed Morken, d/b/a Northwestern Cattle, Spring Grove, Minnesota. Corporate Respondent would receive payment from Northwestern Cattle and would subsequently make payment to the original sellers (Objection to Motion for Decision Without Hearing).

[3]*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). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Willfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *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.'")

(continued...)

argument that they issued insufficient funds checks and failed to pay for livestock because Northwestern Cattle failed to pay Respondents does not mitigate against a finding that Respondents willfully violated sections 312(a) and 409 of the Packers and Stockyards Act, or the 5-year suspension of Respondents' registration as a result of their violations of the Packers and Stockyards Act.

Respondents claim that denial of an opportunity to present mitigating circumstances during an oral hearing deprives them of their right to due process (Respondents' Appeal Pet. at 2).

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[4] Respondents have shown no basis for setting aside the Default Decision.[5] The Rules of Practice clearly provide that an

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[3](...continued)

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 would still be found willful.

[4]*See generally In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. 1121 (1996) (setting aside a default decision 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) (setting aside a default decision 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); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (vacating a default decision and remanding the case to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[5]*See generally In re Jack D. Stowers*, 57 Agric. Dec. __ (July 16, 1998) (holding that the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); In *re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision (continued...)

[5](...continued)
proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal docketed*, No. 96-7124 (11th Cir. Nov. 8, 1996); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir.
(continued...)

answer must be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondents' Answer to Complaint was filed 23 days after Respondents were served with the Complaint. Moreover, Respondents' Answer to Complaint admits the material allegations of the Complaint.

The requirement in the Rules of Practice that a respondent deny or explain any allegation of a complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its large workload in an expeditious and economical

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[5](...continued)
1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

manner. The United States Department of Agriculture's four administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 40 to 60 cases per year. As such, 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.'"[6] If Respondents were permitted to contest some of the allegations of fact after failing to file a timely answer and after filing a late Answer to Complaint, which admits the material allegations of the Complaint, 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.

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution.[7]

Second, Respondents contend that "[t]he sanction imposed by the Administrative Law Judge was unreasonable under the circumstances which included mitigating factors which would have been presented had an oral hearing been permitted" (Respondents' Appeal Pet. at 1).

I disagree with Respondents' contention that the sanction imposed by the ALJ is unreasonable. The ALJ imposed the following sanction against Respondents:

> Corporate Respondent, Hines and Thurn Feedlot, Inc., its officers, directors, agents, and employees, successors and assigns, directly or through any corporate device and Respondent James L. Thurn and Respondent

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[6]*See 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 also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that 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) (stating that 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) (stating that 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).

[7]*See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

Deryl D. Hines, their agents and employees, directly or through any corporate device in connection with their activities subject to the P&S Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock purchases; and
3. Failing to pay the full purchase price of livestock purchases.

Respondents Hines and Thurn Feedlot, Inc., James L. Thurn, and Deryl D. Hines are suspended as registrants under the P&S Act for five (5) years. Provided, that upon application to the Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of Respondents at any time after two (2) years upon demonstration that all livestock sellers identified in the complaint in this proceeding have been paid in full. Provided further, that this order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent Thurn and Respondent Hines by another registrant or packer after the expiration of the first two (2) years of this suspension term and upon demonstration of circumstances warranting modification of the order.

Default Decision at 8-9.

The United States Department of Agriculture'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.

Respondents willfully violated sections 312(a) and 409 of the Packers and Stockyards Act and section 201.43 of the Regulations by: (1) purchasing livestock

and in purported payment for the livestock, issuing 8 checks in amounts totaling $546,771.74 which were returned unpaid by the bank upon which they were drawn because Corporate Respondent did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented; (2) purchasing livestock for a purchase price of over $1,000,000, and failing to pay, when due, the full purchase price of the livestock; and (3) failing to pay $853,266.06 for livestock.

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is "to assure fair trade practices in the livestock marketing . . . industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock." *Bruhn's Freezer Meats v. United States Dep't of Agric.*, 438 F.2d 1332, 1337 (8th Cir. 1971), *cited in Van Wyk v. Bergland,* 570 F.2d 701, 704 (8th Cir. 1978). The requirement that a purchaser make timely payment effectively prevents sellers from being forced to finance the transaction. *Van Wyk v. Bergland* at 704. Respondents contravened that requirement, and Respondents' violations directly thwart one of the primary purposes of the Packers and Stockyards Act.[8]

Given the large number of Respondents' violative transactions and the dollar amounts involved, a severe sanction is warranted. Further, great weight is given to the sanction recommendations of administrative officials, and the Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, USDA, recommended the sanction imposed by the ALJ. Finally, the sanction imposed by the ALJ is consistent with the sanctions imposed in cases involving failures to pay for livestock.[9] Under these circumstances, a 5-year suspension of Respondents as registrants under the Packers and Stockyards Act is entirely appropriate.

Respondents claim that they and the livestock producers that sold to

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[8]*See Mahon v. Stowers*, 416 U.S. 100, 111, (1974) (per curiam) (dictum) (stating that regulation requiring prompt payment supports policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for their own purposes); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating that one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

[9]*In re Jeremy Byrd,* 55 Agric. Dec. 443 (1996); *In re Samuel J. Dalessio, Jr.*, 54 Agric. Dec. 590 (1995), *aff'd,* 79 F.3d 1137 (3d Cir. 1996) (Table); *In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Bruce* Thomas, 53 Agric. Dec. 1569 (1994); *In re Jimmy Ray* Hendren, 51 Agric. Dec. 672 (1992); *In re David H. Harris*, 51 Agric. Dec. 649 (1992); *In re Jeff Palmer*, 50 Agric. Dec. 1762 (1991); *In re Sam Odom*, 48 Agric. Dec. 519 (1989); *In re Edward Tiemann*, 47 Agric. Dec. 1573 (1988).

Respondents are victims of Northwestern Cattle's failure to pay Respondents and that most, if not all, of Respondents' creditors support Respondents' return to employment immediately (Respondents' Appeal Pet. at 3). Respondents' alleged victimization and creditors' preference are irrelevant considerations in determining sanctions for Respondents' serious violations of the Packers and Stockyards Act. As the court held in *Van Wyk*, Respondents' claim that their inability to meet their obligations is a debtor/creditor problem and is irrelevant to disposition of the proceeding. *Van Wyk v. Bergland,* 570 F.2d 701, 704 (8th Cir. 1978) (stating that failure to pay shipper promptly is a proscribed deceptive practice under the Packers and Stockyards Act).

Respondents request permission to be employed by registrants in the livestock business during the suspension period to enable Respondents to repay their creditors. However, it has consistently been held that any hardship to a respondent's creditors, customers, community, or employees, which might result from a suspension order, is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interest that might be damaged as a result of a suspension order.[10]

I find no basis for Respondents' contention that the sanction imposed by the ALJ is unreasonable, and the mitigating circumstances raised by Respondents are not relevant to the sanction to be imposed for Respondents' willful violations of the

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[10]*See In re Sam Odom*, 48 Agric. Dec. 519, 540-41 (1989) (holding that national public interest in deterring similar violations must prevail over the narrow interests of particular creditors); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 206 (1989), *aff'd*, 891 F.2d 281 (3d Cir. 1989) (unpublished) (holding that national public interest in deterring similar violations must prevail over the narrow interests of particular creditors); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987) (holding that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interest that might be temporarily damaged as a result of a suspension order); *In re Hugh B. Powell*, 41 Agric. Dec. 1354, 1365 (1982) (holding that any hardship to local interests is given no weight in determining the sanction); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979) (holding that hardship on local livestock community arising from registrant's suspension is outweighed by the national interest in deterring future violations); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978) (holding that hardship on local livestock community arising from registrant's suspension is outweighed by the national interest in deterring future violations); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977) (holding that hardship to the community resulting from a suspension order is irrelevant in determining sanctions); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (holding that it is USDA's policy to impose a severe sanction for violations of the Packers and Stockyards Act even when it would have an adverse effect on the local economy).

Packers and Stockyards Act.

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

Order

Paragraph I.

Corporate Respondent, Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock, its officers, directors, agents, and employees, successors and assigns, directly or indirectly through any corporate or other device, and Respondent James L. Thurn and Respondent Deryl D. Hines, their agents and employees, directly or indirectly through any corporate or other device in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock purchases; and
3. Failing to pay the full purchase price of livestock purchases.

Paragraph II.

Corporate Respondent, Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock, Respondent James L. Thurn, and Respondent Deryl D. Hines are suspended as registrants under the Packers and Stockyards Act for 5 years: *Provided*, That upon application to the Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of Respondents at any time after 2 years upon demonstration that all livestock sellers identified in the Complaint have been paid in full; *And provided further*, That this Order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent James L. Thurn and Respondent Deryl D. Hines by another registrant or packer after the expiration of the first 2 years of this suspension term and upon demonstration of the circumstances warranting modification of this Order.

Paragraph III.

Paragraph I of this Order shall become effective on the day after service of this Order on Respondents. Paragraph II of this Order shall become effective on the 60th day after service of this Order on Respondents.

In re: HUGH T. HENNESSEY, d/b/a HENNESSEY CATTLE CO., SIXES RIVER CATTLE CO., EARNEST A. BUSSMANN, and PETER E. BUSSMANN.
P&S Docket No. D-97-0003.
Decision and Order filed July 13, 1998.

Scheme to restrict competition not found - Dismissal of Complaint.

Respondents were alleged to have engaged in a scheme to restrict competition by controlling prices with respect to the sale of slaughter cattle in the Willamette Valley region of Oregon. Complainant maintained that it was not permissible for both Respondent Peter Bussmann and Respondent Hugh Hennessey, as representatives of Sixes River Cattle Company, to both be present at auctions without bidding against each other. The evidence supported the conclusion that Peter Bussmann ceased to regularly attend the Corvallis auction due to health concerns, and that, as a result, Hugh Hennessey was hired by Sixes River to purchase cows in his stead. Hennessey was also a buyer for Armour Meat Company and Walt's Meats, but was only authorized to purchase extra-fat or "gobby" cows for Sixes River. Judge Bernstein found that this arrangement did not adversely affect competition at the Corvallis sale and that the purchasing arrangement did not remove a competitor from the marketplace. The evidence showed that Respondents did not violate the Act or the regulations. The Complaint was dismissed.

Andrew Y. Stanton, for Complainant.
Respondent Hugh T. Hennessey, Pro se.
G. Lance Salladay, Boise, ID, for Respondents Sixes River Cattle Co., Earnest and Peter Bussmann.
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 ("the Act") (7 U.S.C. § 181 *et seq.*). The proceeding was instituted on October 24, 1996, by a Complaint filed by the Acting Deputy Administrator of the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture ("USDA"). The Complaint alleges that Respondents entered into an agreement with the purpose or effect of restricting competition by controlling prices with respect to the sale of slaughter cattle in the Willamette Valley region of Oregon, in willful violation of sections 312(a) of the Act and 201.70 of the regulations.

Respondents filed Answers denying all material allegations. I conducted a hearing in Portland, Oregon, on February 24 through 26, 1998. Complainant was represented by Andrew Y. Stanton. Sixes River Cattle Co., Earnest A. Bussmann, and Peter E. Bussmann were represented by G. Lance Salladay, Boise, Idaho. Hugh T. Hennessey appeared *pro se*.

The parties filed post-hearing briefs, proposed findings of fact, proposed

conclusions of law and reply briefs. The last such brief was filed on June 30, 1998. All proposed findings of fact, conclusions of law, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the record. The hearing transcript is cited herein as "Tr." Complainant's exhibits are cited as "CX" and Respondents' exhibits are cited as "RX."

Findings of Fact

1. Respondent Sixes River Cattle Company ("Sixes River") is an Oregon corporation whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Sixes River was engaged in the business of a dealer, buying and selling livestock in commerce for its own account or the account of others, and as a market agency, buying on consignment; and was duly registered with the Secretary of Agriculture as a dealer and a market agency (Answer ¶ 1; Tr. 118-19). At all times material, George Bussmann was the sole stockholder and president of Sixes River (Tr. 347, 489).

2. Respondent Earnest A. Bussmann is an individual whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Earnest Bussmann was the manager of Sixes River, and was responsible for the direction, management and control of its business operations (Tr. 451, 488-89, 589-90, 603).

3. Respondent Peter E. Bussmann is an individual whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Peter Bussmann was an employee of Sixes River. Due to a heart condition, Peter Bussmann's duties at Sixes River were limited and consisted primarily of attending the Lebanon Auction Livestock Sale every Thursday to sell feeder cattle owned by Bussmann Brothers and to purchase feeder and slaughter cattle for Bussmann Brothers and Sixes River. Occasionally, Peter Bussmann would take feeder cattle that he did not sell at Lebanon to the Corvallis auction on the following day. Corvallis held an auction every Friday (Tr. 226-29, 452-54, 460, 589-96, 598-99, 618).

4. The Lebanon auction sale was less stressful than other sales because very few, if any, other buyers generally attended that auction. Also, after the Lebanon sale, Peter Bussmann was able to spend the night in the area and return to Sixes River the next day (Tr. 454-56, 460).

5. The Corvallis auction sale is more stressful than the Lebanon auction sale as it is regularly attended by several buyers; and Peter Bussmann must return to Langlois the same day as the sale at Corvallis because Sixes River needs the

trailer back at Langlois to pick up cattle on Saturdays. Corvallis is approximately a 4-hour drive from Langlois, Oregon (Tr. 292, 341, 455-56).

6. Respondent Hugh T. Hennessey ("Hennessey"), doing business as Hennessey Cattle Co., is an individual whose business address is 6883 70th Avenue, S.E., Salem, Oregon 97301. Hennessey, at all times material, was engaged in the business of a dealer, buying and selling livestock in commerce for his own account or the account of others, and a market agency, buying on commission; and was duly registered with the Secretary of Agriculture as a dealer and as a market agency (CX 1, 2).

7. Sixes River hired Hennessey as a commissioned buyer to purchase slaughter cattle on its behalf at various stockyards in north-central and northern Oregon and southern Washington. During the material time period, Hennessey was also a buyer for Armour Meat Company and Walt's Meats. Hennessey was authorized only to buy extra-fat, or "gobby" cows for Sixes River, whereas he purchased choice, high-quality slaughter cows for Armour and mid to high-quality animals for Walt's Meats (Tr. 32, 120, 165, 177, 279-80, 293-94, 342, 452, 460, 600-01).

8. Sixes River buys gobby cows in order to resell them to Beef Packers, Inc. ("BPI"). Gobby cows are considered to be the least desirable type of slaughter cattle. There is a very limited market for gobby cows. BPI is the only packer in the area that processes such cattle (Tr. 301, 304, 401, 409, 456-57).

9. One of the auctions that Hennessey regularly attended was the Corvallis auction on Fridays. Peter Bussmann also occasionally attended the Corvallis auction in order to sell feeder cattle left over from the Lebanon auction on the previous day. Peter Bussmann would sometimes also purchase a few feeder cows at Corvallis if he saw a good deal. At Corvallis, the small feeder calves are sold first, cow/calf pairs are sold second, bred cows third, large feeder cattle fourth, and slaughter cattle are sold last. Peter Bussmann would not always leave the sale immediately after the feeder cattle were sold, and would sometimes be present during the sale of slaughter cattle. Peter Bussmann would not bid during that portion of the auction, however, because Hennessey was present to bid on slaughter cattle for Sixes River (Tr. 219-20, 228, 279, 281, 297-98, 454-58, 490, 587-88, 598-600, 607).

10. There were 11 occasions during the weekly sales between July 1994 and July 1995, when both Hennessey and Peter Bussmann were present at the Corvallis Auction, with each bidding on at least one animal. In some instances, Peter Bussmann did not purchase any cattle but only bought back his own to prevent a sale at too low a price (CX 7-14, 16-18; Tr. 490-91).

11. The Corvallis auction was regularly attended by several buyers other

than Mr. Hennessey, including Kenneth Hale, Chris Bartel, and Terry Cowert (Tr. 127-29, 219, 280, 484-85).

12. Irving Hanger is the owner of Corvallis Auction Yard, however, he rarely attended sales (Tr. 320). He has serious medical problems, as well as a problem with alcohol abuse (Tr. 627). Sales at Corvallis were instead managed by Mr. Hanger's son, John Hanger, who testified that sales were competitive at all times material to the Complaint (Tr. 295-96). In addition, the Corvallis Auction Yard did not engage in any market support activities in order to protect its consignees during that time period (Tr. 164, 295-96, 365-68).

Conclusions of Law

1. Respondents did not engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with buying or selling cattle in violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)).

2. Respondents conducted their buying operations in competition with and independently of other packers and dealers similarly engaged in accordance with section 201.70 of the regulations (9 C.F.R. § 201.70).

Discussion

The Complaint alleges that Respondents engaged in a scheme to restrict competition by controlling prices, in wilful violation of § 312(a) of the Act and § 201.70 of the regulations.

Section 312(a) of the Act provides that:

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

7 U.S.C. § 213(a).

Section 201.70 of the regulations requires that:

> Each packer and dealer engaged in purchasing livestock, in person or through employed buyers, shall conduct his buying operation in competition with, and independently of, other packers and dealers similarly engaged.

9 C.F.R. § 201.70.

Neither the Act nor the regulations define the terms "unfair," "unjustly discriminatory," or "deceptive." Their meaning must be determined by the facts of each case, taking into account the purposes of the Act. *Spencer Livestock Comm'n Co. v. Dep't of Agriculture*, 841 F.2d 1451, 1454 (9th Cir. 1988). Accordingly, Courts have held that in order to prove a violation of section 312(a) of the PSA, a complainant must show that the challenged conduct is likely to produce the sort of injury the Act is designed to prevent. *See, e.g., Spencer Livestock Comm'n Co. v. Dep't of Agriculture*, 841 F.2d 1451, 1454 (9th Cir. 1988); *Bosma v. United States Dep't of Agriculture*, 754 F.2d 804, 808 (9th Cir. 1984); *Central Coast Meats, Inc. v. United States Dep't of Agriculture*, 541 F.2d 1325, 1327 (9th Cir. 1976)(2-1 decision).

The type of injury that is sought to be prevented by prohibiting failure to compete in section 201.70 of the regulations is the removal of a buyer from the market who would otherwise be there. *Central Coast Meats, Inc. v. United States Dep't of Agric.*, 541 F.2d 1325, 1327 (9th Cir. 1976). In the instant case, that did not occur and was not likely to occur. It is important to note that Complainant does not challenge the fact that Mr. Hennessey was purchasing cattle for several principals. Rather, Complainant maintains that it is not permissible for Peter Bussmann and Hennessey as representatives of the same principal to both be present at these auctions without bidding against each other.

Essentially, Complainant's argument is that with Bussmann present, Hennessey could have bid on the gobby cows for Armour or Walt's Meats, thus increasing competition and by not doing so, they decreased competition. Although Complainant repeatedly asserts that there was a strong market for gobby cows and that both Armour and Walt's Meats wanted those animals, the record does not support that claim. The evidence shows that there was only one competitor for gobby cows, BPI.[1] That fact would not change simply because Peter Bussmann happened to be present at Corvallis auction sales.

In addition, Hennessey was not the only buyer at the Corvallis auction. Any of the other buyers could have bid on the gobby cows, but did not. Armour or Walt's Meats could have sent additional buyers if they had wished to compete with Sixes River for the gobby cows.

Furthermore, Courts have generally held that proof of actual or likely harm to

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[1]Not only did other witnesses testify to this (Tr. 301, 304, 401, 409, 456-57) but Complainant's own investigators acknowledged that they failed to ascertain that there were any other competitors in the area for gobby cows (Tr. 177, 337-39).

competition is necessary to find a violation of the Act.[2] *See, e.g., Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir. 1939); *Berigan v. United States*, 257 F.2d 852 (8th Cir. 1958), *Aikens v. United States*, 282 F.2d 53 (10th Cir. 1960), *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968), *Farrow v. United States Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985). The evidence does not show any actual or likely harm to competition resulting from Hennessey and Bussmann not bidding against each other. John Hanger, the auctioneer at Corvallis, testified that the activity at Corvallis during the relevant period was consistent with a competitive market; and there were no market support activities employed, which would have indicated a depressed market.

The only evidence indicating any harmful effect on competition is an affidavit given by Irving Hanger, the president of the Corvallis Auction Yard. Mr. Hanger stated in relevant part that:

> When I started in 1973, there was good competition for slaughter cows with numerous packers both large and small in the area. Over the years, competition has changed. I don't remember exactly when Tip Hennessey began buying for Armour here but he soon was buying most of the top cows for that account. Pete Bussmann had the order for Beef Packers Incorporated in California and they took the top cows also. Before too long Tip was buying for BPI and Bussmann was at the sale as a spectator. When the sale was over, Tip would come into the sales office and mark the cows to Sixes River, Pete Bussmann's dealer firm, and that has become a regular occurrence at my market. I never asked Bussmann why or how this arrangement came about but it has bad effects on competition and the prices for slaughter cows.

CX 19 at 2.

However, Irving Hanger's statement with respect to Peter Bussmann's presence at the auctions and the level of competition at the auctions is entitled to little weight. The evidence indicates that Irving Hanger rarely attended the Corvallis auctions and that his perceptions may have been affected by his problem of alcohol abuse (Tr. 320, 627). Furthermore, his statements are contained in an affidavit

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[2]Some courts have allowed a lesser showing of injury to competitors. *See Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961), *Swift & Co. v. United States*, 393 F.2d 247 (7th Cir. 1968). Complainant has failed to meet even this standard, as the record is devoid of any evidence of injury to any of Respondents' competitors.

which was not subject to cross-examination. I, therefore, accorded much more weight to the testimony of the auctioneer on the scene, John Hanger, and others who concluded that the market at Corvallis was competitive.

The Ninth Circuit has found violations in the absence of injury to competition, but only where the conduct at issue was *per se* proscribed. *See Spencer Livestock, supra,* at 1454; *Bosma, supra,* at 808-09. Here, that is not the case. There is no statute or regulation that prohibits a principal from attending an auction where it has a buyer present, or from sending more than one representative to an auction. Nor is there any case law which definitively proscribes such activity under all circumstances. Complainant relies on two Departmental cases that did find violations of the Act where a principal and agent both attended auctions without bidding against each other. Those cases are, however, distinguishable.

In *In re Jesse Amaral, Sr.*, 36 Agric. Dec. 872 (1977), the judge found that the respondents had competed for the same types of animals prior to the purchasing agreement and that the agreement did result in the loss of a competitor from the marketplace. The principal was a qualified buyer who regularly attended the auctions anyway; and, furthermore, one of the respondents admitted that the arrangement was entered into for the purposes of restricting competition and lowering prices. *Id.* at 887-88. In *In re San Jose Valley Veal*, Inc., 34 Agric. Dec. 966 (1975), the principal and agent also both regularly attended the auctions and were both qualified cattle buyers; and again both would have been competing for the *same* veal calves in the absence of the purchasing arrangement. However, in the instant case, no one else was interested in the gobby cows.

In addition, both cases were marked by the absence of any valid reason for hiring an agent, which helped lead to the inference that the purchasing arrangements were entered into for the purpose of reducing competition. In the instant case, Peter Bussmann did not regularly attend the Corvallis Auction Sale which explains why Sixes River hired Hennessey.

During the time period of July 1994 to July 1995, Peter Bussmann only attended 11 of the approximately 50 weekly auctions at Corvallis and during those dates he often did not remain for the sale of slaughter cattle. Complainant makes light of Bussmann's heart condition, arguing that he really was not concerned about his health since he only reduced his activities instead of ceasing work altogether; and that he, therefore, could have regularly attended the Corvallis auction. The uncontroverted testimony, however, indicates that Peter Bussmann has a serious heart condition. As a result of that condition, he reduced his work activities by attending one auction each week instead of five auctions. The auction that he attended at Lebanon was the least stressful for him to attend, as there were less buyers competing for cattle. Also, he was also able to spend the night after the

Lebanon auction and travel home the next day, further reducing the stress involved.

The evidence further shows that Peter Bussmann only attended the Corvallis auction when necessary to sell feeder cows left over from the Lebanon sale. While there, he would occasionally also buy a few feeder cows. His instructions from Sixes River and Earnest Bussmann were to return home as soon as possible after the feeder sale. It was not always possible, however, for Bussmann to leave immediately as it took time to complete the paperwork and arrange for animals to be loaded onto the trailer. In addition, Bussmann occasionally liked to stay to socialize with people with whom he had worked for so many years. As such, he would not always be gone by the time the sale of slaughter cattle began. Under these circumstances, it cannot be inferred, as it was in *Amaral* and *San Jose Valley Veal*, that there was any anticompetitive intent in entering into the purchasing arrangement.

More importantly, unlike *San Jose Valley Veal* and *Amaral*, there was no loss of a competitor from the marketplace when Hennessey took over bidding for Sixes River. Hennessey purchased different types of cattle for each of the principals that he represented. Although Complainant asserts that Hennessey could have bid on gobby cows for Armour and Walt's Meats, there is no evidence to support the contention that they or anyone else sought this type of animal.

The great weight of the evidence, therefore, supports the conclusion that Peter Bussmann ceased to regularly attend the Corvallis auction due to health concerns, and that, as a result, Hennessey was hired to purchase gobby cows in his stead. The evidence further indicates that this arrangement did not adversely affect competition at the Corvallis sale.

Based on these facts, Respondents' activities were not unfair or deceptive. They did not adversely affect competition, nor were they likely to. More importantly, the purchasing arrangement did not remove a competitor from the marketplace who would otherwise have been there. Therefore, it cannot be said that Respondents caused the type of harm that the Act was designed to prevent. Accordingly, Respondents have not violated the Act or the regulations.

Order

The Complaint is dismissed.

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 pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final August 19, 1998.-Editor]

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDER

In re: IBP, INC.
P&S Docket No. D-95-0049.
Stay Order filed September 3, 1998.

JoAnn Waterfield & Timothy Morris, for Complainant.
William H. Baumgartner, Jr., et al, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On July 31, 1998, I issued a Decision and Order: (1) concluding that IBP, inc. [hereinafter Respondent], violated section 202 of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 192); and (2) ordering Respondent to cease and desist from entering into or continuing any agreement, contract, arrangement, or understanding containing a right of first refusal which provides that Respondent may obtain livestock by matching the highest previous bid for livestock. In *re IBP, inc.*, 57 Agric. Dec. ____, slip op. at 16, 75 (July 31, 1998).

On August 12, 1998, Respondent filed Motion of IBP, inc. [,] For a Stay of the Agency's Order of July 31, 1998 [hereinafter Motion for a Stay], requesting a stay of the July 31, 1998, cease and desist order pending the resolution of Respondent's petition for review filed with the United States Court of Appeals for the Eighth Circuit (Motion for a Stay at 2). On August 31, 1998, Complainant filed Complainant's Response to IBP, inc.'s Motion for a Stay of the Agency's Order, stating that Complainant does not object to a stay of the July 31, 1998, Decision and Order pending resolution of Respondent's petition for review filed with the United States Court of Appeals for the Eighth Circuit. On August 31, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for a Stay.

Respondent's Motion for a Stay is granted. The Order issued in this proceeding on July 31, 1998, *In re IBP, inc.*, 57 Agric. Dec. ____ (July 31, 1998), 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.

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: BUFORD WATSON, JR., a/t/a PETE WATSON AND TW&W.
P&S Docket No. D-98-0020.
Decision and Order filed September 30, 1998.

Andre Allen Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

This disciplinary proceeding brought pursuant to 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, was instituted on April 13, 1998 by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, by a Complaint alleging that Respondent wilfully violated the P&S Act. The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter the Rules of Practice, were served on Respondent by regular mail on May 13, 1998, after service by certified mail, return receipt requested, was returned unclaimed. Accompanying the Complaint, Respondent was mailed a cover letter informing him that an Answer must be filed within twenty (20) days of service and that failure to file an Answer would constitute an admission of all of the material allegations of fact in the Complaint and a waiver of the right to oral hearing.

Respondent did not file an answer within the time period required by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission to all of the material allegations of fact in the Complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

Findings of Fact

1. Buford Watson, Jr., also trading as Pete Watson and TW&W, referred to herein as Respondent, is an individual with a mailing address of P.O. Box 93–1A, Rutledge, Tennessee 37861.
2. Respondent is and at all times material herein was:
   a. Engaged in the business of a dealer buying and selling livestock in

commerce for his own account and a market agency buying livestock in commerce on a commission basis; and

b. Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

3. The surety bond which Respondent was required to maintain for the purpose of securing the performance of his livestock obligations under the P&S Act terminated on September 29, 1989. In spite of the fact that his bond had terminated, Respondent continued to operate subject to the P&S Act. Since September 29, 1989, Respondent has operated subject to the P&S Act without maintaining an adequate bond or its equivalent.

4. As set forth in section VI(a) of the Complaint, Respondent issued insufficient funds checks for livestock purchases.

5. As set forth in section VI(a) and (b) of the Complaint, Respondent failed to pay, when due, for livestock purchases.

Conclusions

1. By reason of the facts set forth above in Finding of Fact 3, Respondent wilfully violated section 312(a) of the P&S Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, .30).

2. By reason of the facts set forth above in Finding of Fact 4, Respondent wilfully violated section 312(a) of the P&S Act (7 U.S.C. § 213(a)).

3. By reason of the facts set forth above in Finding of Fact 5, Respondent wilfully violated sections 312(a) and 409 of the P&S Act (7 U.S.C. §§ 213(a), 228b).

Accordingly, the following order is issued.

Order

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the P&S Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the P&S Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent;

2. Issuing insufficient funds checks in payment for livestock purchases; and

3. Failing to pay, when due, the full purchase price for livestock purchases.

In accordance with section 312(b) of the P&S Act (7 U.S.C. § 213(b)), a $2,500

civil penalty is assessed against Respondent.

This decision and order shall become final and effective without further proceedings thirty–five (35) days after service on Respondent unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, 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 November 10, 1998.-Editor]

In re: JOHN LUSTIG MEATS, INC., JOHN S. LUSTIG, JR.
P&S Docket No. D-98-0009.
Decision and Order filed November 13, 1998.

Andrew Y. Stanton, for Complainant.
Respondents, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents have wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*).

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 Act were served upon respondents by certified mail. 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 and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision Without Hearing by Reason of Default, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

(1) John Lustig Meats, Inc., hereinafter referred to as the corporate respondent,

is a corporation whose business mailing address is 670 East Cherry Road, Quakertown, Pennsylvania 18951.

(2) The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock for purpose of slaughter; and

(b) A packer within the meaning of and subject to the Act.

(3) John S. Lustig, Jr., hereinafter referred to as the individual respondent, is an individual whose business mailing address is 188 Keystone Road, Quakertown, Pennsylvania 18951.

(4) The individual respondent is, and at all times material herein was:

(a) The president and owner of 80% of the class A stock and 90% of the class B stock of the corporate respondent and directs, manages and controls all business activities of the corporate respondent, including the acts and practices alleged herein; and

(b) A packer within the meaning of the Act and subject to the provisions of the Act.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

Order

Respondent John Lustig Meats, Inc., its officers, directors, agents, employees, successors and assigns, and respondent John S. Lustig, Jr., individually or through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

1. Issuing checks in purported payment for purchases of livestock which are returned unpaid by the bank upon which they are drawn because the corporate respondent does not have and maintain sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, for livestock purchases; and
3. Failing to pay for livestock purchases.

Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of Thirteen Thousand Dollars ($13,000.00).

This Decision Without Hearing by Reason of Default 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 of this Decision Without Hearing by Reason of Default shall be served upon the parties.

[This Decision and Order became final on February 5, 1999.-Editor]

In re: MARK V. PORTER d/b/a MVP FARMS.
P&S Docket No. D-98-0022.
Decision and Order filed November 24, 1998.

Eric Paul, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, 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 Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent 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 respondent by certified mail on May 28, 1998. Respondent was 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 was required by section 1.136(a) of the Rules of Practice to file an answer by June 17, 1998. Respondent failed to file an answer by this date or request an extension of time in which to file an answer. On July 6, 1998, respondent submitted by FAX a letter dated June 20, 1998, in which respondent states in response to the complaint "At this time I have chosen not to fight Packers and Stockyards in this case. I do admit some of the violations submitted in the complaint." Although respondent goes on to assert that his presence in the marketplace adds competition and to claim that "the Sale Yards you listed in the complaint are confident and satisfied with me," respondent neither denies any of the material allegations of the complaint or requests the holding of a hearing by this

letter. 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 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. Mark V. Porter, hereinafter referred to as the respondent, is an individual doing business as MVP Farms whose business mailing address is P.O. Box 864, Sunnyside, Washington 98944.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

3. Respondent, on or about the dates and in the transactions set forth below, purchased livestock from Marysville Livestock Auction, Inc. and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Purchased Under Names	No Hd	Livestock Amounts	Invoice Amounts	Payments & (Dates Paid)	Livestock Amount Unpaid
06-Feb-96	MVP and/or RJ	14	$ 4,459.90	$ 4,465.50		
13-Feb-96	MVP and/or RJ	24	10,521.17	10,544.27		
20-Feb-96	MVP and/or RJ	28	6,511.76	6,511.76		
27-Feb-96	MVP and/or RJ	22	8,690.48	8,690.48		
05-Mar-96	MVP and/or RJ	56	14,116.86	14,179.86		

					$20,000.00 (30-Sep-96)	
					10,000.00 (23-Oct-96)	
					5,000.00 (07-Feb-97)	
					2,000.00 (22-Aug-97)	
TOTAL:			$44,300.17	$44,391.87	$37,000.00	$7,300.17[1]

[1] This figure assumes that payments received paid all non livestock charges, including $63.00 assessed in connection with the livestock purchases made on March 5, 1996.

4. Respondent, on or about the dates and in the transactions set forth below, purchased livestock from Ellensburg Livestock Exchange, Inc. and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Purchased Under Names	No Hd	Livestock Amounts	Invoice Amounts	Payments & (Dates Paid)	Livestock Amount Unpaid
05-Sep-97	MVP	27	$12,811.86	$12,811.86		$12,811.86
31-Oct-97	MVP	1	255.20	255.20		255.20
07-Nov-97	S & L	3	1,580.40	1,595.40		1,580.40
14-Nov-97	BPI	11	4,932.34	4,962.98		4,932.34
21-Nov-97	S & L	27	11,486.07	11,486.07		11,486.07
21-Nov-97	BPI	12	3,751.67	3,827.35		3,827.35
05-Dec-97	BPI	31	11,755.17	11,896.57		11,755.17
05-Dec-97	Baxley	30	10,344.22	10,434.97		10,344.22
12-Dec-97	Baxley	32	14,161.19	14,277.12		14,161.19

12-Dec-97	BPI	7	2,661.57	2,693.36		2,661.57
23-Jan-98	MVP	10	3,714.49	3,714.49		3,714.49
06-Feb-98	MVP	13	5,446.71	5,446.71		5,446.71
TOTAL:						$82,900.89

5. As of March 25, 1998, respondent's unpaid livestock purchases from Marysville Livestock Auction, Inc. and Ellensburg Livestock Exchange, Inc. total $90,201.06.

6. Respondent, on or about the dates and in the transactions set forth below, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Purchased From	No Hd	Purchase Amount	Payment Due per § 409	Check Date	No. of Days Late
03-May-96	Sunnyside Livestock Market, Inc	22	$ 2,884.65	06-May-96	10-May-96	4
06-May-96		10	1,454.51	07-May-96	10-May-96	3
10-May-96		11	9,347.08	13-May-96	17-May-96	4
18-May-96		25	5,330.11	20-May-96	05-Jun-96	16
20-May-96		68	24,607.67	21-May-96	05-Jun-96	15
20-Jul-96		48	8,341.11	22-Jul-96	12-Aug-96	21
22-Jul-96		46	14,722.89	23-Jul-96	12-Aug-96	20
27-Jul-96		10	1,105.74	29-Jul-96	12-Aug-96	14
29-Jul-96		76	14,125.61	30-Jul-96	12-Aug-96	13
05-Aug-96		46	11,668.02	06-Aug-96	12-Aug-96	6
30-May-96	Toppenish Livestock Comm.	77	24,989.94	31-May-96	11-Jun-96	11

06-Jun-96		96	34,860.42	07-Jun-96	18-Jun-96 21-Jun-96 24-Jun-96	11 14 17
18-Jul-96		65	19,498.07	19-Jul-96	12-Aug-96	24
25-Jul-96		85	26,500.55	26-Jul-96	12-Aug-96	17

7. Respondent, on or about the dates and in the transactions set forth below, purchased livestock and held checks issued in payment for such livestock for a number of days after the check date to unlawfully delay respondent's payments of the full purchase price of such livestock, thereby failing to pay, when due, the full purchase price of livestock.

Purchase Date	**Purchased From**	**Purchase Amount**	**Payment Due per § 409**	**Check Date**	**Delivery and Deposit**	**Days Late**
17-Feb-95	Ellensburg Livestock Exchange, Inc.	$ 8,540.84	21-Feb-95	03-Mar-95	06-Mar-96	13
17-Feb-95		16,091.54	21-Feb-95	20-Feb-95	28-Feb-96	7
24-Jan-95 31-Jan-95 07-Feb-95	Marysville Livestock Auction, Inc.	30,0117.65	25-Jan-95 01-Feb-95 08-Feb-95	17-Feb-95	01-Mar-95	28 to 31
14-Jan-95 16-Jan-95	Sunnyside Livestock Market, Inc.	58,701.29	17-Jan-95 17-Jan-95	20-Jan-95	23-Jan-95	6
21-Jan-95 23-Jan-95		58,511.30	23-Jan-95 24-Jan-95	25-Jan-95	30-Jan-95	6 to 7
03-Mar-95 04-Mar-95		66,100.45	06-Mar-95 06-Mar-95	10-Mar-95	13-Mar-95	7
05-May-95 06-May-95 08-May-95		56,607.14	08-May-95 08-May-95 09-May-95	11-May-95	15-May-95	6 to 7

19-May-95 20-May-95 22-May-95		23,629.79	22-May-95 22-May-95 23-May-95	24-May-95	30-May-95	7 to 8
02-Jun-95 03-Jun-95 05-Jun-95		55,802.81	05-Jun-95 05-Jun-95 06-Jun-95	07-Jun-95	12-Jun-95	6 to 7
10-Jun-95 12-Jun-95		45,075.33	12-Jun-95 13-Jun-95	15-Jun-95	19-Jun-95	6 to 7

8. Respondent, in the transactions set forth below, issued checks in purported payment for livestock which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented.

Check Date	**Check No.**	**Livestock Seller Payee**	**Livestock Purchase Dates**	**Check Amount**	**Date Returned**
25-Feb-98	6174	Ellensberg Livestock Exchange, Inc.	08-Aug-97 to 06-Feb-97	$86,509.78[1]	05-Mar-98
08-Jul-96 (date check completed)	3784	Marysville Livestock Auction, Inc.	06-Feb-96 to 05-Mar-96	54,484.25[2]	09-Jul-96
01-Apr-96	4365	Sunnyside Livestock Market, Inc.	23-Mar-96 and 25-Mar-96	40,049.83	04-Apr-96
22-May-96	4453		18-May-96 and 20-May-96	29,937.78	30-May-96
01-Jun-96	4459	Toppenish Livestock Comm.	30-May-96	24,989.94	07-Jun-96
09-Jun-96	4546		06-Jun-96	34,860.42	14-Jun-96
01-Jun-96	4542	Quincy Livestock Market	15-May-96 to 29-May-96	21,053.25	17-Jun-96
17-Jun-96	4555		05-Jun-96	23,808.17	28-Jun-96

17-Jun-96	4556		12-Jun-96	10,741.46	02-Jul-96
24-Jun-96	4559		15-May-96 to 19-Jun-96	38,643.43	11-July-96
02-Jul-96	4621		15-May-96 to 26-Jun-96	23,521.77	16-Jul-96
08-Jul-96	4623		15-May-96 to 03-Jul-96	59,384.90	19-Jul-96
11-Jul-96	3892		15-May-96 to 10-Jul-96	56,621.98	31-Jul-96

[1] This check was for $84,537.54 in livestock charges (including a $7,965.00 balance owed as of August 8, 1997) and $1,972.24 in non livestock charges.

[2] This check was for $44,300.17 in livestock charges, and $91.70 in related non livestock charges during these dates, and an additional amount required to fully pay off respondent's account as of July 8, 1996.

9. Respondent was notified by certified mail received August 28, 1995, to increase the amount of bond coverage that respondent maintained to secure his livestock purchase obligations under the Act from $75,000.00 to $80,000.00. Respondent was notified by certified mail received October 18, 1995, that his $5,000 deposit to his trust fund agreement account does not satisfy his bond requirement unless he submits a rider to his trust fund agreement. Notwithstanding such notice, and a prior order of the Secretary requiring respondent to cease and desist engaging in business without maintaining a reasonable bond or its equivalent, respondent has continued to engage in the business of a dealer and a market agency buying on commission without completing and submitting the rider required for an adequate bond or its equivalent.

Conclusions

By reason of the facts found in Findings of Fact 3 through 8 above, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

By reason of the facts found in Finding of Fact 8 above, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9C.F.R. §§ 201.29, .30).

Order

Respondent Mark V. Porter, his agents and employees, directly or through any

corporate or other device, shall cease and desist from:

1. Failing to pay the full purchase price of livestock;
2. Failing to pay, when due, the full purchase price of livestock;
3. Issuing checks in payment for livestock and holding such checks after the date of issuance before delivering such checks to the livestock sellers;
4. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank accounts upon which they are drawn to pay such checks when presented; and
5. 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.

Respondent Mark V. Porter is suspended as a registrant under the Act for a period of 5 years and thereafter until he demonstrates that he is in full compliance with such bonding requirements, provided, that when respondent demonstrates that all unpaid livestock sellers have been paid in full, and that he is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after respondent has served at least 150 days of the suspension.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final January 4, 1999.-Editor]

In re: LYNN R. HOTTLE.
P&S Docket No. D-98-0028.
Decision and Order filed December 1, 1998.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, 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 respondent 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 respondent by certified mail on July 27, 1998. Respondent was 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. Lynn R. Hottle, hereinafter referred to as the respondent, is an individual doing business in the State of Pennsylvania, and whose mailing address is R.D. #2, P.O. Box 183, Wysox, Pennsylvania 18854.

2. Respondent is, and at all times material herein was:

(a) Engaged in business as a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency buying on commission.

3. Respondent, in connection with his operations subject to the Act, was notified by certified mail received on March 3, 1998, as set forth in paragraph II(a) in the complaint that he was 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. Respondent was again notified by certified mail received on March 30, 1998, that due to the volume of business (livestock purchases) shown on his last annual Dealer Business Report of March 13, 1998, he was required to increase his bond from the amount of $10,000.00 to $15,000.00 before continuing his livestock operations subject to the Act.

Notwithstanding such notices, respondent failed to obtain the bond and has continued to engage in the business of a dealer 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, respondent has willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, .30)

Order

Respondent Lynn R. Hottle, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from 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 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby 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 respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 5, 1999.-Editor]

In re: S.A. HALAL MEAT, INC., and MOHAMMED ARSHAD.
P&S Docket No. D-98-0031.
Decision and Order filed December 16, 1998.

Mary Hobbie, 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 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 August 5, 1998. 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.

Respondents have 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 respondents' 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. S.A. Halal Meat, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated and doing business in the State of New York, and whose mailing address is 6902 Ridge Boulevard, Apt. D-10, Brooklyn, New York 11209.

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. Mohammed Arshad, hereinafter referred to as the individual respondent, is an individual whose address is 6902 Ridge Boulevard. Apt. D-10, Brooklyn, New York 11209.

4. The individual respondent is, and at all times material herein was:

(a) President and sole shareholder of the corporate respondent and responsible for its direction, management and control;

(b) The *alter ego* of the corporate respondent;

(c) Engaged in the business of buying livestock in commerce for the purpose of slaughter; and

(d) A packer within the meaning of and subject to the provision of the Act.

5. The corporate respondent, under the direction, management and control of the individual respondent was notified by a letter of February 4, 1998, hand-delivered by Packers and Stockyards Program personnel on March 9, 1998, as set forth in paragraph II(a) in the complaint that it was 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. The corporate respondent, under the direction, management and control of the individual respondent, has made representations in response to numerous contacts, the last being April 27, 1998, that a bond would be obtained. Notwithstanding such notices, 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, S.A. Halal Meat, Inc., its officers, directors, agents and employees, successors and assigns, directly or indirectly through any corporate or other device, and respondent Mohammed Arshad, 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 February 8, 1999.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PACKERS AND STOCKYARDS ACT

Prindle Leasing Co., Inc., d/b/a Joseph Latella & Sons and Peter A. Latella, Sr. P&S Docket No. D-97-0018. 7/20/98.

Cimarron Properties, Ltd. and Wall Lake Cattle Co., Inc., d/b/a Midlands Cattle Company and Gordon Reisinger. P&S Docket No. D-97-0026. 7/22/98.

Donald Dryden. P&S Docket No. D-98-0013. 7/31/98.

Mississippi Livestock Producers Association. P&S Docket No. D-98-0024. 8/17/98.

Nicholas Meat Packing Co., and Eugene A. Nicholas. P&S Docket No. D-98-0026. 9/29/98.

Garfield R. Freeze. P&S Docket No. D-97-0025. 10/29/98.

Lee Gashel & Sons, Inc. and Kenneth L. Gashel. P&S Docket No. D-98-0016. 11/2/98.

Tommy W. Welch and Rhoda V. Welch, a/k/a Vickie Welch. P&S Docket No. D-98-0017. 11/3/98.

James B. Henderson. P&S Docket No. D-99-0004. 11/13/98.

Poplarville Stockyards, Inc., M&J Cattle Company, Inc., and Joe Mack Smith. P&S Docket No. D-95-0014. 11/19/98. Consent decision as to Joe Mack Smith.

Orville L. Pettersen and Sandra K. Pettersen, d/b/a Pettersen Livestock. P&S Docket No. D-98-0033. 11/20/98.

L&S Cattle Company, a partnership, Doug Sasseen and Donnie Stidham. P&S Docket No. D-96-0018. 12/9/98. Consent decision as to L&S Cattle Company, a partnership, and Doug Sasseen.

AGRICULTURE DECISIONS

Volume 57

July - December 1998
Part Three (PACA)
Pages 1458 - 1750

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 statues 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

JULY - DECEMBER 1998

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

DEPARTMENTAL DECISIONS

REPARATION DECISIONS

MISCELLANEOUS ORDERS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

ANDERSHOCK'S FRUITLAND, INC., AND JAMES A. ANDERSHOCK v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 96-4238.
Decided August 10, 1998.

(Cite as 151 F.3d 735)

Perishable agricultural commodities — Failure to pay — Sanction — License revocation.

The United States Court of Appeals for the Seventh Circuit held that the Judicial Officer's revocation of the license of a dealer regulated under the Perishable Agricultural Commodities Act (PACA) for repeated failures to pay for produce over an extended period of time, was proper. The court stated that relevance is a matter of substantive policy and that it is within the agency's power to decide that the reasons for a PACA licensee's repeated failures to pay for produce are not relevant to sanction.

United States Court of Appeals
Seventh Circuit

Before FLAUM, EASTERBROOK, and KANNE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Dealers regulated by the Perishable Agricultural Commodities Act must "truly and correctly . . . account and make full payment promptly in respect of any transaction". 7 U.S.C. § 499b(4). The Secretary of Agriculture has defined "promptly" as "within 10 days after the day on which the produce is accepted". 7 C.F.R. § 46.2(aa)(5). Section 8(a) of the PACA, 7 U.S.C. § 499h(a), authorizes the Secretary to revoke the license of any dealer who commits "flagrant or repeated" violations of § 499b. Between May 1994 and May 1995 Andershock's Fruitland failed to pay the agreed purchase prices of 113 lots of agricultural commodities, a total of more than $245,000. It did not finish paying these sums until 1997, almost a year after the administrative hearing, and the bulk of repayment was accomplished by giving Thomas Produce, its biggest creditor, an equity interest in the dealership in lieu of cash. The Secretary revoked its license under the Department's rule that "repeated failures to pay a substantial amount of money over an extended period of time" lead to revocation rather than a lesser sanction. *Caito Produce Co.*, 48 Agric. Dec. 602, 611-13 (1989).

Andershock's Fruitland argued in the administrative proceedings that revocation of its license would be an excessive sanction because nonpayment was attributable to its inability to collect from some of its own customers, rather than to an effort to exploit its suppliers. It contended that for the decade before it encountered cash-flow problems it had been a model dealer. The administrative law judge thought that these were mitigating circumstances and gave Andershock's Fruitland a year from the date of his decision to cover the debt; if it did so, there would be no sanction, but otherwise its license would be revoked. This effectively allowed Andershock's Fruitland to withhold payment for two and a half years (the earliest debts arose in May 1994, and a year from the ALJ's decision was mid-December 1996). The Judicial Officer of the Department of Agriculture, acting as the Secretary's delegate, thought this incompatible with established norms: "The Department's policy is to revoke the PACA license of any Respondent that has not made full payment promptly . . . and fails to make such payments by the time of the hearing." *Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216 (1996) (collecting authority). In an extensive opinion the Judicial Officer explained that prompt payment in earlier years, good-faith efforts to pay suppliers, and the effects of revocation on employees and suppliers are not relevant to the choice of sanction.

Andershock's Fruitland contends that in reaching this conclusion the Department disregarded the "sanctions policy" of *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991). Before *S.S. Farms Linn County* the Department took the view that any substantial failure to follow the requirements of the PACA led to loss of license. *S.S. Farms Linn County* announced that, when devising sanctions to carry out the statutes under its administration, the Department would consider "all relevant circumstances". Andershock's Fruitland maintains that it proffered evidence in mitigation that the Judicial Officer ignored despite its relevance to the sanction. Because an agency must follow its own rules and doctrines until it changes them explicitly, see *Allentown Mack Sales & Service, Inc. v. NLRB*, ___ U.S. ___, ___-___, 118 S.Ct. 818, 826-29, 139 L.Ed.2d 797 (1998), Andershock's Fruitland insists that it is entitled to reinstatement of the ALJ's decision.

But of course "we consider all relevant evidence" does not mean or imply that "all evidence is relevant." Relevance is a matter of substantive policy. So if in a bank robbery prosecution the defendant said that he was poor and needed the money to feed his family, the court would deem this irrelevant—not because it played no role in the causal chain, but because poverty is not a defense to crime. Poverty *could* be relevant; the Sentencing Guidelines could make the offender's wealth a factor in sentencing; but it would need more than the appearance of the

word "relevant" in a formula to make it so. It would need a substantive decision.

S.S. Farms Linn County establishes a norm for a portfolio of statutes, such as the Packers and Stockyards Act, the Animal Quarantine Act, the Animal Welfare Act (the statute involved in *S.S. Farms Linn County* itself), and the Perishable Agricultural Commodities Act. A rational decisionmaker may conclude that a particular offense (say, extended nonpayment under the PACA) requires a specific response even if a latitudinarian approach suffices for most. So our initial question is whether the Department of Agriculture has in other nonpayment cases deemed "relevant" circumstances such as the failure of a licensee's customers to pay the licensee. The Judicial Officer said that it has not—that whenever a licensee fails to pay a substantial amount of money over an extended period of time, the license will be revoked. Andershock's Fruitland contends that *S.S. Farms Linn County* displaced this rule, of which *Caito Produce* is a leading exemplar. Yet since *S.S. Farms Linn County* the Department has repeatedly applied *Caito Produce* to nonpayment under the PACA. E.g., *Allred's Produce*, 56 Agric. Dec. 1488 (1997); *Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 946-48 (1997); *Lloyd Myers Co.*, 51 Agric. Dec. 747, 764-65 (1992). Several decisions are explicit that the approach *Caito Produce* announces for "no-pay" cases is unaffected by *S.S. Farms Linn County*. E.g., *Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 931-32 (1996); *Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996), *affirmed*, 136 F.3d 89 (2d Cir. 1997); *Moreno Bros.*, 54 Agric. Dec. 1425 (1995); *Potato Sales Co.*, 54 Agric. Dec. 1409 (1995); *Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239 (1995); *Atlantic Produce Co.*, 54 Agric. Dec. 701, 715 (1995). And *Havana Potatoes of New York*, the only judicial decision that has squarely addressed the question whether as a matter of administrative law *S.S. Farms Linn County* requires the Department to abandon *Caito Produce*, has held that it does not.

Caito Produce today acts as an exception to *S.S. Farms Linn County*. Andershock's Fruitland appears to believe that all provisos and exceptions are forbidden as "inconsistent" with the norms that otherwise would apply, but that can't be so. Statutes and opinions (judicial and administrative) teem with reservations, exceptions, provisos, and unless clauses. If these violate the consistency requirement that has been read into the Administrative Procedure Act, the Executive Branch of government might as well go on holiday. But just as the Department could develop the approach of *S.S. Farms Linn County* in common-law fashion, so it may use future cases to develop exceptions to its approach. Exceptions differ from inconsistency, so the only real issue is whether it is within the Department's power to decide that the reasons for nonpayment don't matter if "there have been flagrant or repeated failures to pay a substantial amount of money

over an extended period of time." And *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973), answers that question in the affirmative.

The Department has applied a consistent sanctions policy in PACA nonpayment cases since *S.S. Farms Linn County*. Twenty-three cases in volumes 54, 55, and 56 of the Agriculture Decisions, covering 1995 through 1997, cite both *S.S. Farms Linn County* and *Caito Produce*, and the Judicial Officer regularly draws a distinction between "willful, flagrant and repeated violations" that lead to revocation without further ado and less serious violations for which extenuating circumstances are relevant. Far from disregarding *S.S. Farms Linn County*, the Judicial Officer regularly remarks on the limited application of that opinion to nonpayment cases. The Judicial Officer (and thus the Department) believes that *S.S. Farms Linn County* did not displace *Caito Produce* for the class of "willful, flagrant and repeated violations" under the PACA. This distinction suffuses the Agriculture Decisions. Here's an illustrative passage from *Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 632-33 (1996):

> I agree with Respondent that the Department's sanction policy, as adopted in *In re S.S. Farms Linn County, Inc.*, *supra*, should be applied in the instant case. *S.S. Farms Linn County, Inc.*, in pertinent part, 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.
>
> 50 Agric. Dec. at 497.
>
> However, the sanction policy in *In re S.S. Farms Linn County, Inc.*, *supra*, does not alter the doctrine in *In re The Caito Produce Co.*, *supra*. *In re Moreno Bros.*, *supra*, 54 Agric. Dec. at 1442-43. The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment 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.

This is the Judicial Officer's routine treatment of "repeated failures to pay a substantial amount of money over an extended period of time".

S.S. Farms Linn County was issued by Judicial Officer Donald A. Campbell. The current Judicial Officer, and the author of *Andershock's Fruitland*, is William G. Jenson. But we do not have a situation in which one adjudicator, dissatisfied with a predecessor's decision but unwilling to repudiate it openly, has undermined it by stealth. Of the 13 cases decided before June 1996 that treat both *Caito Produce* and *S.S. Farms Linn County* as authoritative, 10 were issued by Campbell and only one—*Andershock's Fruitland*—by Jenson. Obviously the author of *S.S. Farms Linn County* sees no inconsistency. Nor do we have the sort of drunken--sailor's walk that multi-member bodies may produce. See Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* 257-471 (1997). At any moment there is only one decisionmaker, who can be (and has been) self-consistent.

Glover Livestock reminded the courts of appeals that "mere unevenness in the application of the sanction does not render its application in a particular case `unwarranted in law'." 411 U.S. at 188, 93 S.Ct. 1455. That adjuration may have been forgotten by the judges in two cases on which Andershock's Fruitland relies. See *ABL Produce, Inc. v. Department of Agriculture*, 25 F.3d 641 (8th Cir. 1994); *Conforti v. United States*, 74 F.3d 838 (8th Cir. 1996). In each of these cases the court of appeals substituted its judgment for the Judicial Officer's about the appropriate sanction. But neither *ABL Produce* nor *Conforti* is a nonpayment case under the PACA, so neither case leads us to question the propriety of the Judicial Officer's conclusion that *S.S. Farms Linn County* and *Caito Produce* can live side-by-side, the former as rule and the latter as exception. Appellate courts have on occasion questioned the Department's handling of this reconciliation. Both *Norinsberg Corp. v. Department of Agriculture*, 47 F.3d 1224 (D.C. Cir. 1995), and *Frank Tambone, Inc. v. Department of Agriculture*, 50 F.3d 52 (D.C. Cir. 1995), upbraided the Judicial Officer for applying *Caito Produce* to a nonpayment case without citing *S.S. Farms Linn County*. But both of these opinions enforced the Department's orders nonetheless, thus recognizing—as the second circuit reiterated in *Havana Potatoes of New York*—that the two lines of administrative precedent are compatible. Even if, as the court of appeals thought in *Norinsberg* and *Frank Tambone*, the Department of Agriculture did not do a very good job at the outset in explaining how *S.S. Farms Linn County* applies to no-pay cases, it has done so since. *Hogan Distributing* is one example; the opinion in *Andershock's Fruitland* is another. In *Havana Potatoes of New York* the second

circuit understood the Judicial Officer's opinion in *Andershock's Fruitland* as the definitive statement of the Department's current sanctions policy. And the court suggested that any different approach might itself offend the statute:

> To be sure, isolated failures to pay within ten days or even substantial delays in payments fully cured after a temporary period of financial difficulty might justify mitigation. However, PACA simply cannot be read to allow the continued licensing of a produce buyer in the face of its persistent failures to comply with the statute's terms because of the produce buyer's long-standing financial difficulties. Persistent violations indicate willfulness in the sense that a persistent violator must know when placing orders for produce that some or all will not be paid for in a timely fashion under PACA. Moreover, financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds.

136 F.3d at 94. We need not endorse this view to conclude that the Department's current position is a rational implementation of the PACA, and no more is required.

Andershock's Fruitland maintains that the Department can have *S.S. Farms Linn County*, or the flagrant-and-repeated-nonpayment policy, but not both. Forcing the Department to elect between the positions (rather than to use a rule-and-exception approach) would be substantive review of the Department's choice of sanctions, meddling forbidden by *Glover Livestock*. Sand in the gears could be a good thing. Most industries get along nicely without a governmental agency that penalizes deadbeats. Probability of payment is just one of many dimensions along which firms compete; businesses willingly put money at risk in exchange for other benefits, such as better service. But the PACA reflects a different approach, which the Department is entitled to implement.

The petition for review is **DENIED**.

STEVEN J. RODGERS v. DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA.
No. 98-1057.
Decided October 19, 1998.

(Cite as 1998 WL 794851 (D.C. Cir.))

United States Court of Appeals
District of Columbia Circuit.

Before SILBERMAN, HENDERSON, and TATEL, Circuit Judges.

JUDGMENT

PER CURIAM

This petition for review of an order of the United States Department of Agriculture was considered on the briefs, including the submission under Federal Rule of Appellate Procedure 28(j), and the appendix filed by the parties. The court has determined that the issues presented occasion no need for an opinion. See D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the petition for review of the Decision and Order of the Judicial Officer, United States Department of Agriculture, filed on December 12, 1997, be denied. Substantial evidence in the record supports the determination of the Judicial Officer that petitioner was "responsibly connected" to the licensee. See 7 U.S.C. § 499a(b)(9); *Veg-Mix Inc. v. United States Dep't of Agriculture*, 832 F.2d 601, 611-12 (D.C. Cir. 1987).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

MICHAEL NORINSBERG v. UNITED STATES DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA.

No. 98-1065.
Decided December 22, 1998.

(Cite as 162 F.3d 1194 (D.C. Cir.)

Responsibly connected — Actively involved.

The Circuit Court granted petitioner's petition for review of the Judicial Officer's (JO) decision, in which the JO held, based on the JO's determination that petitioner was actively involved in the activities resulting in violations of the PACA, that petitioner was responsibly connected with a Perishable Agricultural Commodities Act (PACA) licensee at the time that the licensee violated the PACA. The Court held that the term "actively involved" in 7 U.S.C. § 499a(b)(9) is not unambiguous; held that the JO did not articulate a standard for determining whether a person is "actively involved"; and remanded the case to the JO to articulate a standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA.

United States Court of Appeals,
District of Columbia Circuit.

Before: WALD, WILLIAMS and HENDERSON, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LeCRAFT HENDERSON, *Circuit Judge*

Michael Norinsberg (Michael or petitioner) petitions for review of the determination by the United States Department of Agriculture (Agriculture or Agency) that he was "responsibly connected" with the Norinsberg Corporation (Corporation) at the time it violated the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a *et seq.* (PACA or Act), challenging Agriculture's interpretation of the term "actively involved" as used in 7 U.S.C. § 499a(b)(9). Because Agriculture inadequately articulated the factors relevant in interpreting "actively involved," we grant the petition for review and remand the case for further explanation.

I.

A. Statutory Background

In 1934 the Congress amended PACA to provide that the Agriculture Secretary could with notice revoke the license of any "commission merchant, dealer, or

broker" that employed an individual "who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year of the date prior to such notice." Pub. L. No. 73-159, ch. 120, § 5, 48 Stat. 586.[1] The Congress, however, did not at that time define "responsibly connected." In 1962, however, concerned about "possible confusion" regarding the interpretation of "responsibly connected," *see* Amendments to the Perishable Agricultural Commodities Act, 1930, H.R. Rep. No. 87-1546, at 4 (1962), the Congress amended the Act to define "responsibly connected" to mean "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." Pub. L. No. 87-725, § 2, 76 Stat. 673 (codified as amended at 7 U.S.C. § 499a(b)(9)).

Over time courts adopted one of two approaches in interpreting "responsibly connected." Most adopted a per se rule, finding an individual responsibly connected if he fit one of the statutory categories. *See, e.g., Faour v. United States Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) ("The statute does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected."); *Pupillo v. United States*, 755 F.2d 638, 643-44 (8th Cir. 1985) ("In sum, we find that a per se analysis of Section 499a(9) better accomplishes Congress' objective."); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) ("Obviously, as interpreted by the Department, the 1962 amendment was intended to establish `per se' exclusionary standards. . . . We agree with the Department."); *see also Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.) (citing per se standard with approval), *cert. denied*, 389 U.S. 835 (1967). On the other hand, this circuit adopted a rebuttable presumption test. *See Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975). In *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), we noted two sets of circumstances in which a person could rebut the presumption that he was responsibly connected if he fell into one of the

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[1]The employment ban that began with the 1934 amendment currently provides in part:

> 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;

7 U.S.C. § 499h(b)

section 499a(b)(9) categories:

> The first involves cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as "to negate its separate personality." Thus, in *Quinn*, we indicated that an officer might meet this test by showing that the sole stockholder of the corporation "`effectively retained the decision making power in all aspects of corporate decision making'" so that the company was not really a corporation within the meaning of 7 U.S.C. § 499a(9), but rather a sole proprietorship. . . .
>
> The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could establish by proving that he lacked "an actual, significant nexus with the violating company." Where responsibility was not based on the individual's "personal fault" it would have to be based at least on his "failure to `counteract or obviate the fault of others.'"

Id. at 1201 (citations omitted).

The circuit split existed until 1995 when the Congress amended the definition of responsibly connected to "permit individuals who are responsibly connected . . . the opportunity to demonstrate that they were not responsible for the specific violation," Perishable Agriculture Commodities Act Amendments of 1995, H.R. Rep. No. 104-207, at 11 (1995). The 1995 amendment added the following:

> 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.

7 U.S.C. § 499a(b)(9) (emphasis added). According to the amendment, Agriculture must first determine if an individual falls within one of the three statutory classifications. If so, the burden shifts to the individual to demonstrate that he was not actively involved and that he was either only a nominal officer or

not an owner of a licensee within the meaning of the statute.[2]

B. Factual Background

Robert Norinsberg, the petitioner's father, became the president of the Corporation in 1974, succeeding the petitioner's grandfather. Between April 1991 and February 1992, the Corporation "failed to make full payment promptly to 10 sellers of the agreed purchase prices of 46 lots of perishable agricultural commodities, in the total amount of $424,913.75." Joint Appendix (JA) 26. Agriculture found that this conduct constituted "willful, flagrant, and repeated violations of section 2(4) of the PACA,"[3] JA 26, and, accordingly, in 1993 it revoked the Corporation's PACA license. On review we denied the Corporation's petition. *Norinsberg Corp. v. Department of Agric.*, 47 F.3d 1224, 1230 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995).

Michael had earlier entered the family business upon his college graduation in 1986. While Robert Norinsberg anticipated that Michael would eventually succeed him, Michael started as an assistant to the Corporation's sales manager and earned between $25,000 and $27,000 annually. Also in 1986, the Corporation issued Michael 150 shares of common stock, which represented 15 per cent of the outstanding shares of common stock. Robert Norinsberg retained the remaining common stock (850 shares).[4] Eventually Robert Norinsberg appointed Michael secretary and treasurer of the Corporation for "administrative convenience" because he "wanted corporate checks and other documents signed with the Norinsberg name and [Michael] was available." JA 50. Nevertheless Michael's salary remained at the $25-27,000 level. Between May 1991 and February 1992, Michael signed nine of 929 checks from one account and seven of 267 from a second account. Twelve checks, totaling $51,369.60, were payable to Robert

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[2]A licensee includes any "individual[], partnership[], corporation[] [or] association[]," 7 U.S.C. § 499a(b)(1), "carrying on the business of a commission merchant, dealer, or broker," *id.* § 499c(a).

[3]Section 2(4) of PACA makes it unlawful to "fail or refuse truly and correctly to make full payment promptly." 7 U.S.C. § 499b(4). The applicable regulations define "promptly" to mean "within 10 days after the day on which the produce is accepted." 7 C.F.R. § 46.2(aa)(5). The violation must be "willful" to support revocation. 5 U.S.C. § 558(c).

[4]Of the 4,035 shares of preferred stock issued by the Corporation, Michael's grandfather's estate owned 2,535 shares and Susan Norinsberg, Michael's grandmother, owned the remaining 1,500 shares. When all of the stock was tallied, then, Michael owned less than three per cent. *In re Norinsberg*, PACA-APP Docket No.96-0009 (Decision and Order Oct. 21, 1997), JA 27.

Norinsberg; one check for $5,359 was payable to Susan Norinsberg; one check for $3,000 was payable to Robert Norinsberg's housekeeper; and two checks totaling $115,966.27 were issued to the Shoreham Cooperative, a company partially owned by Robert Norinsberg, for produce sold to the Corporation. JA 31. At the time he signed the checks, Michael admitted that he knew that the Corporation was not making full and prompt payment to its suppliers. Although Michael also admitted that signing the checks troubled him, he did not refuse to sign. JA 235.

Using Michael's position as an officer and shareholder as the basis for his determination, Agriculture's PACA Branch Chief, Fruit and Vegetable Division (Branch Chief), issued an initial determination that Michael was responsibly connected with the Corporation at the time it violated PACA. JA 66-67. Michael sought review by an administrative law judge (ALJ). After a hearing, the ALJ, applying the amended definition of responsibly connected, concluded that the Congress had adopted this circuit's rebuttable presumption test and under that test Michael was not responsibly connected because, in his view, both the statute and this circuit contemplated "active participation at a managerial level in decision making activities that resulted in the violation." *In re Norinsberg*, PACA-APP Docket No. 96-0009 (Decision and Order May 6, 1998), JA 64.[5] The ALJ therefore reversed the Branch Chief s finding that Michael was responsibly connected to the Corporation.

The Branch Chief appealed the ALJ's determination to a judicial officer (JO), arguing that the ALJ had misapplied this circuit's test. The JO disagreed with the ALJ, finding that neither the statute nor the relevant legislative history contemplated managerial decision making. JA 43. In doing so, the JO expressly concluded that the amendment did not codify this circuit's law. JA 42-43.[6] The

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[5]The ALJ concluded that Michael had established both that he was not actively involved and that he was only a nominal officer.

[6]The JO stated:

> While [the 1995 amendment] generally incorporated the rebuttable presumption standard followed by the United States Court of Appeals for the District of Columbia circuit into the definition of responsibly connected . . . District of Columbia circuit case law does not premise responsible connection with a PACA violator on active involvement . . . Instead the United States Court of Appeals for the District of Columbia cases decided prior to the enactment of [the 1995 amendment] premise responsible connection with a PACA violator upon personal fault or the failure to counteract or obviate the fault of others. Thus, I do not rely on District of Columbia circuit case law regarding the issue of Petitioner's active involvement.

JA 40-41.

JO first noted that the checks Michael signed had already been filled out when they were presented to him for signature and that he signed the checks only when "Robert M. Norinsberg was unavailable and at Robert M. Norinsberg's direction." JA 42. The JO also noted that the "Petitioner knew at the time that he signed [the checks] that The Norinsberg Corporation was not making full payment promptly to produce creditors, and Petitioner was troubled by his signing the checks." *Id.* Without further elaboration, the JO concluded that Michael was "actively involved" within the meaning of the statute because "the act of signing checks is active involvement in an activity, and in this instance, the activity resulted in The Norinsberg Corporation's violations of PACA." JA 44. As Michael conceded that he was an officer, albeit a nominal one, the JO found Michael responsibly connected with the Corporation because, as an "actively involved" officer, Michael had failed to demonstrate by a preponderance of the evidence that he was not responsibly connected with the Corporation at the time it violated PACA.

Michael petitioned for reconsideration, arguing that the JO had retroactively applied the amended statute to him. The JO denied the petition on the ground that Michael had failed to object timely. *In re Norinsberg*, PACA-APP Docket No. 96-0009 (Order Denying Petition for Reconsideration Jan. 26, 1998), JA 15. Michael then petitioned this court for review.

II.

We review the Agency's interpretation of PACA under the familiar framework described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, we determine if "Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If it has, our inquiry is at an end. "If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." Id. at 943. We cannot, however, "exercise [our] duty of review unless [we] are advised of the considerations underlying the action under review," *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). In cases where "`we are at a loss to know what kind of standard [the agency] is applying or how it is applying that standard to this record,'" *Checkosky v. SEC (Checkosky II)*, 139 F.3d 221, 225 (D.C. Cir. 1998) (quoting *United Food & Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1435-36 (D.C. Cir. 1989)), but where the "agency's failure to state its reasoning or to adopt an intelligible decisional standard is [not] so glaring that we can declare with confidence that the agency" erred, *Checkosky v. SEC (Checkosky I)*, 23 F.3d 452, 463 (D.C. Cir. 1993) (Silberman, J., concurring), *appeal after*

remand, 139 F.3d 221 (D.C. Cir. 1998), the proper course is to remand to the agency for it to enunciate the standard. *See, e.g., id.* at 462 (Silberman, J., concurring) ("Absent such clarity, the proper course, one that we follow today, is to remand so as to afford the agency an opportunity to set forth its view in a manner that would permit reasoned judicial review."); *United Food & Commercial Workers*, 880 F.2d at 1436 (remanding because "the decision in its current form fails to reflect the reasoned decisionmaking required of administrative agencies"), *appeal after remand*, 1 F.3d 24 (D.C. Cir. 1993), *and cert. granted*, 511 U.S. 1016, and *cert. dismissed*, 511 U.S. 1016. We believe that this case requires such treatment.

As often happens, each party contends that the Congress has spoken and resolved the question in its favor. *See, e.g., Alabama Power Co. v. FERC*, 160 F.3d 7, 1998 WL 785622 at *4 (D.C. Cir. Nov.13, 1998). Contrary to Agriculture's position, however, the term "actively involved" does not have an unambiguous meaning. The lack of clarity is amply demonstrated not only by the agency officials' conflicting views on whether or not "actively involved" requires "managerial decision making," JA 43, but also by their lack of agreement over whether the amendment codified this circuit's precedent of "personal fault" or even what our precedent required. On the other hand the petitioner is wrong in asserting that the Congress "clearly" intended to adopt our precedent as set forth in our opinions in *Quinn*, 510 F.2d at 752-56, *Minotto v. United States Dep't of Agriculture*, 711 F.2d 406, 408-09 (D.C. Cir. 1983), and *Bell*, 39 F.3d at 1201-05. First, the statutory language does not expressly so state. While we agree with the petitioner that his burden of demonstrating that he "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" mirrors part of our test, *see Maldonado v. Department of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998), it is far from clear that, by using the term "actively involved," the Congress also intended to incorporate our "personal fault" requirement.[7] Had the Congress intended to do so, it could have done so expressly. *Cf. Oneida Tribe of Indians v. Wisconsin*, 951 F.2d 757, 762 (7th Cir. 1991) (noting that Congress's different wording from past indicates intent that new word has different meaning). Nor does the limited legislative history address the issue. Congressional desire that "individuals who

[7]The personal fault factor requires an "`actual and significant nexus with the violating company,'" *Bell*, 39 F.3d at 1201 (quoting *Minotto*, 711 F.2d at 409), to support a "responsibly connected" determination. "Where responsibility was not based on the individual's `personal fault,'" it must "be based at least on his `failure to "counteract or obviate the fault of others."'" *Id.* (citations omitted)

are not responsibly connected" have "the opportunity to demonstrate that they were not responsible for the specific violation," H.R. Rep. No. 104-207, at 11, does not necessarily demonstrate such an intent. As the Congress has not spoken to the precise question, we must take the second *Chevron* step and determine if Agriculture's interpretation is reasonable.

The JO's opinion provides virtually no standard for us to examine. Agriculture's argument that each case requires a fact-specific determination does not excuse its failure to provide any standard. *See Philadelphia Gas Works v. FERC*, 989 F.2d 1246, 1251 (D.C. Cir. 1993) ("For [the agency] to utter the words `unique facts and circumstances' and `equity' as it did here, as a wand waved over undifferentiated porridge of facts, leaves regulated parties and a reviewing court completely in the dark."). The JO makes only two points in interpreting "actively involved." We know only that "active participation in managerial decision making" is not required and that writing checks standing alone *may* be sufficient.[8] JA 42-44. At oral argument, Agriculture suggested that, while signing checks was sufficient, mailing them was not. The JO, however, provides no principled way to distinguish the two. Both could amount to "active involvement in an activity" that resulted in the violation. JA 44. Moreover, the JO's opinion does not indicate clearly whether a scienter requirement exists. For example, its language that Michael signed the checks and was therefore actively involved does not necessarily suggest a scienter requirement. In another part of his opinion, however, he indicates that an individual must *knowingly* participate in the PACA violation to be responsibly connected. For example, the JO specifically notes Michael's knowledge of the Corporation's financial problems and the fact that Michael was troubled by signing the checks--both irrelevant if uninformed check signing alone constitutes active involvement.[9] JA 42.

As we are unable to determine what, if any, standard the JO applied, we cannot determine if Agriculture's interpretation is a permissible one. Accordingly, we must remand to Agriculture to articulate a standard we can review in an informed

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[8]The Ninth Circuit has held that check writing alone is insufficient to constitute active involvement. *Maldonado*, 154 F.3d at 1088.

[9] Petitioner *knew* at the time that he signed these 14 checks that The Norinsberg Corporation was not making full payment promptly to produce creditors. and Petitioner was troubled by his signing checks made payable to Robert M. Norinsberg . . .

JA 42 (emphasis added)

manner. In doing so, we express no opinion on the merits of the case.[10] While retroactivity issues may arise depending on whether, and how, the enunciated standard may differ from our precedent, any retroactivity analysis is premature because we do not know now what standard Agriculture will adopt. This issue is properly addressed, if at all, on remand in accordance with the holdings in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994), and *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). We therefore grant the petition for review and remand to the Agency for it to explain its decision.

So ordered.

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[10]We can, and do, however, uphold Agriculture's conclusion that Michael was only a nominal officer.

DEPARTMENTAL DECISIONS

In re: LAWRENCE D. SALINS.
PACA-APP Docket No. 96-0010.
Decision and Order filed February 26, 1998.

Responsibly connected — Active involvement in violations — Officer of company — Rebuttable presumption standard.

The Judicial Officer reversed Judge Hunt's (ALJ) decision that Petitioner had rebutted by a preponderance of the evidence the presumption that, as an officer of Sol Salins, Inc., Petitioner was responsibly connected with Sol Salins, Inc., during the time that Sol Salins, Inc., violated the PACA. The definition of *responsibly connected* in section 1(b)(9) of PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) establishes a rebuttable presumption, which provides as pertinent in the proceeding that: Petitioner, even though a corporate officer, is not deemed responsibly connected if Petitioner proves by a preponderance of the evidence *both* (1) that Petitioner was not actively involved in the activities resulting in Sol Salins, Inc.'s violations *and* (2) that Petitioner either was only nominally an officer of Sol Salins, Inc., or was not an owner of Sol Salins, Inc., which was the alter ego of its owners. However, Respondent proved by a preponderance of the evidence that Petitioner was actively involved in corporate decision making, which resulted in Sol Salins, Inc.'s violations. *e.g.*, that Petitioner attended and participated in weekly corporate staff meetings as secretary-treasurer; that Petitioner handled payroll, taxes, and financial documents; that Petitioner was the only corporate signatory and issued large numbers of checks for large amounts every month; and that Petitioner decided which suppliers to pay in order to keep produce coming to stay in business. Respondent also proved that Petitioner was not merely a nominal officer of Sol Salins, Inc., because of Petitioner's access to corporate records; knowledge of Sol Salins, Inc.'s financial troubles; familiarity and close relations with unpaid creditors; check writing responsibilities; responsibility for signing corporate documents; and salary. Although Petitioner did not argue that Petitioner was not an owner of Sol Salins, Inc., which was the alter ego of its owners, the argument would have failed because, even though Petitioner was not an owner, there was no evidence that Sol Salins, Inc., was the alter ego of its owners. Petitioner thus having failed by a preponderance of the evidence to rebut the presumption, as an officer of a violating licensee, Petitioner is deemed to be responsibly connected to Sol Salins, Inc.

Timothy A. Morris, for Respondent.
Petitioner, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

I. INTRODUCTION

Lawrence D. Salins [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 For Review on September 11, 1996.

The Petition challenges the August 15, 1996, determination by 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 Sol Salins, Inc., during the period of time that Sol Salins, Inc., violated the PACA,[1] in that Petitioner was secretary and treasurer of Sol Salins, Inc., and active in the business activities of Sol Salins, Inc.

On June 3, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] conducted an oral hearing in Washington, D.C. Mr. Steven P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioner.[2] Mr. Timothy A. Morris, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On August 1, 1997, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law, and Respondent filed Respondent's Proposed Findings of Fact, Conclusions, and Order [hereinafter Respondent's Brief], respectively.

On September 26, 1997, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ reversed "[t]he September 20, 1996, determination by Respondent, Chief, PACA Branch, Fruit and Vegetable Division, that Lawrence D. Salins was responsibly connected with Sol Salins, Inc. . . ." (Initial Decision and Order at 8.) On October 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

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[1]During the period September 1995 through March 1996, Sol Salins, Inc., purchased, received, and accepted in interstate or foreign commerce 784 lots of perishable agricultural commodities from 107 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $1,198,992.31. Sol Salins, Inc.'s failures to make full payment promptly constituted willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *See In re Sol Salins, Inc.*, 56 Agric. Dec. 1797, 1798-99 (ALJ's June 3, 1997, Bench Decision and Order, filed June 25, 1997).

[2]On December 22, 1997, Mr. Stephen P. McCarron of McCarron & Associates filed Notice of Withdrawal of Appearance stating "[p]lease note that Stephen P. McCarron and McCarron & Associates hereby withdraw as attorney for petitioner in the above-captioned case." The caption of the case in the Notice of Withdrawal of Appearance is "In the matter of Lawrence D. Salins, PACA RC 96-1017." The hearing clerk has no case captioned "In the matter of Lawrence D. Salins, PACA RC 96-1017," and after Mr. McCarron filed the Notice of Withdrawal of Appearance, the hearing clerk placed the Notice of Withdrawal of Appearance in the record of this proceeding. On February 24, 1998, I contacted Mr. McCarron, and Mr. McCarron confirmed that he intended that the Notice of Withdrawal of Appearance operate as a withdrawal of appearance on behalf of Petitioner in this proceeding.

Rules of Practice (7 C.F.R. § 2.35).[3] On December 16, 1997, Petitioner filed Response to Respondent's Appeal Petition, and on December 17, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the evidence in the record, I reverse the ALJ's conclusion that Petitioner was not responsibly connected to Sol Salins, Inc. However, my disagreement is with the ALJ's interpretation of the facts and not, for the most part, with the analysis and the facts found by the ALJ. Therefore, the Initial Decision and Order is modified and 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.

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

II. PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. *Short title and definitions*

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

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[3]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)).

(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.

7 U.S.C. § 499a(b)(9) (Supp. I 1995).

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

A. Preliminary Statement

In this proceeding, Petitioner, Lawrence D. Salins, challenges the determination of Respondent, Chief, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, that, under section 1[(b)](9) of the PACA (7 U.S.C. § 499a[(b)](9)), Petitioner was "responsibly connected" as an officer with Sol Salins, Inc., a company that was found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) [*See In re Sol Salins, Inc.*, 56 Agric. Dec. 1797, 1798-99 (ALJ's June 3, 1997, Bench Decision and Order, filed June 25, 1997).]

. . . .

B. Statement of the Facts

Sol Salins, Inc., founded in 1936, was a PACA-licensed wholesale produce dealer. In 1990, Lee and Leonard Salins, grandsons of the founder, took over the daily operation of the company and did the buying and selling. However, in 1992, their uncle, Richard Salins, a retired part-owner of the company, returned to the business to control its overall operations. Richard's other two nephews, Lawrence Salins and Lane Salins, also worked for the company.

Lawrence Salins, the Petitioner in this proceeding, had started working for the company as a clerk in 1981 at the age of 18. [Petitioner's] job included writing

invoices, cashiering, routing trucks, and preparing loads for delivery. [Petitioner] was later assigned accounts payable and receivable and in 1992 [Petitioner] was given the responsibility for processing the company's payroll. These duties consisted of matching purchase orders with invoices from produce suppliers and paying them for the merchandise. [Petitioner,] however, had . . . discretion as to which suppliers were paid. The company's policy was to pay according to the age of the invoice and [Petitioner] [w]ould make a payment only after receiving the express approval of the buyer who had made the purchase[, in that the buyer would check to see that the invoice had the quantity and quality that the buyer was promised at the price agreed with the supplier]. [Petitioner] would then make the payment out of the company's operations account. [Petitioner] had no control over or access to the company's investment or pension accounts which were under the direct control of [Petitioner's] uncle, Richard, who spent little time at the company but made all the major decisions.

In 1988, [Petitioner] was made assistant treasurer when [Petitioner], together with three others, were given check signing authority on the operations account. [Petitioner] moved up to treasurer about 1993, but with no additional duties, and in January 1995, [Petitioner] was designated the company's secretary when his brother, Lee, left the company. [Petitioner] signed various reports for the company relating to such matters as unemployment compensation, tax withholding, income tax, PACA licensing, and answers to reparation complaints. [Petitioner] signed some reports because [Petitioner] was responsible for the payroll, while [Petitioner] signed others as the secretary at the direction of the company's accountant or attorney who had prepared the forms and reports. [Petitioner's] salary was $89,000 a year, but his compensation in 1994 was $124,683, which included a bonus and vacation pay for 1993. [Petitioner] owned no stock in the company and was not a director. [Petitioner] never bought or sold produce . . . [but was actively involved in] business or policy decisions for the company.

In January 1995, Lee and Leonard Salins left the company. Two new buyers, Chris Horner and Rick Thomas, were hired and, as before, . . . [the buyers approved the quantity and quality on] invoices. In September 1995, Richard Salins hired Jerry Cristiano as a general manager to run the company's day-to-day operations. Cristiano consulted with Richard about running the business. [Petitioner] had no authority over Cristiano.

[Petitioner] knew from seeing the company's monthly financial statements that the company was having problems with its cash flow. The statements were prepared by the company's accountant from information provided by an employee named "Sophia." Sophia, who reported to the accountant and Richard Salins, maintained the company's general ledger and recorded its cash receipts.

[Petitioner] testified that [Petitioner] attended weekly "staff" meetings with [Petitioner's] uncle, Richard, at the office of the company's lawyer, Howard Silberberg. However, Cristiano, the general manager, did not name [Petitioner] as one of those present at these meetings.

[BY MR. CRISTIANO:]

At the meeting was [sic] the CPA, D.H. Scarborough, Howard Silberberg, Dicky [Richard Salins], and myself, and go [sic] over different operational problems that were happening, some of the things that I thought they should do, and get directions from where he wanted to go.

[BY MR. McCARRON:]

Q. Now, during this period of time, what was Larry [Lawrence Salins] doing?

A. Really, accounts payable, accounts receivable, signing the checks. He handled the money.

Q. Did he have any control over what you were doing and over running the business?

A. No, he never had any time.

Q. Did his role change at all during the period of time you were there?

A. No.

Tr. 65.

Cristiano said [Petitioner] did not make any management decisions for the company and that when a line of credit was being considered he asked [Petitioner] for the names of the banks the company dealt with but that [Petitioner] had nothing to do with the line of credit itself. (Tr. 65[, 73].)

[Petitioner] testified that "when requested" [Petitioner] offered information and suggestions at the meetings. [Petitioner] said that "major problems or issues" were brought to Richard Salins' attention and that "he would tell us what he thought we should do, or Howard [Silberberg] would interject his opinion." [Petitioner] said that Richard made the decision to continue buying produce even though the

company lacked the finances to pay for them. (Tr. 50, 97, 104.)

Richard transferred some money from the investment account to the operations account to help pay the suppliers. [Petitioner] said [Petitioner] believed there was a "large amount of money" in the investment account, but that [Petitioner] did not have access to the account and that its records were kept by Sophia and the accountant (Tr. 98).

In 1995 and 1996, [Petitioner] began receiving calls from unpaid sellers requesting payment. One of these suppliers, Kevin Keany, said he called [Petitioner] because he had been dealing with members of the Salins family for years and that [Petitioner] was the only member of the family he knew who was still at the company (Tr. 108). On some occasions [Petitioner] would pay a supplier "on the spot" in order to obtain produce when "the buyer would come to me, Sol Salins' buyer, and say, we need to pay such and such. Can't we get a check out today? . . . It depends on the circumstance. It depends on the money that we received that day. Many times we were going to do a check run on the computer later in the afternoon and this would be earlier in the day, and the person would need a check number. So, in order to give them a check number, we would have to write the check by hand." (Tr. 59-60.) "[B]asically, if the money was in the account, I could write the check." (Tr. 50.)

Sol Salins, Inc., reached the point where it could not pay its suppliers and it went out of business in March 1996. Its failure to pay its creditors resulted in the order finding that it violated the PACA. Respondent also determined that [Petitioner], as an officer of the company, was responsibly connected to Sol Salins, Inc. [Petitioner] denies that he was responsibly connected.

. . . .

C. **Discussion**

As the company's secretary-treasurer, [Petitioner] was an officer of Sol Salins, Inc. However, [Petitioner] contends that he was only nominally an officer and was not actively involved in the activities resulting in a violation of the PACA.

A dictionary definition of "nominal" is "existing in name only and not in reality." (Webster's II, New Riverside University Dictionary [798] (1984). . . . [N]amed as a corporate officer, [Petitioner] had . . . [some] say in the operation of the company and he had limited authority. [Petitioner] was not involved in the company's day-to-day management except for paying the suppliers when a buyer approved and when there were sufficient funds in the operations account to make a payment. Although [Petitioner] maintained the operations account, and could write checks on that account, [Petitioner] was not entrusted with the company's

cash receipts, general ledger, or its investment and pension accounts. [Petitioner] was not involved in seeking a line of credit . . . [but had] discretion in deciding whether to pay creditors. [Petitioner] signed forms and reports for the corporation . . . [which] had been prepared by the company's accountant and lawyer. . . . I find that his actions as a corporate officer . . . [showed active involvement in the activities of the company resulting in the payment violations and] that he was . . . [more than] the nominal secretary-treasurer of the company.

[Petitioner's] involvement with the company's day-to-day operations was likewise limited. [Petitioner] was well paid[, earning $124,683 in 1994 and $89,000 in 1995,] but [claimed that Petitioner] made no policy or business decisions. [However, Petitioner made] . . . decisions concerning produce purchases, which is the type of activity that could directly lead to a company's violation of the PACA (i.e., making purchases when there were insufficient funds to pay for them). [Petitioner] signed checks to pay suppliers, . . . [had] . . . discretion, and could make a payment . . . if there were sufficient funds in the operations account. There is no evidence that [Petitioner] failed to make any authorized payment when funds were available to [Petitioner] to make payments. [Petitioner] had no control over the company's investment account or other assets, which might have helped pay the creditors. [Petitioner] also had no supervision over the activities of the general manager who ran the company on a day-to-day basis or over those who purchased produce.

[Petitioner] was present at meetings with [Petitioner's] uncle, the general manager, and the company's accountant and lawyer. However, [Petitioner] lacked the clout of a corporate director or shareholder . . . [but could] influence . . . decisions at these meetings. . . . Richard Salins . . . made all the major decisions for the business, including the critical decision to continue buying produce when Richard knew from his accountant's financial statements that the company lacked the money to pay for its purchases, a decision that directly resulted in the company's violation of the PACA. [Petitioner was actively involved, as well, in deciding which creditors would get paid and which creditors would not be paid.]

Considering all these circumstances, . . . [Petitioner] was . . . actively involved in the activities resulting in the violation of the PACA by Sol Salins, Inc.

D. **Findings of Fact**

1. Petitioner, Lawrence D. Salins, was secretary-treasurer of Sol Salins, Inc.

2. Petitioner's duties and responsibilities as secretary-treasurer were significant. . . .

3. Petitioner was . . . [much more than just] nominally an officer of Sol Salins,

Inc.

4. Petitioner was . . . actively involved in the activities resulting in the violation of the PACA by Sol Salins, Inc.

E. Conclusion of Law

Petitioner, Lawrence D. Salins, was . . . responsibly connected with Sol Salins, Inc., [as defined in 7 U.S.C. § 499a(b)(9) (Supp. I 1995)].

IV. ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

A. Background

A review of a *responsibly connected* proceeding necessarily entails an understanding of changes in the PACA. As originally enacted in 1930, section 8 of the PACA empowered the Secretary of Agriculture to suspend or revoke the PACA license of any commission merchant, dealer, or broker who violated section 2 of the PACA, but the Secretary of Agriculture had no authority to impose any employment restrictions on individuals who were responsibly connected with the violator and actively involved in the activities resulting in the violation.[4] Amendments to the PACA in 1934 empowered the Secretary of Agriculture to revoke the PACA license of any commission merchant, dealer, or broker, who, after notice, continued to employ an individual who had been *responsibly connected* with any firm, partnership, association, or corporation whose license had been revoked,[5] and the 1956 amendments to the PACA authorized the

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[4]The Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 8, 46 Stat. 535, provides:

> Sec. 8. Whenever the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, he 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 a flagrant or repeated violation of such provisions, the Secretary may, by order, revoke the license of the offender.

[5]The Act of April 13, 1934, Pub. L. No. 159, ch. 120, § 5, 48 Stat. 586, provides:

> Sec. 5. That a new paragraph lettered (c) and reading as follows is hereby added to section 4 of the Perishable Agricultural Commodities Act, 1930:
>
> "(c) The Secretary may, after thirty days' notice and an opportunity for a hearing,

(continued...)

Secretary of Agriculture to suspend or revoke the PACA license of any commission merchant, dealer, or broker who, after notice, continued to employ an individual who had been *responsibly connected* with any firm, partnership, association, or corporation whose license had been suspended or revoked.[6] However, until 1962, the PACA did not define the term *responsibly connected.* In order to give the term *responsibly connected* "specific meaning" and avoid "possible confusion as to interpretations,"[7] section 1 of the PACA (7 U.S.C. § 499a) was amended by adding a definition of the term *responsibly connected* to read 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

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[5](...continued)
revoke the license of any commission merchant, dealer, or broker, who after the date given in such notice continues to employ in any responsible position any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year prior to the date of such notice. Employment of such individual by a licensee in any responsible position after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond or other satisfactory assurance that its business will be conducted in accordance with the provisions of [the PACA.]"

[6]The Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 5, 70 Stat. 727, provides:

> Sec. 5. Section 8(b) of [the PACA] (7 U.S.C., sec. 499h(b)) is amended to read as follows:
>
> "(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ in any responsible position any individual whose license has been revoked or is under suspension or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension. Employment of an individual whose license has been revoked or is under suspension for failure to pay a reparation award or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension for failure to pay a reparation award after one year following the revocation or suspension of any such license may be permitted by the Secretary upon the filing by the employing licensee of a bond, of such nature and amount as may be determined by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of [the PACA.]"

[7]H.R. Rep. No. 87-1546, at 4 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2751; S. Rep. No. 87-750, at 2 (1961).

> outstanding stock of a corporation or association[.]

Act of October 1, 1962, Pub. L. No. 87-725, § 2, 76 Stat. 673.

The applicable House of Representatives Report and Senate Report each state that the definition of the term *responsibly connected* "[i]mprove[s] and clarif[ies] provisions dealing with the eligibility for license, or for employment by licensees, of persons guilty of specified acts and persons affiliated with them[.]"[8] Further, both reports state that:

> Responsible connection by the applicant (or one of the applicant's officers, directors, or members, or a holder of more than 10 percent of the applicant's stock) with a person guilty of the specified conduct would require a refusal of a license, without showing (as is now required) that the applicant, officer, director, or member was responsible in whole or in part for such conduct.

H.R. Rep. No. 87-1546, at 6 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2753; S. Rep. No. 87-750, at 5 (1961).

Until 1975, an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was considered *per se* responsibly connected and subject to the licensing and employment restrictions in the PACA.

The *per se* standard was first enunciated in *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966). The court held that the 1962 amendment to the PACA adding a definition of the term *responsibly connected* was intended to establish a *per se* exclusionary standard whereby an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation would be subject to the Secretary of Agriculture's authority to prohibit employment under section 8(b) of the PACA (7 U.S.C. § 499h(b)) and that no defense, such as lack of real authority within the corporation or partnership, would be available to individuals who fell within the definition of the term *responsibly connected.*

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[8]H.R. Rep. No. 87-1546, at 2 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2750; S. Rep. No. 87-750, at 1 (1961).

This *per se* exclusionary rule was followed in other circuits.[9] However, in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), a court determined, for the first time, that the presumption that an individual who was a partner in a partnership, or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was responsibly connected is a rebuttable presumption. The court found that an individual who held the title of vice president was not *responsibly connected* to a corporation that had committed flagrant and repeated violations of the PACA because he neither participated in the management of the corporation nor had the power to participate.

The United States Court of Appeals for the District of Columbia Circuit continued to adhere to the doctrine that a partner in a partnership, or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation could rebut the presumption that he or she was *responsibly connected* as defined in section 1 of the PACA (7 U.S.C. § 499a).[10]

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[9]*See Conforti v. United States*, 74 F.3d 838, 841 (8th Cir.) (stating that the court applies a *per se* rule to the definition of the term *responsibly connected* in section 1 of the PACA; actual responsibilities or interests are irrelevant to the question of responsible connection to a PACA violator), *cert. denied*, 117 S. Ct. 49 (1996); *Hawkins v. Agricultural Marketing Service*, 10 F.3d 1125, 1130 (5th Cir. 1993) (holding that the definition of *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) commands the application of a *per se* rule); *Faour v. United States Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) (holding that if a person is an officer, director, or holds over 10 per centum of the outstanding stock of a corporation that has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b, that person is considered *responsibly connected* and subject to sanctions under the PACA; PACA does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected); *Pupillo v. United States*, 755 F.2d 638, 644 (8th Cir. 1985) (stating that a *per se* analysis of the definition of *responsibly connected* in section 1 of the PACA accomplishes Congress' objective of providing a clear definition of *responsibly connected*, and that Congress did not intend to require proof of personal fault to penalize a person associated with a PACA violator). *See also Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.) (citing with approval the *per se* approach taken by the court in *Birkenfield*), *cert. denied*, 389 U.S. 835 (1967).

[10]*See Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997) (stating that this court has held that the presumption that an officer, director, or holder of more than 10 per centum of the stock of a corporation is responsibly connected is a rebuttable presumption); *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating that this circuit has consistently read 7 U.S.C. § 499a and 499h(b) as establishing only a rebuttable presumption that an officer, director, or major shareholder of a PACA violator is responsibly connected with the violator; and that a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder if: (1) the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality; or (2) the petitioner proves that at the time of the violations he was only a nominal officer, director, or shareholder); *Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating that, as construed by this court, characterization as *responsibly connected*, as defined in the PACA, is

(continued...)

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. Specifically, section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter 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.

The applicable House of Representatives Report states that purpose of the 1995 amendment to the definition of *responsibly connected* is "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation."[11] The House Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or

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[10](...continued)
rebuttable, not absolute); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating that the definition of the term *responsibly connected* in section 1 of the PACA establishes only a rebuttable presumption that an officer, director, or large shareholder of a PACA violator is responsibly connected); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1413 (D.C. Cir. 1986) (stating that PACA's provisions on responsible connection establish, not an incontrovertible rule, but rather a rebuttable presumption); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (stating that the court had established in *Quinn* that being a director, officer, or 10 percent stockholder is only prima facie evidence that one is *responsibly connected* to a company that has violated the PACA and that a finding of liability under 7 U.S.C. § 499h must be premised upon personal fault or failure to counteract or obviate the fault of others).

[11]H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

shareholders and that they were uninvolved in the violation."[12]

In the proceeding, *sub judice*, Petitioner does not deny that he was the secretary-treasurer of Sol Salins, Inc., at all times material to this proceeding. Therefore, as an officer of Sol Salins, Inc., Petitioner falls within the statutory categories of responsibly connected. Thus, Petitioner is deemed to be responsibly connected, unless Petitioner demonstrates by a preponderance of the evidence *both* that Petitioner was not actively involved in the activities resulting in a violation of the PACA *and* either that Petitioner was *only nominally an officer* of Sol Salins, Inc., or that Petitioner was *not an owner* of Sol Salins Inc., which was the alter ego of its owners.

The ALJ held that Petitioner carried his burden of proof by the requisite preponderance of the evidence; that Petitioner showed that Petitioner was not actively involved in the activities which caused the violations; that Petitioner was only nominally an officer; that Petitioner was not responsibly connected to Sol Salins, Inc., and that the Chief of the PACA Branch's determination that Petitioner was responsibly connected is reversed.

B. Respondent's Appeal Petition

Respondent appeals the ALJ's reversal of Respondent's determination that Petitioner was responsibly connected to Sol Salins, Inc. Respondent's argument is correct that section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) provides that "responsibly connected" means an officer of the corporation, and it is uncontested that Petitioner was an officer of Sol Salins, Inc., serving as both secretary and treasurer, during the entire violations period of September 1995 through March 1996 (Respondent's Appeal Petition at 8-9). I agree with Respondent's argument that the ALJ erroneously found that Petitioner rebutted the statutory presumption that Petitioner was responsibly connected, as explained below.

C. A Two-Prong Test for Rebutting the Presumption of *Responsibly Connected* Under the PACA

In framing the appeal, Respondent is correct that there is a two-prong test for rebutting the presumption when a person meets the definition of *responsibly*

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[12]H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

connected in the first part of the statute: the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners (Respondent's Appeal Petition at 7). The record shows that Petitioner was not an owner of Sol Salins, Inc., but there is no evidence that Sol Salins, Inc., was the alter ego of its owners. Therefore, Petitioner would have to show by a preponderance of the evidence two things: (1) Petitioner was not actively involved in the activities at Sol Salins, Inc., which resulted in a violation of the PACA, and (2) even if an officer of Sol Salins, Inc., Petitioner was an officer in name only.

1. First Prong of the Test: Petitioner Was Actively Involved in Activities Resulting in PACA Violations

Regarding the first prong of the test, Respondent makes two arguments for the proposition that the ALJ erred by ignoring the substantial evidence in the record that Petitioner was actively involved in the activities resulting in the PACA violations of Sol Salins, Inc.

a. Petitioner's Role in Corporate Decision Making

First, Respondent argues that the ALJ erred by discounting Petitioner's role in corporate decision making (Respondent's Appeal Petition at 10-11). Respondent argues that the ALJ erroneously found that Petitioner was not actively involved, because the ALJ concluded that purchasing produce when there are insufficient funds directly leads to PACA payment violations, but the ALJ found that Petitioner made no decisions concerning produce purchases. The ALJ is correct that purchasing produce when there are insufficient funds leads directly to PACA payment violations, but I agree with Respondent that the ALJ's conclusion erroneously assumes that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of PACA. The ALJ gives no authority for this assumption and I do not believe such a conclusion can be supported.

On the contrary, I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce. Petitioner attended weekly staff management meetings, in which meetings Petitioner participated in the formal corporate decision making process as an officer of the company. Thus, corporate decisions were well known to Petitioner and Petitioner could affect those decisions. Moreover, I agree with Respondent that Petitioner issued large numbers of checks each month, in some instances choosing which past due bills would be paid to selected suppliers in order to keep produce coming. Respondent argues that Petitioner's admitted activities show that Petitioner was actively involved in the activities, which resulted in the violations of PACA by Sol Salins, Inc. I agree.

Next, Respondent argues (Respondent's Appeal at 12) that the ALJ erroneously relied on the proposition that Petitioner was not actively involved because Petitioner "made no policy or business decisions" (Initial Decision and Order at 6). Such language is another way of saying that to be actively involved, the activity must be on the managerial level. I agree with Respondent's argument, which is supported by the *Michael Norinsberg* decision, in which I specifically addressed and disposed of this "managerial level" argument, as follows:

> The ALJ appears to have based his decision that Petitioner was not actively involved in activities that resulted in The Norinsberg Corporation's violations of the PACA on the fact that Petitioner did not actively participate at a managerial level in decision making activities that resulted in The Norinsberg Corporation's violations of the PACA as follows:
>
> > As to the criterion as to whether or not Petitioner was "actively involved in the activities resulting in the violation" of the PACA, what is contemplated is an active participation at a managerial level in decision making activities that resulted in the violation. The weight of the evidence shows that Petitioner did not serve in such a role in connection with his duties as an employee. The evidence is that he did what he was directed to do. His father was the decision-making authority in the business and to a lesser extent the corporation's comptroller and sales manager, who were paid more than twice what Petitioner was paid, exercised authority. Petitioner appeared to sign checks or sign his name only when he was told to do such. Therefore, I conclude that Michael Norinsberg's activity

> in the business was limited to following orders of others and he was not an active participant in the corporation's violations of the PACA. [Citation omitted.]
>
> I disagree with the ALJ's conclusion that an individual is not actively involved in activities resulting in a violation of the PACA unless that individual actively participated at a managerial level in decision making activities that resulted in the violation. I find nothing in section 12(a) of the PACAA-1995 or the applicable legislative history to indicate that Congress intended to limit active involvement in activities resulting in a violation of the PACA to "active participation at a managerial level in decision making activities that resulted in the violation." [Citation omitted.]

In re Michael Norinsberg, 56 Agric. Dec. 1840, 1857-58 (1997).

In this case, *sub judice*, Petitioner was actively involved in activities resulting in violations of the PACA on both the managerial level and a working level.

Finally, Respondent argues that the ALJ erred in concluding that Petitioner's long-term and frequent participation in Sol Salins, Inc.'s formal decision making process was insufficient to qualify as active involvement (Respondent's Appeal Petition at 13). As *Michael Norinsberg, supra*, makes clear, it is not necessary under the PACA for a petitioner to participate actively in managerial level decision making activities for that petitioner to qualify as being actively involved in activities resulting in the violations. Nevertheless, I agree with Respondent that Petitioner's long-term, substantial involvement in weekly management meetings, where Petitioner admitted to commenting on policy, offering suggestions, recommending courses of action, and providing financial information to assist in the decision making process (Tr. 29-30, 76, 96-97) proves Petitioner's active involvement in activities resulting in violations of the PACA on a managerial level.

b. Petitioner's Role in Payments Made on Behalf of Sol Salins, Inc.

Second, Respondent argues that the ALJ erroneously concluded that Petitioner was not actively involved in the activities resulting in the violations of the PACA because Petitioner could make a payment only when approved by a Sol Salins, Inc., buyer, and even then only if there were sufficient funds in the account (Respondent's Appeal Petition at 14). I agree with Respondent, both that

Petitioner was not constrained by the decisions of Sol Salins, Inc.'s produce buyers, and that the check-writing function is a very important indicator of responsibly connected status.

The ALJ's conclusion that Petitioner's freedom to write checks on the corporate account was dependent on the approval of the company's buyers is not supported in the record. For example, Petitioner testified that some suppliers would not send any more loads of produce until paid, and Petitioner would "accommodate that to be able to receive merchandise." (Tr. 40.) Petitioner also testified that he discussed payment with suppliers, but that Petitioner would not call it his "discretion" when he decided whom to pay first, but rather, Petitioner "would call it a cash flow problem." (Tr. 50.) Finally, Petitioner testified that "I had a number of people that we owed and the decision was based on making sure we could still get product, and the buyers would tell me who we needed to pay." (Tr. 59.) Petitioner is engaging in semantics; Petitioner's testimony is conclusive that Petitioner would choose which produce sellers to pay in order to keep Sol Salins, Inc.'s business going. Petitioner was therefore actively involved in Sol Salins, Inc.'s failure to pay produce sellers in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Next, Respondent argues that it is well settled that the act of writing checks is a very important determinant of responsible connection. Respondent quotes from the *Rodgers* case for "[t]he fact that a person signs corporate checks should be considered one of the strongest indications of that person's close involvement in the financial affairs of the corporation." *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1944-45 (1997). Also, Respondent cites cases decided prior to the PACAA-1995 for the same point (Respondent's Appeal at 15-16). I agree with Respondent that writing checks for the corporation is a salient fact in determining responsibly connected status.

I also agree with Respondent's other points in support of responsible connection (Respondent's Appeal Petition at 16), including that Petitioner was the only signatory of the operations account at Sol Salins, Inc., during the entire period in which the violations occurred (Tr. 91-92); that Petitioner signed every corporate check during the pertinent period (Tr. 41, 54-55); and that Petitioner testified that Petitioner signed hundreds of checks each month (Tr. 92-93). Further, Respondent is correct that it strains credulity for Petitioner to portray himself as puppet-like, always under orders from others, when the record shows a 16-year career of active participation in the financial affairs of Sol Salins, Inc., including signing checks for payroll and important corporate documents, and having access to accounts payable, accounts receivable, invoices, and monthly financial statements (Tr. 53-54). Petitioner's activities made Petitioner fully

cognizant of Sol Salins, Inc.'s precarious financial situation, but Petitioner's active involvement facilitated and perpetuated the continued late payment and failure to pay violations. Petitioner testified that with his inside knowledge of company financial statements he knew in the early 1990s that the company was failing (Tr. 54, 76, 96-97).

Based upon this record, there is little question but that Petitioner was actively involved in the activities resulting in the violations by Sol Salins, Inc., and I so find. Petitioner fails the first prong of the test, active involvement in the activities resulting in Sol Salins, Inc.'s violations of the PACA. Therefore, Petitioner should not have been considered by the ALJ to have rebutted the statutory presumption of responsible connection. Nevertheless, I will address the second prong of the test for being responsibly connected.

2. Second Prong of the Test: Petitioner Was Not a Nominal Corporate Officer of Sol Salins, Inc.

The second prong of the test in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) only operates when Petitioner meets the requirements of the first prong of the test, which I find Petitioner did not actually meet. Nevertheless, since a reviewing court may disagree with me, I will assume for purposes of review that Petitioner met this requirement.[13] Respondent cites pre-PACAA-1995 cases in support of Respondent's definition of the term "nominal," where certain individuals and their situations were examined. These cases are illustrative and helpful, but they pre-date the 1995 change in the law. Respondent makes seven arguments to support the proposition that Petitioner was not a nominal officer of Sol Salins, Inc.

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[13]However, this review's analysis need only address the first part of the second prong of the test (whether Petitioner was a nominal officer of Sol Salins, Inc.), because there is no record evidence that Sol Salins, Inc., was the alter ego of its owners, as required by the second part of the second prong of the test (whether Petitioner was not an owner of a violating licensee that was the alter ego of its owners). The record is conclusive that Petitioner was not an owner of Sol Salins, Inc., but non-owner status would only help Petitioner fulfill the second part of the second prong of the test if the context is that Sol Salins, Inc., was the alter ego of its owners. But, Petitioner did not even argue that Sol Salins, Inc., was the alter ego of its owners, except to state that Petitioner's uncle, Richard Salins, was president and controlled the company (Tr. 8). Respondent addressed this inchoate issue by arguing that Richard Salins' non-majority, 40 percent share did not allow control (RX 1 at 1); that former employees John Edward and Petitioner established that Richard Salins was rarely at Sol Salins, Inc. (Tr. 51, 56-57, 114-15); that Petitioner and General Manager Jerry Cristiano were very frustrated that Richard Salins was not involved in the day-to-day operations (Tr. 61); and that PACA Branch investigator, Basil Coale, testified that Petitioner stated that Petitioner and Jerald Cristiano were running the company (Tr. 133). Therefore, the second part of the second prong of the test is not available to Petitioner. (Respondent's Brief at 26-27.)

a. Petitioner's Access to Corporate Records

Respondent argues that it was error for the ALJ not to consider Petitioner's access to important corporate records in determining whether Petitioner was a nominal officer of Sol Salins, Inc. (Respondent's Appeal Petition at 19). Further, Respondent argues that the record shows that Petitioner received detailed monthly financial statements (Tr. 54); that Petitioner's check-writing authority afforded Petitioner full and complete access to accounts receivable, accounts payable, invoices, and related corporate documents (Tr. 52-53); and that Petitioner was able to locate and provide all requested pertinent documents to agency investigator, Basil Coale, during the 4-day investigation of Sol Salins, Inc., beginning March 18, 1996 (Tr. 131-33). I agree with Respondent that Petitioner's degree of access, use, and familiarity with corporate records indicate that Petitioner was not a nominal officer of Sol Salins, Inc.

b. Petitioner's Knowledge of Sol Salins, Inc.'s Financial Troubles

Respondent argues that relevant "nominal officer" cases decided before the 1995 amendments to the PACA found it significant whether the individual was aware of the company's wrongdoing. Petitioner admitted that Petitioner was aware of Sol Salins, Inc.'s financial woes in the early 1990s (Tr. 54); that Petitioner discussed all aspects of the company's failing health, including unpaid creditors, at the weekly management meetings (Tr. 76, 96); and that Petitioner got financial statements from Sol Salins, Inc.'s certified public accountant (Tr. 54, 102). I agree that the ALJ should have considered the sophisticated level of information provided to Petitioner in the ALJ's determination of Petitioner's nominal status. I conclude that Petitioner's level of knowledge about Sol Salins, Inc.'s financial woes and subsequent PACA payment violations are not consistent with Petitioner being only a nominal officer of Sol Salins, Inc.

c. Petitioner's Relations With Unpaid Creditors

In determining nominal status, Respondent argues that it is significant that unpaid creditors would try to contact the "nominal" officer of a company for payment. Although pre-PACAA-1995 cases considered an officer's relationship with unpaid creditors a factor in determining nominal status, Respondent argues that the ALJ erroneously failed to consider in the Initial Decision and Order Petitioner's relationship with creditors. Respondent argues that Petitioner was the last remaining family-name member of this generations-old company, which

meant unpaid produce creditors looked to Petitioner for payment (Tr. 107-08); that a former employee of Sol Salins, Inc., testified that he witnessed a phone conversation during the pertinent violations period, where an unpaid creditor demanded Petitioner pay and Petitioner promised to send a check (Tr. 116-17); that agency investigator, Basil Coale, heard a recorded phone message left for Petitioner from an angry unpaid creditor specifically asking Petitioner for payment (Tr. 134-35); and that, as Petitioner was the last Salins in the Salins' family business on a day-to-day basis, Petitioner had a de facto responsibility to work with produce sellers on resolving unpaid bills (Tr. 59-60, 107-08, 116-17). I agree with Respondent that Petitioner's relationship with unpaid creditors, as shown in the record, is inconsistent with Petitioner being only a nominal officer. Therefore, Respondent is correct that the ALJ erroneously failed to consider the level to which Petitioner was responsible to produce creditors in determining Petitioner's nominal status.

d. Petitioner's Active Participation in Corporate Decision Making

I have already addressed Petitioner's active participation in corporate decision making in the section on the first prong of the statutory test in this Decision and Order, *supra*, where I conclude that Petitioner was involved in both managerial and working level decision making. I agree with Respondent that the ALJ erred by concluding that Petitioner could not influence corporate decisions unless Petitioner was a director or shareholder. Petitioner's level of active participation shows that Petitioner was not merely a nominal officer of Sol Salins, Inc.

e. Petitioner's Check-Writing Responsibilities

Respondent argues that the ALJ erred by diminishing the significance of Petitioner's "extraordinary check writing responsibilities" while emphasizing other responsibilities not Petitioner's (Respondent's Appeal at 22-23). Respondent makes the same arguments with which I agreed in the analysis of Petitioner's check writing in the first prong of the statutory test in this Decision and Order, *supra*, and there is no purpose to be served in doing the analysis twice. I find that Petitioner's check-writing responsibilities vastly exceed anything an officer might do and still be considered an officer in name only. In fact, based upon this record, Petitioner could be considered the only indispensable officer at Sol Salins, Inc., at the time pertinent to this case.

f. Petitioner's Responsibility for Signing Corporate Documents

Respondent argues that the ALJ should have placed more weight on the fact that Petitioner signed corporate documents for Sol Salins, Inc., rather than the ALJ ascribing the importance to the lawyer or accountant who prepared the corporate documents for Petitioner's signature, in Petitioner's capacity as either treasurer or secretary of the corporation (Respondent's Appeal at 24-25). I agree with Respondent that the documents signed by Petitioner go far beyond anything a nominal officer would sign, and include PACA licenses, answers to reparations complaints, State wage reports, State tax withholding reports, and State corporate annual reports (Respondent's Appeal at 25).

g. Petitioner's Salary

Respondent argues that Petitioner's salary belies the Petitioner's claim that Petitioner was only a nominal officer of Sol Salins, Inc. (Respondent's Appeal at 25). Petitioner was paid $124,683 in compensation for 1994, which was the most anyone was paid that year at Sol Salins, Inc. (RX 13 at 3; Tr. 94-95). Petitioner testified that this amount consisted of a base annual salary of $89,000, plus a week's vacation pay taken in cash, and a 1993 bonus paid in 1994. If 52 weeks of the year is divided into $89,000, a week's pay is about $1,710. Since Petitioner was paid almost $125,000 in 1994, that means Petitioner's 1993 bonus was over $33,000. Petitioner was paid $89,000 in 1995.

I find it not credible that a produce clerk, as Petitioner describes Petitioner's job, could command a salary of $89,000. Moreover, I am incredulous that a clerk would receive almost $125,000 in salary, bonuses, and vacation pay to become the highest paid person in the company. Petitioner was neither an owner nor a shareholder of Sol Salins, Inc.; therefore, there were no dividends or other payouts to Petitioner to explain this high compensation. As for "bonuses" as Petitioner's explanation for the high salary, Petitioner testified that Petitioner knew that the company was in financial trouble in the early 1990s, but Petitioner does not explain why Petitioner was getting a bonus when the company was in financial trouble. I conclude that a reasonable explanation for Petitioner's bonus is that Petitioner was much more than a nominal officer, and in fact had become over the years almost indispensable to Sol Salins, Inc.

Respondent has shown that Petitioner was much more than a nominal officer of Sol Salins, Inc., and, as explained in footnote 13, *supra*, the second part of the second prong of the test is not available to Petitioner because, even though Petitioner was not an owner of Sol Salins, Inc., there is no evidence that Sol

Salins, Inc., was the alter ego of its owners.

D. Petitioner's Response to Respondent's Appeal Petition

Petitioner urges that the ALJ's decision be affirmed, and argues that there is no evidence to suggest that Petitioner was actively involved in the activities resulting in Sol Salins, Inc.'s PACA violations; that record testimony states that Petitioner was only named an officer of Sol Salins, Inc., for the convenience of the owners; that Petitioner was never involved in buying or selling produce; that the ALJ noted that two new buyers and a general manager were hired to run day-to-day operations under the direction of Richard Salins; that Respondent's allegation that Petitioner's attendance at weekly management meetings was active participation in the corporate decision making, which resulted in payment violations, is pure speculation, without an evidentiary basis; that Petitioner's involvement in the weekly staff meetings was only to bring information; that Petitioner's job was under the supervision of Richard Salins, who gave authority over company operations to the buyers; that Petitioner's job did not change when family members, Lenny and Lee Salins, were replaced as buyers by Chris Horner and Rick Thomas, and Jerry Cristiano was hired to run Sol Salins, Inc., under Richard Salins; that Respondent is wrong when Respondent claims that Petitioner knowingly delayed payment to some unpaid creditors in order to place new orders that the company would not be able to pay for when due; that Respondent fails to recognize that Petitioner had no control over payments, because the buyers, under the supervision of Richard Salins, directed which payments were to be made, if there were funds available; that Petitioner believed that all creditors would be paid and all outstanding debt paid, either from a management-promised new line of credit to help cash flow or from an over-funded company pension plan Petitioner believed existed; that the pension plan was handled by company attorney, Howard Silberberg, but Petitioner was not a trustee of that plan and had no information that Petitioner's beliefs were not true; that Respondent's statements that Petitioner perpetuated the company's late payments and failed to take action to make the payments suggests that Petitioner get personal loans to solve the company's problems; that Petitioner's job, however, was done when Petitioner provided financial information to the owners; that Petitioner had neither control over company assets nor authority to negotiate with lending institutions; that the owners had full knowledge of the company's financial situation; and that the facts of this case show that the situation was totally out of Petitioner's control, which means that the ALJ's decision that Petitioner was not responsibly connected is correct and is the only decision that can be made on the facts of this case

(Response to Respondent's Appeal Petition).

E. Judicial Officer's Conclusions

I have reviewed the entire record in this proceeding, and I find that the ALJ erroneously found that Petitioner rebutted the presumption that Petitioner is responsibly connected. Petitioner freely admitted to being an officer of the violating licensee, thus, Petitioner is statutorily deemed to be responsibly connected (7 U.S.C. § 499a(b)(9) (Supp. I 1995)). As pertinent here, the statute has a two-prong test: (1) a petitioner must show that, as an officer of the violating licensee, the petitioner was not actively involved in the activities resulting in the licensee's violations, *and* (2) that petitioner was only a nominal officer of the violating licensee or not an owner of the violating licensee, which was the alter ego of its owners. I find that Petitioner has not met the first prong of the statutory test because Petitioner has not demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in Sol Salins, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). In fact, as discussed in this Decision and Order, *supra*, the evidence clearly establishes that Petitioner was actively involved in the activities resulting in Sol Salins, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These findings alone are sufficient to conclude that Petitioner was responsibly connected with Sol Salins, Inc. *See In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1850 (1997). Petitioner at all times material to this proceeding was responsibly connected with Sol Salins, Inc., within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)).

Petitioner fails the first prong of the statutory test. The statute is in the conjunctive, therefore, the second-prong issue is moot. However, to assist in possible court review, I address the issue of whether Petitioner was only nominally an officer of Sol Salins, Inc. Petitioner admits that he was an officer of Sol Salins, Inc., but argues that he was only nominal. However, as discussed in this Decision and Order, *supra*, Petitioner was actively involved in activities much beyond anything a nominal officer, an officer in name only, would be doing. Therefore, I disagree with and reverse the ALJ's finding that Petitioner proved by a preponderance of the evidence that he was only nominally an officer of Sol Salins, Inc., because the evidence clearly establishes that Petitioner was much more than a nominal officer of Sol Salins, Inc.

Petitioner would also have failed the second part of the two-prong test if Petitioner had argued it, even though Petitioner is not an owner of Sol Salins, Inc. (See note 13, *supra*).

Petitioner having thus failed by a preponderance of the evidence to rebut the presumption in 7 U.S.C. § 499a(b)(9), as an officer of a violating licensee, Petitioner is presumed to be responsibly connected to the violating licensee.

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

V. ORDER

The 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 Sol Salins, Inc., during the period of time that Sol Salins, Inc., violated the PACA, is affirmed. This Order shall become effective 61 days after service of this Order on Petitioner.

In re: COLONIAL PRODUCE ENTERPRISES, INC.
PACA Docket No. D-95-0534.
Decision and Order filed March 30, 1998.

Suspension of license — Civil penalties — Employment restrictions — Responsibly connected — Failure to pay.

The Judicial Officer affirmed Chief Judge Palmer's (Chief ALJ) decision assessing Respondent a civil penalty of $15,000 or in lieu thereof imposing a 45-day suspension of Respondent's PACA license. The record supports the conclusion that Respondent willfully violated 7 U.S.C. § 499h(b) by neither terminating, nor posting a USDA-approved surety bond for, the employment of an individual responsibly connected to a corporation which had repeatedly and flagrantly violated failure to pay requirements (7 U.S.C. § 499b(4)) within the 30-day time period given by certified letter dated May 5, 1994. Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. I 1995)) authorizes the assessment of a civil penalty in lieu of a license suspension or license revocation. When determining the amount of the civil penalty, due consideration must be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Complainant's sole argument on appeal is that any alternative civil penalty in lieu of a 45-day suspension is not appropriate. Complainant is not persuasive that the Chief ALJ did not consider the factors under section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995)).

JoAnn Waterfield, Esq., for Complainant.
Jerome Cooper, Esq., and Robert E. Coleman, Esq., of Lynbrook, New York, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary 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 August 17, 1995.

The Complaint alleges that Colonial Produce Enterprises, Inc. [hereinafter Respondent], willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) in that Respondent was notified by certified letter dated May 5, 1994, served May 10, 1994, that 30 days after service, Respondent must either terminate Mr. Alvin Schepps' employment or post a USDA approved surety bond, because Mr. Schepps was subject to PACA employment restrictions for being responsibly connected with North American Produce Corporation, which had repeatedly and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); but, Respondent continued Mr. Alvin Schepps' employment beyond June 9, 1994, without posting a USDA approved surety bond (Compl. at 3-4).

On September 20, 1995, Respondent filed an Answer denying that Respondent willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)). Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing conducted in New York, New York, on May 21-22, 1996, and Miami, Florida, on November 18-19, 1996. JoAnn Waterfield, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant, and Jerome Cooper, Esq., and Robert E. Coleman, Esq., of Lynbrook, New York, represented Respondent (except Mr. Coleman did not appear at the segment of the hearing conducted in Miami, Florida).

On April 25, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order [hereinafter Complainant's Brief]; on June 24, 1997, Respondent filed Respondent's Proposed Findings of Fact, Conclusions and Order [hereinafter Respondent's Brief]; and on July 3, 1997, Complainant filed Complainant's Reply Brief.

The Chief ALJ filed a Decision and Order [hereinafter Initial Decision and Order] on July 8, 1997, in which the Chief ALJ concluded that Respondent willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)), and assessed Respondent a civil penalty of $15,000 in lieu of suspending Respondent's PACA license for 45 days.

On September 30, 1997, Complainant 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 December 22, 1997, Respondent filed Respondent's Reply Brief, and on December 24, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), the Chief ALJ's Initial Decision and Order is adopted as the final Decision and Order in this proceeding. Changes in the Chief ALJ's Initial Decision and Order are shown by brackets, deletions shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the conclusions of the Chief ALJ.

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 May 21-22, 1996, is in two volumes, but the pages are consecutively numbered 1 through 413. The portion of the transcript that relates to that segment of the hearing conducted on November 18-19, 1996, is in two volumes, but the pages are consecutively numbered 1 through 235. Therefore, references in this Decision and Order to "Tr. I" are to the volumes of the transcript that relate to the May 21-22, 1996, segment of the hearing and references in this Decision and Order to "Tr. II" are to the volumes of the transcript that relate to the November 18-19, 1996, segment of the hearing.

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

. . . .

The findings proposed by the parties have been either adopted or incorporated as part of the findings that follow, or rejected as not being in accord with the relevant evidence. Upon considering the record evidence and the arguments of the parties, an Order is entered assessing a civil penalty of $15,000

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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)).

in lieu of a 45-day suspension for Respondent's willful violation of the PACA.

Pertinent Statutory Provisions

7 U.S.C.

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(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.

. . . .

§ 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.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

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--

. . . .

(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 . . . .

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 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.

. . . .

(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. §§ 499a(b)(10), 499h(a), (b)(2) (1994); 7 U.S.C. § 499h(e) (Supp. I 1995).

. . . Findings of Fact

1. Respondent, Colonial Produce Enterprises, Inc., is a corporation whose business and mailing address is 150 Broadhollow Road, Melville, New York 11747 (CX 1 [at 14, 18, CX 15], CX 16 [at 1]).

2. Pursuant to the licensing provisions of the PACA, license number 93105[0] was issued to Respondent on April 2[2], 1993. This license has been renewed annually, is presently in effect, and is subject to renewal on or before April 2[2], 1998 (CX 1, CX 16).

3. [Nicholas A.] Penachio was the original sole officer and director of Colonial Produce Enterprises, Inc. [(CX 1 at 2)], and transferred his ownership of stock and his position as officer and director to Frank Mandera who became the 100% stock owner and sole officer and director of Colonial Produce Enterprises, Inc., [on June 10,] 1993) [(CX 1 at 5, 14, CX 2 at 16-18, CX 14 at 1)].

4. Frank Mandera was not under an employment restriction during the period relevant to this proceeding.

5. Respondent's main operations are conducted in a New York office,

and a small office in Florida is maintained [(CX 1 at 14)] for the use of Frank Mandera or [Joseph] Mirando [(CX 10 at 1, 8)]. The Florida office is also used by Scott Schneider for the transaction of business for Tropical Sensations [(CX 10 at 1)]. Sometimes Alvin Schepps aided Scott Schneider in his business . . . [(Tr. I at 79-82, 193; CX 5 at 8)].

6. Alvin Schepps had been responsibly connected with North American Produce Corporation, which, by a decision and order effective May 11, 1993, was found to have committed repeated and flagrant violations of the PACA for failing to make full and prompt payment for produce. *In re North American Produce Corp.*, 52 Agric. Dec. 804 (1993). For that reason, Alvin Schepps was subject to employment restrictions under the PACA for the period May 11, 1993, to May 11, 1995, wherein he could not be employed, on any basis, by a PACA licensee from May 11, 1993, to May 11, 1994, and could be employed during the period May 11, 1994, to May 11, 1995, only if [the employing PACA licensee furnishes and maintains] a surety bond in [form and] amount [satisfactory to the Secretary] (7 U.S.C. § 499h(b)).

7. On May 10, 1994, Respondent received a certified letter[, article number P 512 602 021,] from USDA dated May 5, 1994, advising . . . of Alvin Schepps' responsible connection with North American Produce Corporation, and the fact that he was barred for that reason from employment by Respondent unless Respondent posted a surety bond in an amount satisfactory to the Secretary (CX 5 [at 1-3]).

8. The . . . period relevant to this proceeding is June 10, 1994, through May 11, 1995, in that the notice by USDA to Respondent that a surety bond would be required for Mr. Schepps to be employed or affiliated with Respondent, became effective on June 10, 1994, 30 days after [Respondent received the notice], and ended on May 11, 1995, when the statutory restriction on Mr. Schepps' employment terminated.

9. On June 2, 1994, Respondent advised USDA that it did not presently employ Mr. Schepps, but that it was considering hiring him as a part-time office clerk in its Florida office, at his residence, at a salary of $7,000 per year (CX 5 [at 4, 6, 8]).

10. USDA also notified Respondent [by certified letter dated May 13, 1993, article number P 512 601 760,] that a surety bond was needed for its employment of [Joseph] Mirando [(CX 2 at 12-14)]. In response to the notice, Respondent obtained a surety bond in the amount of $175,000 for [Joseph] Mirando, and his employment was approved by USDA [(CX 2 at 37)].

11. Subsequent to the May 5, 1994, letter, USDA sent Respondent five

[certified] letters dated June 6, 1994[, article number P 512 601 573]; June 9, 1994[, article number P 512 597 595]; July 6, 1994[, article number P 512 597 613]; August 17, 1994[, article number P 512 602 116]; and September 21, 1994[, article number P 512 597 694], and engaged in a telephone conversation with Respondent's president on June 2, 1994, [which is memorialized in the June 6, 1994, letter. In each of these letters and during the telephone conversation,] the bonding obligation and the possible sanctions if Respondent employed Mr. Schepps [without a bond were reiterated] (CX 5 [at 9-12, 13-15, 17-19, 20-22, 23, 27]). Respondent was advised that a $100,000 surety bond was required (CX 5 [at 17]).

12. Mr. Schepps was employed by Respondent subsequent to June 10, 1994, during the period of the restrictions on his employment under the PACA, and the record evidence establishes that he maintained an affiliation with the business operations of Respondent from June 10, 1994, through November 1994.

Conclusions

1. Respondent, Colonial Produce Enterprises, Inc., willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) by failing to [furnish and maintain] a $100,000 surety bond for Alvin Schepps, who was employed by, and affiliated with, Respondent during the period June 10, 1994, through November 1994, after Respondent had been given notice that Mr. Schepps could not be employed [by] or affiliated with [Respondent] during that period unless an approved surety bond was [furnished and maintained].

2. A civil penalty of $15,000 in lieu of a 45-day suspension is the appropriate sanction to be imposed on Respondent for its willful violation[].

Discussion

In a letter dated May 5, 1994, Respondent was given official notice that [Respondent] could not continue to employ Alvin Schepps after 30 days from the letter's receipt unless [Respondent] posted a surety bond in an amount satisfactory to the Secretary (CX 5 at 1, 2). This [restriction on Mr. Schepps' employment by Respondent was imposed] because Mr. Schepps had been responsibly connected with another PACA licensee, North American Produce Corporation, which had been found to have committed repeated and flagrant violations of section 2 of the PACA. The PACA precludes all employment by PACA licensees of responsibly connected persons for one year after such a

finding has been made and only permits employment during the second year after the finding when the PACA licensed employer [furnishes and maintains] a surety bond [in a form and an amount satisfactory to the Secretary] (7 U.S.C. § 499h(b)).

The certified receipt card[, article number P 512 602 021,] for the [May 5, 1994,] letter shows it was received on May 10, 1994 (CX 5 at 3). Accordingly, Respondent's employment of Mr. Schepps without an approved surety bond was prohibited from June 10, 1994 (the thirtieth day after [Respondent received] the letter [dated May 5, 1994]), until May 11, 1995 (the end of two years from the May 11, 1993, finding entered against North American Produce Corporation).

On June 2, 1994, Respondent replied to the [May 5, 1994,] letter, stating that it intended to hire Mr. Schepps as a part-time office clerk at a salary of $7,000 per year (CX 5 at 4, 6). By letter dated June 9, 1994, a USDA official reminded Respondent that its employment of Alvin Schepps or Joseph T. Mirando (for whom Respondent did eventually [furnish] a bond) was prohibited unless bonds were posted and USDA approval was obtained (CX 5 at 13, 14). On August 17, 1994, the same USDA official referenced a letter of July 6, 1994, advising Respondent that a $100,000 surety bond was needed for Mr. Schepps' employment and asked Respondent to state its intentions (CX 5 at 20). The letter, paraphrasing the PACA (7 U.S.C. § 499a(b)(10)), further advised Respondent that:

> The terms "employ" and "employment" are defined under the Act as any affiliation of any person with the business operation of a licensee, with or without compensation, including ownership or self-employment.

CX 5 at 20.

The USDA official wrote to Respondent again on September 21, 1994, and stated that since he had received neither a $100,000 surety bond nor a written reply, it was assumed that Respondent had no intention of posting the bond, and reminded Respondent that it could not employ Mr. Schepps without a surety bond until after May 11, 1995 (CX 5 at 23).

Despite these warnings, information came to USDA's attention that Mr. Schepps was conducting business for Colonial Produce Enterprises, Inc. An investigator, Scott C. Sharer, went to the docks of Port Everglades in Florida. While there, Mr. Sharer obtained sworn statements from Pablo Alejandro,

Provision Master, and Harold Markt, Executive Chef, for Commodore Cruise Lines (CX 8 at 1-3).

In his affidavit of December 3, 1994, Mr. Alejandro states he had been employed as Provision Master for the Crown Jewel and Crown Dynasty ships since November 19, 1994, and that:

> When we receive the products from the "Colonial Productes" [sic], I allway's [sic] deal with Alvin Stheeps [sic] who represents himself as "Colonial Productes" [sic]. If some times problems with the product's [sic] I tell "Alvin St.", face to face, to haven [sic] correct's [sic] the problem with the deliverys [sic] inmedietly [sic]. Alvin is my contact with "Colonial Productes [sic]".

CX 8 at 3.

Executive Chef Harold Markt of the Crown Jewel swore that he had been with Cunard Crown for 7 months prior to his affidavit of December 3, 1994, and during this time:

> . . . I now [sic] Mr. Alvin Schepps as the Dock-side representative from Coloniel [sic] Produce. During the unloading of the produkts [sic], he is the contact person for any complaints regarding quality and quantytiy [sic] problems for the products.
>
> I meet him allmost [sic] every Sathurday [sic] since April 94 at the pier for the quality check as a representative of Coloniel [sic] Produce . . . .

CX 8 at 1.

Mr. Markt gave the address and telephone numbers for Colonial Produce Enterprises, Inc., and stated that he had identified Mr. Schepps from the Photo ID Mr. Sharer had shown him.

Neither Mr. Alejandro nor Mr. Markt testified at the hearing. Therefore, although their affidavits were received under the liberal evidentiary rules applicable in administrative hearings, the fact that Respondent's attorney was unable to cross-examine them . . . limits the evidentiary weight to be given either affidavit standing alone.

However, another witness was interviewed by Mr. Sharer who did testify.

Mr. Angel Louis Sanabria Marties, who regularly delivered ice to ships at the Port Everglades dock, was formerly an employee of North American Produce Corporation, prior to its going into bankruptcy. [Mr. Sanabria] (the shortened, American version of his name) had worked for Alvin Schepps at North American [Produce Corporation]. In [Mr. Sanabria's] affidavit (CX 9), [Mr. Sanabria] identified Mr. Schepps as being present when [Respondent] made deliveries to the ships as [Respondent's] representative correcting problems for ship personnel with the shipments. At the hearing, Mr. Sanabria stated that he observed Mr. Schepps acting as the apparent representative of [Respondent] in 1993 and on two occasions in October 1994 (Tr. II at 119-21, 123-25). Mr. Sanabria also testified that while he was talking to Mr. Sharer on December 3, 1994, Mr. Schepps saw Mr. Sanabria and [Mr. Schepps] turned around in his car and left (Tr. II at 105). Although Mr. Sanabria was unhappy about the fact that he was not fully paid his earned wages when North American Produce Corporation went into bankruptcy, I do not believe his testimony was motivated by revenge. I find [Mr. Sanabria] to be a credible witness whose testimony is reliable and corroborates the affidavits of the cruise line employees. Based on this evidence, I have concluded that despite the need for Mr. Schepps to be bonded after June 10, 1994, Respondent did not obtain the surety bond, but instead allowed Mr. Schepps to continue to be employed and affiliated with Respondent while unbonded for over 5 months, through November 1994.

Respondent's argument that Mr. Schepps was not on [Respondent's] payroll is unavailing. The PACA definition of "employment" is extremely broad and includes any affiliation with a licensee with or without compensation and indicates on its face that the term is to be given a broad reading (7 U.S.C. § 499a(b)(10)). *See Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 165 (D.C. Cir. 1987). *See also Bama Tomato Co. v. United States Dep't of Agric.*, 112 F.3d 1542, 1545 (11th Cir. 1997).

Respondent received multiple letters from USDA advising it of the need to obtain a $100,000 surety bond, if Mr. Schepps was to be employed by or affiliated with [Respondent], but did not do so while employing Mr. Schepps through November 1994, more than 5 months after the surety bond became required. Under these circumstances, Respondent's violation of the PACA must be construed as willful.

Complainant's request that Respondent's license be suspended for 90 days would cause 15 to 20 employees to be out of work for at least 3 months and could result in a permanent shut-down due to irreversible losses of customers and suppliers who would necessarily shift their business elsewhere. . . .

The Departmental decision in *In re Ruma Fruit & Produce Co.*, 56 Agric. Dec. [902 (1997), *dismissed*, No. 97-1192 (D.C. Cir. Sept. 9, 1997)], imposed a $12,400 penalty in lieu of a 45-day license suspension. In assessing that amount, consideration was given to the fact that the licensee employed six full-time employees and two part-time employees to 15 employees; was a small to medium-small business; and had continued to employ a person under PACA employment restriction for 105 days.

In this case, Respondent employs 15 or 20 employees (Tr. II at 170). It has sales of less than 5 million dollars a year, which USDA considers to be "a pretty small firm in the produce industry" (Tr. II at 171). Respondent continued to employ a person under PACA employment restriction for 172 days. The circumstances of the violations in the instant case and *Ruma* are . . . comparable. Both involve small businesses with equivalent numbers of employees. Both concern serious violations arising out of the employment of persons subject to PACA employment restrictions. However, the employment continued in this case after notice was received that either a surety bond should be posted or the employment terminated, for 67 days more than in *Ruma*. Therefore, it is appropriate to [assess] a somewhat higher civil penalty than was [assessed] in *Ruma* in lieu of a 45-day license suspension.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The only issue on appeal is that Complainant disagrees with the Chief ALJ's assessment of a civil penalty in lieu of a 45-day suspension of Respondent's PACA license:

> The only issue appealed herein is the appropriateness of the sanction imposed by Chief Administrative Law Judge Victor W. Palmer. After finding that Respondent unlawfully employed Alvin Schepps despite receiving seven notices from the Agency that such employment was unlawful, Judge Palmer imposed a 45 day license suspension with the provision that respondent be allowed to pay a $15,000.00 civil penalty in lieu of the suspension. The Agency appeals the portion of the sanction that assesses the $15,000.00 civil penalty in lieu of the 45 day license suspension.

Complainant's Appeal at 5-6.

Complainant initially sought revocation of Respondent's PACA license

(Compl. at 5). Subsequently, Complainant reduced the recommended sanction to a 90-day suspension of Respondent's PACA license (Complainant's Brief at 29). On appeal, Complainant now agrees with the Chief ALJ that Respondent deserves only a 45-day suspension, but Complainant disagrees with the Chief ALJ that the Respondent should be allowed to pay a civil penalty in lieu of a 45-day suspension (Complainant's Appeal at 21).

Yet, even though Complainant argues that the $15,000 civil penalty chosen by the Chief ALJ "seriously undervalued the appropriate amount to assess to provide the same deterrent effect that a 45 day license suspension would achieve," Complainant does not seek to substitute an "appropriate amount" for the Chief ALJ's $15,000 civil penalty in lieu of the 45-day suspension (Complainant's Appeal at 13.) On the contrary, Complainant argues that the facts of this case only support a 45-day suspension, but no alternative civil penalty. Therefore, the narrow issue in this appeal is whether the Chief ALJ inappropriately assessed a civil penalty (of any amount) in lieu of a 45-day suspension.

Complainant's first argument is that the Chief ALJ erred by not using a "two-step" process for determining the sanction, as follows:

> Once Judge Palmer determined that respondent violated section 8(b) of the Act by unlawfully employing Mr. Schepps, he was required to undergo a two step process in determining the appropriate sanction. First, applying the Judicial Officer's sanction policy, Judge Palmer had to determine whether the appropriate sanction included an "in lieu of" civil penalty; second, if an "in lieu of" civil penalty was appropriate, Judge Palmer, considering the statute's criteria, had to determine the amount of the civil penalty. Judge Palmer, however, failed to apply the Judicial Officer's sanction policy to determine whether a civil penalty was appropriate and, further, failed to consider all of the statute's criteria to determine the amount of the civil penalty to assess.
>
> In this case, Judge Palmer sanctioned respondent by suspending its license for 45 days with a provision allowing respondent to pay a civil penalty of $15,000.00 in lieu of the license suspension. In sanctioning respondent, Judge Palmer failed to apply the Judicial Officer's sanction policy to determined [sic] whether a civil penalty was appropriate; instead, in order to determine whether a civil penalty was appropriate, Judge Palmer considered some of the Act's criteria for determining the

amount of a civil penalty.

Complainant's Appeal at 7.

I reject Complainant's argument that there is a "required" two-step process for the Chief ALJ's analysis. Complainant cites no authority for Complainant's view of the interrelation between the Department's sanction policy[2] and the PACA's alternative civil penalties under 7 U.S.C. § 499h(e) (Supp. I 1995), and there is no statutory language in 7 U.S.C. § 499h requiring a "two-step" process.

The Initial Decision and Order indicates that the Chief ALJ applied the Department's sanction policy both to determine the type of sanction to be imposed (license revocation, license suspension, or civil penalty) and to determine the amount of the civil penalty to be assessed. Moreover, the Initial Decision and Order reveals that the Chief ALJ considered the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, as required by 7 U.S.C. § 499h(e) (Supp. I 1995), when determining the amount of the civil penalty to be assessed against Respondent.

Further, the Chief ALJ has achieved the purpose of the PACA as amended by the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995] to allow civil penalties in lieu of suspension or revocation. The legislative history of the PACAA-1995, in relevant part, states:

> *Section 11—Imposition of civil penalty in lieu of suspension or revocation*
>
> Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found

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[2]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.

employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 104-207, at 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

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.

. . . .

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. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the 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).

I find that the Chief ALJ has correctly addressed the requirements of the Department's sanction policy and 7 U.S.C. § 499h(e) (Supp. I 1995). Thus, I disagree with Complainant's argument that the Chief ALJ did not examine "relevant circumstances of this particular case and the Agency's recommendation" when determining the type of sanction to be imposed and the amount of the civil penalty to be assessed (Complainant's Appeal at 8).

Complainant also disagrees with the Chief ALJ's conclusion that this case is comparable to *Ruma, supra*, and Complainant makes six arguments that the two cases involve completely different circumstances (Complainant's Appeal at 15-19).

First, and Complainant argues, foremost, is that Complainant in *Ruma* recommended the civil penalty in lieu of a 45-day suspension, based upon the Agricultural Marketing Service's calculation of Ruma Fruit & Produce Co.'s costs for a 45-day suspension; but, in this case, Complainant recommended license suspension without any provision for a civil penalty in lieu of a suspension, because of the intentional nature of the violation, the violation's impact on the industry, and the history of violations by Respondent's affiliates

(Complainant's Appeal at 15-16). The difference, Complainant argues, is that the administrative law judge in *Ruma* considered Complainant's recommendation and gave it weight; whereas, in this case, Complainant did not recommend a civil penalty, and the Chief ALJ gave Complainant's recommendation no weight (Complainant's Appeal at 16).

The Chief ALJ did consider the sanction recommendation of agency officials (Initial Decision and Order at 10-11). 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.[3] The Chief ALJ does not indicate that he gave no weight to the agency'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 weight to the agency's sanction recommendation.

Second, Complainant argues that the employee in the *Ruma* case was restricted in employment because the employee was responsibly connected to an employer which failed to pay a reparations award; whereas, here, Mr. Alvin Schepps was responsibly connected to a previous employer which committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Complainant's sanction witness testified that the Agricultural Marketing Service is less likely to recommend civil penalties in a case in which the employed individual has been responsibly connected with a firm that has committed repeated and flagrant failure to pay violations than it is in a case in which the employed individual has been responsibly connected with a firm that has failed to pay a reparations award. However, neither the Department's sanction policy nor 7 U.S.C. § 499h(e) (Supp. I 1995) make a distinction between the employment of an individual responsibly connected with a firm that failed to pay a reparations award and the employment of an individual responsibly connected with a firm that failed to make full payment promptly in accordance with section 2(4) of the PACA.

Third, Complainant argues that the cases are different because the violation in this proceeding is much more serious than the *Ruma* violation. In *Ruma*,

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[3] *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 573-74 (1998); *appeal dismissed*, No. 98-3296 (8th Cir. Oct. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (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 based the recommended sanction on the good business reputation of, and no other violations committed by, Respondent. Complainant argues that Respondent's violation in this proceeding is much more serious than in *Ruma*, because the long history of PACA violations committed by firms with whom individuals associated with Respondent were involved aggravates the seriousness of Respondent's violation (Complainant's Appeal at 16).

However, the Complaint only alleges that Respondent violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) based on its employment of Mr. Alvin Schepps after June 9, 1994. Respondent's "business reputation" is not relevant to the sanction to be imposed. Further, the history of PACA violations committed by firms with whom individuals (other than Mr. Schepps) affiliated with Respondent were involved is not relevant to the sanction to be imposed in this proceeding, unless those individuals are shown to be affiliated with Respondent in violation of section 8(b) of the PACA (7 U.S.C. § 499h(b)). If Respondent has committed violations of section 8(b) of the PACA (7 U.S.C. § 499h(b)) which were not alleged in the Complaint filed in this proceeding, a new proceeding should be instituted, and if any violations are found in this new proceeding, the violation which I find in this proceeding will be considered when determining the sanction to be imposed at the conclusion of the new proceeding.

Fourth, Complainant argues that "the respondent in *Ruma* terminated its employment of the restricted individual. (Citation omitted.) Respondent, here, failed to take any steps to investigate why the Agency believed it employed Mr. Schepps (citation omitted) or to terminate any affiliation with Mr. Schepps." (Complainant's Appeal at 17.) However, the record establishes that, while Respondent continued to employ Mr. Schepps in violation of section 8(b) of the PACA (7 U.S.C. § 499h(b)) for 172 days, Respondent did terminate employment of Mr. Schepps in November 1994.

Fifth, Complainant argues that in *Ruma* the civil penalty was based on the "articulable calculation" of the "net profits that Ruma would lose if it were to serve the 45 day suspension" and the "calculation was used to replicate the deterrent effect of the suspension if Ruma chose to pay the civil penalty in lieu of serving the suspension." (Complainant's Appeal at 17-18.) Complainant argues that the Chief ALJ did not provide an articulable calculation for the $15,000 civil penalty, in lieu of the 45-day suspension, assessed by the Chief ALJ. I reject this argument because neither the Department's sanction policy nor 7 U.S.C. § 499h(e) (Supp. I 1995) requires an "articulable calculation" for setting the amount of a civil penalty. The civil penalty authorized by PACAA-1995 is discretionary and requires that certain factors be considered when setting

the amount of the civil penalty. I find that the Chief ALJ considered all of the factors he was required to consider to determine the amount of the civil penalty to assess against Respondent.

Sixth, Complainant argues that the Chief ALJ did not give due consideration to the criteria in the statute by only comparing the facts and circumstances of this case with the *Ruma* case; and that as a consequence the Chief ALJ's $15,000 civil penalty in lieu of a 45-day suspension is contrary to the mandate of Congress because the Chief ALJ failed to consider the size of the business, and the seriousness, nature, and the amount of the violation. I reject this argument because it is factually wrong. While it is true that the Chief ALJ compared this case to *Ruma*, it certainly is not error to compare these very similar cases. Further, the record establishes that the Chief ALJ based his decision to assess Respondent a civil penalty of $15,000 in lieu of a 45-day suspension for its violation of section 8(b) of the PACA (7 U.S.C. § 499h(b)) on these factors: 1) the size of the business is a small business of less than 5 million dollars in sales annually; 2) the number of employees is 15 to 20; 3) the seriousness of the violations is that the violations are serious; 4) the nature of the violations is that Respondent continued to employ a person subject to PACA employment restrictions without securing a surety bond after notice of the requirement for a surety bond; and 5) the amount is that the violative employment continued for 172 days. (Initial Decision and Order at 10-11.) The Chief ALJ has fulfilled all requirements for imposing an alternative civil penalty under the Department's sanction policy and under 7 U.S.C. § 499h(e) (Supp. I 1995).

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

Order

Respondent, Colonial Produce Enterprises, Inc., is assessed a civil penalty of $15,000, 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, United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch, Room 2095-South Building, 1400 Independence Avenue, S.W., Washington, DC 20250, within 60 days after the date of 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-95-534. In the event the PACA Branch does not receive a certified check or money order in accordance with this Order, a 45-day suspension of Respondent's PACA license shall take effect, beginning 61 days

after the date of service of this Order on Respondent.

In re: JOSEPH T. KOCOT.
PACA-APP Docket No. 97-0006.
Decision and Order filed August 10, 1998.

Responsibly connected — Active involvement in violations — Officer, director, and shareholder — Alter ego — Nominal — Rebuttable presumption standard.

The Judicial Officer affirmed Judge Baker's (ALJ) decision that Joseph T. Kocot (Petitioner) was responsibly connected with Caito & Mascari, Inc., during the time that Caito & Mascari, Inc., violated the PACA. Petitioner admits that he was the president, a director, and a holder of 38 per centum of the outstanding stock of Caito & Mascari, Inc., during the time that Caito & Mascari, Inc., violated the PACA. The definition of *responsibly connected* in section 1(b)(9) of PACA (7 U.S.C. § 499a(b)(9) (Supp. II 1996)) establishes a rebuttable presumption, which provides that: a petitioner, even though a corporate officer, director, or holder of more than 10 per centum of the stock of a violating corporation is not deemed responsibly connected if the petitioner proves by a preponderance of the evidence *both* (1) that petitioner was not actively involved in the activities resulting in the violations *and* (2) that the petitioner either was only nominally an officer, director, and shareholder of the violating corporation or was not an owner of the violating corporation which was the alter ego of its owners. Petitioner failed to prove that he was not actively involved in activities that resulted in Caito & Mascari, Inc.'s violations of the PACA or that his positions with Caito & Mascari were merely nominal. Instead, the evidence reveals that Petitioner was intimately involved with the formulation of policies concerning Caito & Mascari, Inc.'s finances and Caito & Mascari, Inc.'s day-to-day operations. Petitioner knew of Caito & Mascari, Inc.'s violations of the PACA; issued checks to persons other than produce sellers, thereby reducing Caito & Mascari, Inc.'s ability to pay produce sellers in accordance with the PACA; and allowed the continuation of a scheme designed to prevent detection of Caito & Mascari, Inc.'s violations. Since Petitioner admits that he was a holder of 38 per centum of the stock of Caito & Mascari, Inc., he is an owner of Caito & Mascari, Inc., and the defense that Caito & Mascari, Inc., was the alter ego of others, is not available to Petitioner.

Stephen P. McCarron, Washington, D.C., for Petitioner.
JoAnn Waterfield, for Respondent.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Joseph T. Kocot [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 for Review (With Oral Hearing) [hereinafter Petition] on March 14, 1997. The Petition challenges the determination by 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, as defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Caito & Mascari, Inc., during a period in which Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent informed Petitioner's counsel, Mr. Stephen P. McCarron, Esq., in letters dated February 14, 1997, that a complaint had been filed by the United States Department of Agriculture [hereinafter USDA] against Caito & Mascari, Inc., alleging that during the period September 1995 through May 1996, Caito & Mascari, Inc., failed to make full payment promptly to 77 sellers for 295 lots of perishable agricultural commodities totaling $997,652.91 and that PACA Branch records indicate that Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, Joseph T. Kocot, and Magdalina M. Mascari [hereinafter Petitioners] each had taken an active role as an officer, director, and/or shareholder in Caito & Mascari, Inc., during the period in which the alleged violations of the PACA occurred and that Petitioners were accordingly determined to be responsibly connected with Caito & Mascari, Inc., during the period that Caito & Mascari, Inc., is alleged to have violated the PACA.

Petitioners challenged the February 14, 1997, determination by Respondent that they were responsibly connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated the PACA. On March 28, 1997, Respondent filed documents with the Hearing Clerk that comprise the record upon which Respondent based his determinations that Petitioners were responsibly connected with Caito & Mascari, Inc.

On May 19, 1997, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] consolidated for oral hearing the disciplinary proceeding instituted against Caito & Mascari, Inc., for alleged violations of section 2(4) of the PACA (7 U.S.C. § 499b(4))[1] with proceedings instituted by Petitioners challenging Respondent's determinations that they were responsibly connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4))[2] (Memorandum of Prehearing

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[1]The disciplinary proceeding instituted against Caito & Mascari, Inc., is captioned, *In re Caito & Mascari, Inc.*, PACA Docket No. D-97-0008.

[2]The responsibly connected proceedings instituted by Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, Joseph T. Kocot, and Magdalina M. Mascari challenging Respondent's determinations that they were responsibly connected with Caito & Mascari, Inc., during the period that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) are captioned respectively, as follows: (1) *In re Anthony A. Caito*, PACA-APP Docket No. 97-0002; (2) *In re Joseph A. Caito, Sr.*, PACA-APP Docket No. 97-0003; (3) *In re Joseph A. Caito, Jr.*, PACA-APP Docket No. 97-0004; (4) *In*

(continued...)

Conference Call and Designation of Oral Hearing Date, filed May 19, 1997).

On August 26, 1997, the ALJ conducted an oral hearing in Indianapolis, Indiana. Mr. Stephen P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioners. Mr. Timothy A. Morris, Esq., of the Office of the General Counsel, USDA, Washington, D.C., represented Respondent.[3] At the close of the disciplinary proceeding, the ALJ issued a bench decision in which the ALJ: (1) found that 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 for 295 lots of perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce; (2) found that, as of August 8, 1997, Caito & Mascari, Inc., had not paid at least $169,896.92 to 30 of the 77 sellers whose transactions account for $736,359.20 of the $997,652.91; (3) found that, as of August 8, 1997, Caito & Mascari, Inc., failed to make full payment promptly to six of the 30 sellers for an additional $116,657.71 of perishable agricultural commodities purchased, received, and accepted after May 1996; (4) concluded that Caito & Mascari, Inc.'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 (5) ordered publication of the conclusion that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Caito & Mascari, Inc.*, 56 Agric. Dec. 1837 (1997). Caito & Mascari, Inc., did not appeal the ALJ's decision, and the ALJ's decision became final September 30, 1997, and effective October 14, 1997. *In re Caito & Mascari, Inc., supra*, 56 Agric. Dec. at 1840.

On October 30, 1997, Petitioners filed Brief of Petitioners and Respondent filed Respondent's Proposed Findings of Fact, Conclusions, and Order. On February 26, 1998, the ALJ issued Decisions and Orders [hereinafter Initial Decision and Order] in which the ALJ: (1) found that Petitioners were responsibly connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) affirmed Respondent's determination that Petitioners were responsibly

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[2](...continued)
re Thomas A. Caito, PACA-APP Docket No. 97-0005; (5) *In re Joseph T. Kocot*, PACA-APP Docket No. 97-0006; and (6) *In re Magdalina M. Mascari*, PACA-APP Docket No. 97-0007.

[3]On May 6, 1998, Ms. JoAnn Waterfield, Esq., Office of the General Counsel, USDA, Washington D.C., advised that Mr. Morris no longer represents Respondent and entered her appearance on behalf of Respondent (Notice of Appearance, filed May 6, 1998).

connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) concluded that Petitioners are subject to the licensing restrictions provided under section 4(b) of the PACA and the employment restrictions provided under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) (Initial Decision and Order at 12, 18, 21, 34-35, 39, 55, 58, 70, 75, 94-95, 111-12).

On March 25, 1998, Petitioners requested an extension of time, to April 30, 1998, within which to file an appeal petition (Motion for Extension of Time to File Appeal Petition, filed March 25, 1998), which I granted on March 30, 1998 (Informal Order, filed March 30, 1998).

On April 30, 1998, Petitioner appealed[4] 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).[5] On July 24, 1998, Respondent filed Respondent's Response to Petitioner's Appeal Petition, and the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record, the Initial Decision and Order, as it relates to Petitioner, 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 conclusions.

Respondent's exhibits are designated by the letters "AX"; documents upon which Respondent relied for his February 14, 1997, determination that Petitioner was responsibly connected are designated by the letters "REC"; and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

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[4]Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, and Magdalina M. Mascari did not file appeal petitions by April 30, 1998. Therefore, the ALJ's Initial Decision and Order, as it relates to Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, and Magdalina M. Mascari became effective at close of business April 30, 1998.

[5]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)).

TITLE 7—AGRICULTURE

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CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

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(b) Definitions

For purposes of this chapter:

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(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.

(10) The term "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.

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§ 499d. Issuance of license

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(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application 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[.]

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering

the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded 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 upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

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(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

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 of 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.

7 U.S.C. §§ 499a(b)(9)-(10), 499d(b)(A)-(B), (c), 499h(b) (Supp. II 1996).

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

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DISCUSSION OF STATUTORY PROVISIONS

. . . [The Secretary is required to refuse a license to an applicant who was responsibly connected to an entity that, within 2 years of the date of the responsibly connected person's application, has been found to have flagrantly or repeatedly violated section 2 of the PACA. 7 U.S.C. § 499d(b). PACA licensees may not employ persons who have been found to have been responsibly

connected with an entity that has flagrantly or repeatedly violated section 2 of the PACA for 1 year following the finding of flagrant or repeated violations of section 2 of the PACA and may only employ the responsibly connected person in the second year following the finding of flagrant or repeated violations if the employing licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary (7 U.S.C. § 499h(b)).] Responsible connection is determined by the [relationship] of the individual[, alleged to be responsibly connected, with] the violating entity. The PACA provides that [a person is responsibly connected with an entity if that person] is a partner, officer, director, or [a holder of] more than 10 per centum [of the outstanding stock] of the violating entity. . . .

. . . [Until 1975, courts consistently held that an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was considered *per se* responsibly connected and subject to the licensing and employment restrictions in the PACA.

The *per se* standard was first enunciated in *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966). The court held that the 1962 amendment to the PACA adding a definition of the term *responsibly connected* was intended to establish a *per se* exclusionary standard whereby an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation would be subject to the Secretary of Agriculture's authority to prohibit employment under section 8(b) of the PACA (7 U.S.C. § 499h(b)) and that no defense, such as lack of real authority within the corporation or partnership, would be available to individuals who fell within the definition of the term *responsibly connected*.

This *per se* exclusionary rule was followed in other circuits.[6] However, i]n

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[6][*See Conforti v. United States*, 74 F.3d 838, 841 (8th Cir.) (stating that the court applies a *per se* rule to the definition of the term *responsibly connected* in section 1 of the PACA; actual responsibilities or interests are irrelevant to the question of responsible connection to a PACA violator), *cert. denied*, 117 S. Ct. 49 (1996); *Hawkins v. Agricultural Marketing Service*, 10 F.3d 1125, 1130 (5th Cir. 1993) (holding that the definition of *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) commands the application of a *per se* rule); *Faour v. United States Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) (holding that if a person is an officer, director, or holds over 10 per centum of the outstanding stock of a corporation that has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b, that person is considered *responsibly connected* and subject to sanctions under the PACA; PACA does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected); *Pupillo v. United States*, 755 F.2d 638, 644 (8th Cir. 1985) (stating that a *per se* analysis of the definition of (continued...)

1975, the United States 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 Secretary of Agriculture's] responsibly connected determination on the grounds that he (Mr. Quinn) 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 United States Court of Appeals for the District of Columbia Circuit found the determination of responsible connection to be a rebuttable 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 Secretary of Agriculture's] determination could be rebutted if the person could show that his title was nominal or that the [firm, which violated the PACA,] was the *alter ego* of another. *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). In addition, D.C. Circuit case law indicated there must be some "personal fault or the failure to `counteract or obviate the fault of others'" for a finding of responsible connection. *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983).

After the *Quinn* decision, [USDA] provided a process through which

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[6](...continued)
responsibly connected in section 1 of the PACA accomplishes Congress' objective of providing a clear definition of *responsibly connected*, and that Congress did not intend to require proof of personal fault to penalize a person associated with a PACA violator). *See also Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.) (citing with approval the *per se* approach taken by the court in *Birkenfield*), *cert. denied*, 389 U.S. 835 (1967).]

individuals [(denominated "Petitioners" in the proceedings)] could contest [PACA Branch] determinations [that they were] responsibly connected [with a violating entity]. While [other] circuit [courts] held to the *per se* standard of the definition of "responsibly connected" found in the PACA,[7] the United States Court of Appeals for the District of Columbia Circuit continued to adhere to the rationale of the *Quinn* decision.[8]

Section 1[(b)](9) of the PACA, 7 U.S.C. § 499a(b)(9), defines the term *responsibly connected*. The definition was . . . amended [on November 15, 1995, with the enactment] of the Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. 104-48, 109 Stat. 424 (1995) [hereinafter the PACAA]. [Specifically, section 12(a) of the PACAA amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. II 1996))] 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 per centum of the outstanding stock of a corporation or association. A person

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[7][See note 6.]

[8][*See Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997) (stating that this court has held that the presumption that an officer, director, or holder of more than 10 per centum of the stock of a corporation is responsibly connected, is a rebuttable presumption); *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating that this circuit has consistently read 7 U.S.C. § 499a(b)(9) as establishing only a rebuttable presumption that an officer, director, or major shareholder of a PACA violator is responsibly connected with the violator; and that a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder if: (1) the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality; or (2) the petitioner proves that at the time of the violations he was only a nominal officer, director, or shareholder); *Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating that, as construed by this court, characterization as *responsibly connected*, as defined in the PACA, is rebuttable, not absolute); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating that the definition of the term *responsibly connected* in section 1 of the PACA establishes only a rebuttable presumption that an officer, director, or large shareholder of a PACA violator is responsibly connected); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1413 (D.C. Cir. 1986) (stating that PACA's provisions on responsible connection establish, not an incontrovertible rule, but rather, a rebuttable presumption); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (stating that the court had established in *Quinn* that being a director, officer, or 10 percent stockholder is only prima facie evidence that one is *responsibly connected* to a company that has violated the PACA and that a finding that a person is *responsibly connected* must be premised upon personal fault or failure to counteract or obviate the fault of others).]

> 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.
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> . . . .

This provision provides two ways [by which a petitioner may] demonstrate that he [or she] is not responsibly connected. First, [the petitioner may demonstrate that he or she is not *responsibly connected*] by showing that he [or she] was not in fact [a partner in the violating partnership, or] an officer, director, or [holder of more than 10 per centum of the outstanding stock of a violating corporation or association.] Second, [the petitioner may demonstrate that he or she is not *responsibly connected*] by showing that, even though . . . a [partner in the violating partnership or] an officer, director, or [holder of more than 10 per centum of the outstanding stock of the violating corporation or association], he [or she] . . . was not actively involved in the [activities resulting in a] violation, and [either] the positions were nominal or [he or she was not an owner of the violating entity which] was . . . the *alter ego* of [its owners]. The first method of avoiding [being deemed responsibly connected with a violating entity] has been part of the PACA for many years.

To avoid a responsibly connected finding, a [petitioner] named as [a partner in a violating partnership or] as an officer, director, or [holder of more than 10 per centum of the outstanding stock in a violating corporation or association may rebut the presumption that he or she is responsibly connected by satisfying a two-prong test. The first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.]

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Findings of Fact . . .

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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. [(REC 1 at 1, REC 6 at 1; *In re Caito & Mascari, Inc.*, 56 Agric. Dec. 1837 (1997).)]

2. [I]n [December] . . . 199[6], Caito & Mascari, Inc., filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 700-766) in the United States Bankruptcy Court for the Southern District of Indiana. This [bankruptcy] petition has been designated Case No. 96-12380-[RLB]-7. [(REC 6; *In re Caito & Mascari, Inc.*, 56 Agric. Dec. 1837 (1997).)]

3. On August 27, 1997, [the ALJ] 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, [the ALJ] 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 for 295 lots of perishable agricultural commodities purchased, 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 . . . against Caito & Mascari, Inc., on November 7, 1996; and (3) Caito & Mascari, Inc., also failed to make full payment promptly to six of these 30 sellers for an additional $116,657.71 for perishable agricultural commodities purchased, received, and accepted after May 1996 and had not paid this amount as of August 8, 1997. [*In re Caito & Mascari, Inc.*, 56 Agric. Dec. 1837 (1997).]

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[4]. [Petitioner] is an individual whose home address is 8824 Bay Breeze Lane, Indianapolis, Indiana [(REC 1 at 23, REC 2 at 3, REC 7 at 63)]. After

working for Dole Fresh Fruit Company for 9 years as a sales manager, [Petitioner] started working as a salesman for Caito & Mascari, Inc., in May 1993 (Tr. 182). [Petitioner] has been working in the produce industry for approximately 15 years (Tr. 207). [Petitioner] has an undergraduate degree in business and a graduate degree in communications (Tr. 207).

[5]. In January 1995, Mark A. Caito and Anthony N. Caito each sold their shares of stock in Caito & Mascari, Inc., to [Petitioner] and left [Caito & Mascari, Inc.] (Tr. 145, 185[-86]). Mark A. Caito had been president, treasurer, and 18 percent shareholder, and Anthony N. Caito had been secretary and 18 percent shareholder (REC 1 at 16).

At the time he purchased the stock, [Petitioner] entered into a shareholder purchase agreement with Mark A. Caito and Anthony N. Caito in which it was represented that [Caito & Mascari, Inc.,] was in compliance with all laws and regulations (Tr. 188-89).

[6]. The board [of directors] appointed Petitioner . . . interim president in January 1995, and in March 1995, he was appointed president (Tr. 188). [Petitioner] was president, director, and 38 percent shareholder in Caito & Mascari, Inc., beginning in March 1995 through the present (REC 1 at 1, 7, 12, 20, REC 2 at 1-3, 6-9, REC 6 at 19-20, REC 7 at 56, 63, REC 15, REC 16; Tr. 202). In a letter to [the "P.A.C.A. Dept.", USDA,] dated March 13, 1995, [Petitioner] informed [USDA] that "[t]here has been a recent change in ownership at Caito & Mascari, Inc." and then proceeded to identify himself as both [Caito & Mascari, Inc.'s] president as well as a 38 percent owner [of Caito & Mascari, Inc.] (REC 1 at 22). In a letter dated February 12, 1996, from [Dale & Eke, a law firm representing] Caito & Mascari, Inc., . . . to [J.E. Servais, Head of the Trade Practices Section, Fruit and Vegetable Division, Agricultural Marketing Service, USDA,] Caito & Mascari, Inc.'s legal counsel acknowledged [that Caito & Mascari, Inc., had] problems [paying produce sellers] when due and explained that "Joseph T. Kocot was installed as the newly elected President of Caito & Mascari by the Board of Directors on January 10, 1995, and since that date he has been implementing new policies and procedures designated to improve the efficiency and productivity of Caito & Mascari" (REC 17).

[7]. [Petitioner] signed multiple documents in his capacity as president, including: (1) settlement agreements with unpaid produce [sellers] (AX 3); (2) [a] PACA license renewal form (REC 1 at 9); (3) correspondence to USDA (REC 1 at 22); (4) [a] bill of sale for the sale of the Brickyard 400 Suite (REC 5 at 1); (5) a chapter 7 bankruptcy petition filed on behalf of Caito & Mascari, Inc. (REC 6 at 2, 20); and (6) five promissory notes and security agreements in

connection with Caito & Mascari, Inc.'s borrowing $35,000 (REC 10, REC 11, REC 12, REC 13, REC 14; Tr. 223).

[8]. Petitioner dealt with and directed Caito & Mascari, Inc.'s lawyers regarding bankruptcy proceedings (REC 6 at 3).

[9]. When Caito & Mascari, Inc., needed to borrow money in November 1995, [Petitioner] advanced the corporation $10,000 of his own money (REC 14; Tr. 223).

[10]. As president, [Petitioner] had the authority to hire, as well as to suspend or terminate, individuals (REC 2 at 8). When Joseph A. Caito, Jr., resigned as both a member of the board of directors and a corporate officer on October 15, 1996, he submitted his letter of resignation to [Petitioner,] as president (REC 1 at 3).

[11]. Petitioner, as president of [Caito & Mascari, Inc.,] was responsible for dealing with unpaid [produce sellers] (AX 3; Tr. 41-43, 227, 229).

[12]. In 1995, Petitioner's salary was approximately $80,000 (Tr. 207).

1[3]. [Petitioner] was one of only three persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts after January 1995 (Tr. 170). After one of the other persons authorized to sign checks, Anthony [A.] Caito, left Caito & Mascari, Inc., on January 5, 199[6], Petitioner was one of only two remaining persons authorized to sign on the corporation's accounts . . ., and as all checks required two signatures (Tr. 170[-71]), he signed every check after that date (Tr. 226-27). Among the checks in evidence that were signed by Petitioner are a check for PACA license renewal (REC 1 at 11), at least 12 payroll checks [dated] from September 14, 1995, to February 1, 1996 (REC 9; Tr. 223), and at least 42 checks [made payable to persons who sold] produce [to] Caito & Mascari, Inc., [and dated] from November 29, 1995, to April 24, 1996 (AX 2; Tr. 225[-26]).

1[4]. As a member of Caito & Mascari, Inc.'s board of directors, Petitioner attended board [of directors] meetings beginning in March 1995, including board meetings held on March 12, 1995, July 12, 1995, and October 25, 1995 (REC 2; Tr. 214). At these board [of directors] 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. 214-16).

1[5]. 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 [Caito & Mascari, Inc.'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 [Caito & Mascari, Inc.]; (3) how to cut [Caito & Mascari, Inc.'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 [Caito & Mascari, Inc.'s] balance sheet (REC 2 at 7).

1[6]. 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 [Caito & Mascari, Inc.'s] expenses; and (3) giving the president the authority to suspend or terminate individuals (REC 2 at 8).

1[7]. 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 [Caito & Mascari, Inc.,] by borrowing money, signing notes, and selling some corporate assets. Petitioner made the motion [to give] Caito & Mascari, Inc., "the right to raise funds by taking loans from a lender" up to $200,000 (REC 2 at 9).

1[8]. As president of Caito & Mascari, Inc., Petitioner dealt with unpaid produce [sellers] in arranging payment and negotiating settlements for partial payment (AX 3; Tr. 41-43).

1[9]. When PACA [Branch] investigator [William] Hammond concluded his investigation of Caito & Mascari, Inc., in May 1996, Petitioner met with him to discuss the findings of the investigation. Petitioner [did not dispute] Mr. Hammond['s] . . . finding . . . that Caito & Mascari, Inc., had not paid its produce [sellers] on time. . . . (Tr. 240.) Petitioner also discussed with Mr. Hammond the different ways in which [Caito & Mascari, Inc.,] was working to pay off these unpaid and past due debts to its produce [sellers] (Tr. 240-41).

[20]. Petitioner was responsibly connected with Caito & Mascari, Inc., during the time it violated [section 2(4) of] the PACA [(7 U.S.C. § 499b(4))].

Conclusions

[Respondent] has determined that Petitioner . . . 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 [to 77 sellers of the agreed

purchase prices in the total amount of $997,652.91 for 295 lots of perishable agricultural commodities which Caito & Mascari, Inc., purchased, received, and accepted in interstate and foreign commerce (Letter from J.R. Frazier to Stephen P. McCarron, dated February 14, 1997)]. . . . [Petitioner] denies he was actively involved in the [activities] resulting in the violations and asserts that his role as president, director, and 38 percent shareholder of Caito & Mascari, Inc., was nominal only. [Petitioner] further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. [(Petition; Brief of Petitioners at 25.)] However, the record indicates that [Petitioner] was actively involved in the activities resulting in [Caito & Mascari, Inc.'s] violations, that Petitioner's positions [with Caito & Mascari, Inc.,] were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Finally, [Petitioner] also claims that he was unaware of the poor financial condition of Caito & Mascari, Inc., when he bought 38 percent of its stock [(Petition; Brief of Petitioners at 23-25)].

Specifically, [Petitioner] maintains that he was not responsibly connected because the violations of the [PACA] occurred prior to his [purchasing 38 percent of Caito & Mascari, Inc., and] assuming the positions of president and director. He argues that after he purchased shares and became president [and a director], he discovered that the former shareholders had done things that placed [Caito & Mascari, Inc.,] in [a poor financial condition] before Petitioner took over. [(Brief of Petitioners at 23-25.)] First, [Mark A. Caito] had factored the accounts receivable, requiring [Caito & Mascari, Inc., to make] large interest payments (Tr. 190). Next, [former shareholders] used insurance proceeds for destroyed refrigeration equipment as working capital and then indebted [Caito & Mascari, Inc.,] to pay for the new refrigeration equipment that was held in the name of another company which Mark A. Caito controlled (Tr. 191). As a result, [Caito & Mascari, Inc.,] had to pay $10,000 per month for refrigeration which it did not own [(Tr. 191)]. Mark A. Caito had orally promised to defer compensation to an employee, leaving [Caito & Mascari, Inc.,] with a large liability, after Mark A. Caito left [Caito & Mascari, Inc.] (Tr. 193. . .). Mark A. Caito also placed the leases for all of [Caito & Mascari, Inc.'s] equipment, including trucks, in the name of Caito Mascari Transportation, Mark A. Caito's other company, so that [Caito & Mascari, Inc.,] did not have control over its equipment. [Further,] the lease for [Caito & Mascari, Inc.'s] building premises was also in the name of Caito Mascari Transportation Company. (Tr. 194-95.)

Petitioner . . . further contends that he discovered that Caito & Mascari,

Inc., had . . . problems [paying produce sellers prior to Petitioner's employment by Caito & Mascari, Inc.,] and that Mark A. Caito instituted the procedure of writing checks to produce suppliers, but not mailing the [checks, to make it appear to the] PACA [Branch] investigators that payments were being made on time (Tr. 195-97).

Petitioner asserts that in March 1995, he discovered that there were produce sellers who had not been paid for over 6 months (Tr. 197), and he paid off the old debt incurred by the former owners [of Caito & Mascari, Inc.] (Tr. 199).

As a result of what he regarded as [fraud] by Mark A. Caito . . ., Petitioner filed a lawsuit against [him] alleging . . . [that Mark A. Caito committed] fraud [in connection with the sale of stock in Caito & Mascari, Inc., to Petitioner] (Tr. 201). However unfortunate or ill-informed [Petitioner's] business decisions may have been to buy . . . [38] per centum of [the outstanding stock of Caito & Mascari, Inc.,] and become its president and director, those decisions do not affect his liability under the PACA for those violations that occurred under his direction and control. [Petitioner] was responsibly connected with Caito & Mascari, Inc.[, during the period (September 1995 through May 1996) that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).]

[Petitioner] Was the President, a Director, [and a Holder of More Than 10 Per Centum of the Stock] of Caito & Mascari, Inc.

Section 1[(b)](9) of the PACA [(7 U.S.C. § 499a(b)(9) (Supp. II (1996)))] provides that "responsibly connected" persons include officers, directors, and holders of more than 10 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. [Petitioner's] role as the president, director, and [holder of] 38 per [centum of the outstanding stock] of Caito & Mascari, Inc., during the entire violations period is uncontested in this [proceeding. Petitioner] acknowledged at the hearing that he held these positions from January 1995 through the present (Tr. 202-03). In addition to the PACA license record that unequivocally designates [Petitioner] as president, a director, and a 38 percent shareholder [of Caito & Mascari, Inc.,] during that time period (REC 1 at 1, 7, 12, 20), numerous other corporate documents conclusively establish Petitioner's role within Caito & Mascari, Inc., including the corporate minutes (REC 2 at 1-3, 6-9), bankruptcy documents filed by [Petitioner] on behalf of Caito & Mascari, Inc. (REC 6 at 19), and corporate correspondence to the PACA [Branch] from [Petitioner] (REC 1 at 22). Accordingly, there is

no question that [Petitioner] was president, director, and a [holder of more] than 10 per centum [of the outstanding stock] of Caito & Mascari, Inc., during the entire 9-month violations period from September 1995 through May 1996.

[Petitioner] Was Actively Involved in Activities Resulting in PACA Violations Committed by Caito & Mascari, Inc.

. . . [S]ection 1[(b)](9) [of the PACA (7 U.S.C. § 499a(b)(9) (Supp. II (1996)))] 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 [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." 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[, who was, at all times material to this proceeding, the president, a director, and a holder of 38 per centum of the outstanding stock of Caito & Mascari, Inc., was] responsibly connected with [Caito & Mascari, Inc.].

The [PACA] . . . does not define [the term] "actively involved." However, guidance on this matter can be found in the decisions issued by the United States 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 [or her] position with the violating firm. While not using the "actively involved" language that appears in [section 1(b)(9) of the PACA], these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he [or she] 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 . . . Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983).

[Therefore,] one [manner by which to determine whether a petitioner has been actively involved in activities resulting in a violation of the PACA] is to examine whether the petitioner either had "personal fault" for the violation or

failed to "counteract or obviate the fault of others" for the violation. 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.

. . . [Petitioner's contention that he was not actively involved in activities resulting in the violations is not sustainable. Given that Petitioner performed both acts of commission and omission, which resulted in Caito & Mascari, Inc.'s violations of the PACA, he was actively involved in Caito & Mascari, Inc.'s violations of the PACA]. . . . Petitioner had knowledge of the financial status of Caito & Mascari, Inc., access to Caito & Mascari, Inc.'s books and records, knowledge of Caito & Mascari, Inc.'s failures to pay produce sellers, and extensive authority for the policies and day-to-day operations of Caito & Mascari, Inc., during the entire period in which Caito & Mascari, Inc., violated section 2(4) of the PACA.

Petitioner enjoyed wide latitude in the running of the day-to-day operations of Caito & Mascari, Inc. (Tr. 125, 129-30, 134).]

. . . .

[Petitioner] testified that[, in March 1995,] shortly after becoming president of Caito & Mascari, Inc., . . . he discovered that [Caito & Mascari, Inc.'s] longtime bookkeeping practice had been to [issue checks payable to produce sellers, but delay] mailing the [checks] in the hope that [Caito & Mascari, Inc.'s] financial records would appear to reflect current payment to its produce [sellers]. However, he admitted that after making this discovery, he permitted this practice to continue (Tr. 224). [This omission to act establishes that Petitioner was actively involved in activities resulting in violations of the PACA by Caito & Mascari, Inc., and activities designed to prevent detection of Caito & Mascari, Inc.'s violations of the PACA.]

Moreover, when asked whether he, after learning that invoices were not being paid promptly, had directed [Caito & Mascari, Inc.'s] buyers to inform prospective produce sellers of Caito & Mascari, Inc.'s payment problems, [Petitioner] replied:

> A. . . . .
>
> I'm trying to tell you that when we found that [William Hammond] was coming in, [in May 1996], virtually every person that we had dealt with was called and contacted and asked to give us extended credit terms to allow us to continue, so at that point, yes, growers were notified that we needed longer terms, that we needed more length in paying.

Tr. 232.

Of course, while [Petitioner] testified that he had learned of [Caito & Mascari, Inc.'s] inability to pay its produce [sellers in accordance with the PACA] by July 1995 (Tr. 231), [Petitioner's] testimony . . . indicates that he chose not to warn produce sellers about the problem until he learned that a PACA [Branch] investigator was about to commence an investigation. For nearly 1 year after learning about [Caito & Mascari, Inc.'s failures to pay produce sellers in accordance with the PACA, Petitioner] permitted [Caito & Mascari, Inc.'s] buyers to continue to use produce sellers as unwitting and unwilling lenders of money. [Petitioner] deliberately and knowingly contributed to [Caito & Mascari, Inc.'s] violations of the PACA.

. . . .

[Furthermore, Petitioner] was one of only three persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts (Tr. 170-71). 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 written on the operations and payroll accounts required two signatures, he signed every check after that date (Tr. 170-73). Among the checks in evidence that were signed by [Petitioner] are a check for PACA license renewal (REC 1 at 11; Tr. 157), at least 12 payroll checks [dated from] September 14, 1995, [through] February 1, 1996 (REC 9; Tr. [223]), and at least 42 checks on Caito & Mascari, Inc.'s operations account to produce [sellers dated] from November 29, 1995, to April 24, 1996 (AX-2; Tr. [225-26]). [Petitioner's act of signing checks drawn on Caito & Mascari, Inc.'s operations and payroll accounts made payable to persons who were not produce sellers constitutes active involvement in an activity resulting in violations of the PACA by Caito & Mascari, Inc. Petitioner's actions enabled persons who presented these checks for payment to receive payment and resulted in the . . . reduction of resources available to Caito & Mascari, Inc., to make full payment promptly to produce sellers in accordance with the PACA.]

. . . .

Moreover, in his role as a member of Caito & Mascari, Inc.'s board of directors, Petitioner attended and actively participated in all of [Caito & Mascari, Inc.'s] board [of directors] meetings beginning March 1995. The corporate minutes from the board of directors meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that [Petitioner] actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making

process (REC 2). At these board [of directors] 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. 215-16).

At the March 12, 1995, board [of directors] meeting, [Petitioner] 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 [Caito & Mascari, Inc.]; (2) how to cut [Caito & Mascari, Inc.'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 [Caito & Mascari, Inc.'s] balance sheet (REC 2 at 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its [produce sellers].

At the July 12, 1995, board [of directors] meeting, [Petitioner] again discussed such matters with the other board members. The business and financial matters discussed by Petitioner at that board [of directors] meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower [Caito & Mascari, Inc.'s] expenses; and (3) giving the president the authority to suspend or terminate individuals (REC 2 at 8; Tr. [214-16]). These discussions . . . addressed the fundamental issues of corporate financial and management policy that determined the manner in which Caito & Mascari, Inc., would [attempt to resolve] its financial problems. [Petitioner] voted in all three of the votes taken (REC 2 at 8).

At the October 25, 1995, board [of directors] meeting, [Petitioner] 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 [Caito & Mascari, Inc.,] by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion to allow [Caito & Mascari, Inc.,] to take out loans (REC 2 at 9 . . .). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that [Caito & Mascari, Inc.,] owed him approximately $20,000 to $30,000 for work he had allegedly performed years earlier (Tr. 94, 131, 148-49, 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 [Caito & Mascari, Inc.,] to pay produce [sellers

to Caito & Mascari, Inc.'s former employee].

In his role as president, director, and [holder of] 38 per centum [of the outstanding stock of Caito & Mascari, Inc., Petitioner] had every opportunity to take action to bring the corporation into compliance with the [PACA. Petitioner] may not credibly contend that he was not actively involved in violations when he knew that he was not paying [Caito & Mascari, Inc.'s produce sellers] promptly, when he was responsible for paying those accounts, and when he was actively trying to get unpaid produce [sellers] to settle for less than they were due or to extend payment times. . . .

Petitioner played an integral role in the financial affairs of [Caito & Mascari, Inc.,] and he extensively participated in the decision making process [regarding Caito & Mascari, Inc.'s finances]. However, assuming *arguendo* that he was . . . not . . . personally at fault for the activities resulting in [Caito & Mascari, Inc.'s] violations [of the PACA], he certainly had a realistic capacity to "counteract or obviate the fault of others", which he failed to exercise. *Bell v. Department of Agric., supra*, 39 F.3d at 1201. Directing the daily operations of Caito & Mascari, Inc., [participating in the policy decisions for Caito & Mascari, Inc., and] possessing the knowledge of [Caito & Mascari, Inc.'s] financial inability to pay its produce [sellers], . . . Petitioner] had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari, Inc., directors and officers in the daily operations of [Caito & Mascari, Inc.,] and in the board [of directors] meetings. Through both his acts of commission and omission, [Petitioner was actively involved in activities resulting in Caito & Mascari, Inc.'s violations of the PACA and thus] responsibly connected with Caito & Mascari, Inc.

Petitioner Was Not Merely a Nominal President, Director, and Stockholder of Caito & Mascari, Inc., and Caito & Mascari, Inc., Was Not the *Alter Ego* of Others.

[Petitioner'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 a violation of the PACA and was an officer, director, [and holder] of more than 10 per centum [of the outstanding stock of Caito & Mascari, Inc. Petitioner], contending that he was not actively involved [in the activities resulting] in [Caito & Mascari, Inc.'s] violations [of the PACA], . . . asserts that his role on the board of directors was merely nominal and . . . that

Caito & Mascari, Inc., was the *alter ego* of unnamed "others" (Petition ¶ 3). However, this contention is not pursued on brief and is not supported by the evidence of record.

. . . Section 1[(b)](9) of the PACA requires 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[(b)](9) (emphasis added). It is evident from case law and the factual record that [Petitioner's] roles were not nominal, that he himself was an owner, and that Caito & Mascari, Inc., was not the *alter ego* of any person.

Petitioner Was Not a Nominal President, Director, or Shareholder of Caito & Mascari, Inc.

Although the legislative history [applicable to] the 1995 amendment [of the definition of the term *responsibly connected*] does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the United States Court of Appeals for the District of Columbia Circuit. In . . . *Bell v. Department of Agric., supra*, the United States 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 [or she] was only a nominal officer, director, or shareholder ["by proving that he lacked `an actual, significant nexus with the violating company.'" *Id.* at 1201.]

. . . .

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. Th[ese circumstances are not present in this proceeding].

First, unlike the petitioner in *Quinn*, [Petitioner] Kocot was active in policy and business decisions and participated in [Caito & Mascari, Inc.'s] formal

decision making process. He admitted that he participated in board of directors meetings in which [he and] other directors . . . made . . . decisions and policies regarding corporate finance from March 1995 through October 1996 (Tr. 215-16). Corporate records indicate that [Petitioner] attended all board [of directors] meetings after March 1995 and that he voted on each motion put to a vote (REC 2 at 6-9).

Second, unlike the petitioner in *Bell*, [Petitioner] Kocot had full access to a wide array of corporate documents as president, director, and [holder of] 38 per centum [of the outstanding stock] of Caito & Mascari, Inc. During the investigation of Caito & Mascari, Inc., [Petitioner] and Joseph Caito, Jr., provided PACA [Branch] investigator [William] Hammond with all the necessary corporate financial documents, and these documents were located in the office shared by [Petitioner] and [Caito & Mascari, Inc.'s] secretary and treasurer . . . (Tr. 237). Petitioner . . . testified extensively regarding his review of [Caito & Mascari, Inc.'s] business and financial records after becoming Caito & Mascari, Inc.'s president in January 1995 (Tr. 190-201).

Third, unlike the petitioner in *Bell*, [Petitioner] Kocot had full knowledge of [Caito & Mascari, Inc.'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 Agric., supra,* 711 F.2d at 408. [Petitioner] admitted that he had full knowledge of Caito & Mascari, Inc.'s financial difficulties and inability to pay its [produce sellers] at least by July 1995 (Tr. 231). Further, . . . [Petitioner] was in charge of the daily operations of [Caito & Mascari, Inc.,] and participated in the board of directors meetings at which officers and directors discussed all aspects of [Caito & Mascari, Inc.'s] operations, including its failing financial health (REC 2). The circumstances surrounding his meeting with PACA [Branch] investigator [William] Hammond in May 1996 also strongly support the fact that [Petitioner] had full knowledge of [Caito & Mascari, Inc.'s] problems. When [Petitioner] spoke with PACA [Branch] investigator [William] Hammond at the end of the PACA investigation to discuss the results of the investigation, [Petitioner did not dispute] that the amounts found in the investigation were indeed past due, that there had been problems with payment, and that [Caito & Mascari, Inc.,] was making efforts to pay off the debts (Tr. 240-41).

[Case precedent underscores the importance of writing checks in the

determination of responsible connection. The fact that a person signs corporate checks is considered one of the strongest indications of that person's close involvement in the financial affairs of the corporation. In *Bell v. Department of Agric., 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) (Table), *reprinted in* 52 Agric. Dec. 1551 (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." (52 Agric. Dec. at 1553.) . . . Petitioner] 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, [Petitioner] was one of only two persons authorized to sign checks on behalf of [Caito & Mascari, Inc.,] meaning that he signed every check after that date because both accounts required two signatures. (Tr. 171-73, 226-27.) Among the checks signed by [Petitioner] are a check for PACA license renewal (REC 1 at 11), at least 1[2] payroll checks [dated] between September 14, 1995, and February 1, 1996 (REC 9; Tr. 223), and at least 42 checks on Caito & Mascari, Inc.'s operations account [made payable to persons who sold produce to Caito & Mascari, Inc., and dated] from November 29, 1995, to April 24, 1996 (AX 2; Tr. 225).

. . . Therefore, [Petitioner's] issuance of many of the checks for Caito & Mascari, Inc.'s operations and payroll checking accounts during the first 4 months of the violations period and all the checks on these accounts for the remaining 5 months of the violations period alone is sufficient to constitute an "actual, significant nexus" which establishes that his multiple positions within Caito & Mascari, Inc., were not nominal.

That Petitioner was not a nominal corporate officer is also demonstrated by his signing multiple corporate documents as president of Caito & Mascari, Inc. [Petitioner] signed corporate documents including: (1) settlement agreements with unpaid produce [sellers] (AX 3); (2) a PACA license renewal form (REC 1 at 9); (3) correspondence to PACA (REC 1 at 22); (4) a bill of sale for the sale of the Brickyard 400 Suite (REC 5 at 1); (5) a chapter 7 bankruptcy petition filed on behalf of Caito & Mascari, Inc. (REC 6 at 2, 20); and (6) five promissory notes and security agreements in connection with Caito & Mascari, Inc.'s borrowing $35,000 (REC 10; REC 11; REC 12; REC 13; REC 14; Tr. 223).

The substantial, rather than nominal, nature of [Petitioner's] positions is underscored by his background, compensation, and responsibilities for personnel matters. [Petitioner] was by no means an unskilled or untrained employee and officer. After working for Dole Fresh Fruit Company for 9 years as a sales manager, he started working for Caito & Mascari, Inc., in May 1993 (Tr. 182). He has been working in the produce industry for approximately 15 years, and he has an undergraduate degree in business and a graduate degree in communications (Tr. 207). Similarly, the fact that [Petitioner's] 1995 salary was approximately $80,000 would strongly suggest that his role as president was anything but nominal (Tr. 207).

[Petitioner] also was able to hire, fire, and suspend [Caito & Mascari, Inc.,] employees (REC 2 at 8). When Joseph Caito, Jr., resigned as both a member of the board of directors and a corporate officer on October 25, 1996, he submitted his letter of resignation to [Petitioner] as president (REC 1 at 3). When asked, "Why would a personnel matter, like someone's resignation, be directed to you?", Mr. Kocot replied, "Because I'm president." (Tr. 212.) Furthermore, [Petitioner] worked with and directed Caito & Mascari, Inc.'s attorneys (REC 6 at 3).

[Petitioner's] claim that his positions as president, 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, [Petitioner] loaned [Caito & Mascari, Inc.,] $10,000 of his own money (REC 14; Tr. 223). [Petitioner's] personal loan of the $10,000 was made in an effort to protect his interest in Caito & Mascari, Inc. Accordingly, [Petitioner's] personal interest in financially assisting the corporation is further evidence of his substantial involvement in the corporation as an officer, director, and [holder of] 38 per centum [of the outstanding stock of Caito & Mascari, Inc].

The extensive and substantive nature of [Petitioner's] activities as a corporate officer is further supported by his activities with unpaid [produce sellers]. The *Bell* court took special notice of the fact that:

> Moreover, to the question, "Did people come to you when they were not paid?" Bell answered unequivocally "No." This clearly means suppliers did not regard Bell as having authority to bring about payment by [the violating company]; it may also suggest that he was not even on notice of serious complaints.

Bell v. Department of Agric., supra, 39 F.3d at 1204 (citation omitted). [Petitioner's] unique role in the corporation as president was recognized by produce [sellers] who specifically contacted him when they sought someone in [Caito & Mascari, Inc.,] with the authority to get them get paid for their produce. As John Schaefer, president of Jack Brown Produce, [Inc.,] testified, he went directly to [Petitioner] when Jack Brown Produce[, Inc.,] had not been paid because he wanted [to] deal with only the president of Caito & Mascari, Inc. (Tr. 41). As president of Caito & Mascari, Inc., [Petitioner] dealt with unpaid produce [sellers], such as Jack Brown Produce[, Inc.,] and Potato Services of Michigan, Inc., in arranging payment and negotiating settlements for partial payment (AX 3; Tr. 41-43). Accordingly, his role as an officer in Caito & Mascari, Inc., cannot . . . be characterized as nominal.

It is evident that [Petitioner] Kocot, unlike the petitioner in *Quinn*, was closely involved in important corporate business and policy functions, which precludes a finding that he was only nominally an officer, director, and shareholder of [Caito & Mascari, Inc.]

[Moreover, the United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that ownership of approximately 20 per centum or more of the stock of a corporation is enough to support a finding of responsible connection. In *Martino v. United States Dep't of Agric.*, 801 F.2d 1410 (D.C. Cir. 1986), the court held that ownership of 22.2 per centum of the stock and the fact that the petitioner was neither enticed nor coerced into the position that rendered him responsibly connected formed a sufficient nexus to establish the petitioner's responsible connection.

In *Veg-Mix, Inc. v. United States Dep't of Agric., supra*, 832 F.2d at 611, the court, relying on its decision in *Martino*, states: "In *Martino*, we found that ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection." This principle was restated in *Siegel v. Lyng, supra*, 851 F.2d at 417, as follows: "Most 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." . . . While a petitioner who owns stock may demonstrate that he or she was only nominally a shareholder of a corporation or association, it is extremely difficult to do so when the petitioner owns a substantial per centum of the outstanding stock of the corporation or association. Petitioner does not deny that he held 38 per centum of the outstanding stock of Caito & Mascari, Inc. Petitioner's ownership of a substantial per centum of the outstanding stock of Caito & Mascari, Inc., alone is very strong evidence that he was not a nominal

shareholder,[9] and Petitioner has failed to rebut this evidence.]

The only reasonable conclusion to be drawn from the evidence in the record is that [Petitioner] had "an actual, significant nexus" with Caito & Mascari, Inc., committed acts of commission by participating in [Caito & Mascari, Inc.'s] violations of the [PACA], 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] has failed to demonstrate that he was a nominal [officer,] director[, and shareholder] of Caito & Mascari, Inc., and, that he was not responsibly connected [with Caito & Mascari, Inc.].

The *Alter Ego* Defense Is Unavailable to Petitioner Because He Is An Owner of Caito & Mascari, Inc., and Because Caito & Mascari, Inc., Was Not the *Alter Ego* of Any Other Person.

Again, assuming *arguendo* that [Petitioner] was not actively involved [in activities resulting] in violations of [the PACA by] Caito & Mascari, Inc., section 1[(b)](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." . . . .

. . . .

[Petitioner] is barred from raising the *alter ego* defense due to his ownership of stock in Caito & Mascari, Inc. In *In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997), *appeal docketed*, No. 98-1065 (D.C. Cir. Feb. 13, 1998), 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 1864-65. As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because of his 2.97914 percent ownership interest in the [violating corporation's] outstanding stock, it is similarly unavailable to

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[9]*See In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating that the petitioner's ownership of 33.3 per centum of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *appeal docketed*, No. 98-1057 (D.C. Cir. Feb. 5, 1998).

[Petitioner] with his 38 percent ownership interest in Caito & Mascari, Inc.[10]

[Moreover, the evidence demonstrates that, while Petitioner was given a great dealt of autonomy in running Caito & Mascari, Inc.'s day-to-day operations, the board of directors retained final approval on major decisions (REC 2; Tr. 129-30, 134). The record establishes that, at all times material to this proceeding, decision making authority within Caito & Mascari, Inc., was distributed among many individuals, and I do not find that Caito & Mascari, Inc., was the *alter ego* of "others," as Petitioner contends.]

. . . Accordingly, [Petitioner's] claim [that he is not an owner of Caito & Mascari, Inc., and that Caito & Mascari, Inc., was the *alter ego* of others] must be rejected.

[Petitioner was the president, a director, and a holder of 38 per centum of the outstanding stock of Caito & Mascari, Inc., during the time that Caito & Mascari, Inc., violated section 2(4) of the PACA. Petitioner was actively involved in the activities resulting in Caito & Mascari, Inc.'s violations of section 2(4) of the PACA. Petitioner was not a nominal officer, director, or shareholder of Caito & Mascari, Inc. Petitioner was an owner of Caito & Mascari, Inc., and Caito & Mascari, Inc., was not the *alter ego* of any other persons.]

. . . .

For the reasons set forth [in this Decision and Order, *supra*, Respondent's] determination that Petitioner . . . was responsibly connected [is] correct and is . . . affirmed.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises one issue in Petitioner's Appeal Petition, as follows:

ISSUE ON APPEAL

Whether a person, who becomes an officer, director and more than 10% shareholder of a produce company, is responsibly-connected if,

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[10][*See also In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating that the petitioner cannot avail himself of the *alter ego* defense because petitioner, at all times material to the proceeding, held 33.3 per centum of the outstanding stock of the violating entity), *appeal docketed*, No. 98-1057 (D.C. Cir. Feb. 5, 1998).]

unknown to that person, there were existing payment violations of the PACA which that person did not exacerbate and tried to correct unsuccessfully?

Appeal Pet. at 1.

The factual premises in Petitioner's issue on appeal are not supported by the record. As fully discussed by the ALJ, Petitioner was an officer, director, and holder of 38 per centum of the outstanding shares of Caito & Mascari, Inc., during the entire 9-month period (September 1995 through May 1996) of Caito & Mascari, Inc.'s violations of section 2(4) of the PACA. Moreover, Petitioner knew that Caito & Mascari, Inc., was violating section 2(4) of the PACA (7 U.S.C. § 499b(4)) no later than July 1995, and Petitioner was intimately involved with the formulation of policies concerning Caito & Mascari, Inc.'s finances and Caito & Mascari, Inc.'s day-to-day operations. While Petitioner did take some steps to correct Caito & Mascari, Inc.'s PACA violations, Petitioner was actively involved in activities resulting in Caito & Mascari, Inc.'s violations of the PACA, was not merely a nominal officer, director, and shareholder of Caito & Mascari, Inc., and, as an owner of Caito & Mascari, Inc., cannot contend that Caito & Mascari, Inc., was the alter ego of "others."

I do not find that the ALJ committed error and except for minor changes noted in this Decision and Order, *supra*, the ALJ's Initial Decision and Order is affirmed and adopted as the final Decision and Order in this proceeding.

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

Order

The 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 Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated the PACA, is affirmed.

Accordingly, Petitioner Joseph T. Kocot is subject to the licensing restrictions under section 4(b) of the Perishable Agricultural Commodities Act and the employment restrictions under section 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 60 days after service of this Order on Petitioner.

In re: LIMECO, INC.
PACA Docket No. D-97-0017.
Decision and Order filed August 18, 1998.

Misrepresentation of produce — False statements — Inaccurate records — Willful, flagrant, and repeated violations — Motive of and benefit to violator irrelevant — Agency recommendation — Uniformity of sanction not required — Civil penalty — License suspension.

The Judicial Officer affirmed the Decision by Chief Judge Palmer (Chief ALJ) concluding that Respondent willfully, flagrantly, and repeatedly violated: (1) 7 U.S.C. § 499b(5) by misrepresenting the origin of 411 cartons of limes that Respondent sold to three customers; (2) 7 U.S.C. § 499b(4) by making false statements regarding the origin of limes; and (3) 7 U.S.C. § 499i by maintaining documents which incorrectly identify the origin of limes. The Judicial Officer increased the 15-day suspension of Respondent's PACA license imposed by the Chief ALJ to 45 days. Respondent's violations were willful; therefore, a written warning, pursuant to 7 C.F.R. § 46.45(e)(5) and 5 U.S.C. § 558(c), offering Respondent an opportunity to achieve compliance, is not required. Respondent's violations were knowing, were designed to deceive, and occurred more than once; and therefore, were flagrant and repeated. The lack of evidence establishing Respondent's motive for or substantial benefits from its violations of the PACA and evidence of Respondent's cooperation with the investigation of its violations are not relevant either to a finding that Respondent violated PACA or to the sanction to be imposed for Respondent's violations. A 45-day suspension of Respondent's PACA license is not more severe than sanctions imposed in other similar cases. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases and will be overturned only if it is unwarranted in law or without justification in fact. The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the PACA, and the PACA has no requirement that sanctions imposed on violators be uniform. Respondent's financial condition is not relevant to the issue of the length of the period during which Respondent's PACA license should be suspended. The Secretary of Agriculture may choose to assess a civil penalty for a violation of 7 U.S.C. § 499b, in lieu of license revocation or suspension, but license revocation or license suspension is appropriate for egregious violations of the PACA. Each misrepresentation by Respondent constitutes a separate violation of 7 U.S.C. § 499b(5), each false and misleading statement made by Respondent for a fraudulent purpose constitutes a separate violation of 7 U.S.C. § 499b(4), and each failure by Respondent to keep accounts, records, and memoranda that fully and correctly disclose all transactions involved in its business constitutes a separate violation of 7 U.S.C. § 499i.

Andrew Y. Stanton, for Complainant.
Al Slobusky, Princeton, FL, & J. Randolph Liebler, Miami, FL, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and 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 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 March 17, 1997.

The Complaint alleges that: (1) Limeco, Inc. [hereinafter Respondent], misrepresented the origin of 411 cartons of limes that it packed and sold to three customers in the course of interstate and foreign commerce and made false and misleading statements in connection with the misbranded limes (Compl. ¶¶ III, IV); and (2) at least during the period January 1996 through September 1996, Respondent failed to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business by failing to provide a positive means of identification to segregate the various lots of limes being handled by Respondent (Compl. ¶ V). Respondent filed Answer and Affirmative Defenses [hereinafter Answer] on April 24, 1997, denying the material allegations of the Complaint.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on December 16 and 17, 1997, in Miami, Florida. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Al Slobusky, Respondent's financial officer, represented Respondent.*

On February 3, 1998, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law, and on February 23, 1998, Respondent filed Post Hearing Brief of Limeco. On March 25, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent willfully, flagrantly, and repeatedly violated section 2(5) of the PACA (7 U.S.C. § 499b(5)) by misrepresenting the country of origin of 411 cartons of limes that Respondent sold to three customers; (2) concluded that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false statements regarding the country of origin of 411 cartons of limes that Respondent sold to three customers; (3) concluded that Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA (7 U.S.C. § 499i) by maintaining documents which incorrectly disclosed the country of origin of 411 cartons of limes that Respondent sold to three customers; and (4) suspended Respondent's PACA license for 15 days (Initial Decision and Order at 6-7, 17).

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*Susan H. Aprill, Esq., Holland & Knight, LLP, Miami, Florida, entered an appearance on behalf of Respondent on April 9, 1997, but filed Holland & Knight LLP's Motion to Withdraw on November 12, 1997, which was granted on November 17, 1997 (Order Granting Motion to Withdraw, filed November 17, 1997). J. Randolph Liebler, Esq., Liebler, Gonzales & Portuondo, P.A., Miami, Florida, filed Respondent's Answer Brief and Respondents [sic] Cross Appeal Petition, on behalf of Respondent on May 18, 1998, and June 5, 1998, respectively.

On April 23, 1998, Complainant 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).** On May 18, 1998, Respondent filed Respondent's Answer Brief.

On June 5, 1998, Respondent filed Respondents [sic] Cross Appeal Petition, and on June 25, 1998, Complainant filed Complainant's Response to Respondent's Cross Appeal Petition. Respondents [sic] Cross Appeal Petition was not timely filed; and therefore, I have not considered Respondents [sic] Cross Appeal Petition or Complainant's Response to Respondent's Cross Appeal Petition.*** Moreover, neither Respondents [sic] Cross Appeal Petition nor Complainant's Response to Respondent's Cross Appeal Petition is part of the record of the proceeding.

On July 21, 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, except with respect to the sanction imposed against Respondent by the Chief ALJ, the Initial Decision and Order is adopted 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.

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."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

**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)).

***On April 23, 1998, Respondent requested an extension of time to June 3, 1998, for filing Respondent's appeal petition, which I granted (Informal Order, filed April 23, 1998). Therefore, Respondents [sic] Cross Appeal Petition, filed June 5, 1998, was not timely filed.

. . . .

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.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

§ 499i. Accounts, records, and memoranda; duty of licensees to keep; contents; suspension of license for violation of duty

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

7 U.S.C. §§ 499b(4)-(5), 499i (1994 & Supp. II 1996).

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

Preliminary Statement

. . . .

. . . All proposed findings, conclusions, and arguments have been considered. To the extent indicated, they have been adopted, otherwise they have been rejected as irrelevant or not supported by the record.

. . . .

Findings of Fact

1. Respondent, Limeco, Inc., is a corporation organized and existing under the laws of the State of Florida. Respondent's business address is 25251 S.W. 139th Avenue, Princeton, Florida 33092. Respondent's mailing address is P.O. Box 4061, Princeton, Florida 33092. Respondent is, and at all times material to the Complaint was, licensed under the PACA. ([Answer ¶ II;] CX 1.)

2. Respondent is an importer, grower's agent, grower, and packer specializing in limes and avocados (Tr. 18, 273). Respondent's principals are Herbert Yamamura, its president, a director, and 100 percent stockholder; Robert Yamamura, its vice-president and a director; and April Yamamura, its secretary-treasurer and a director (CX 1 at 1).

3. Respondent handles Persian seedless limes which are grown in both Florida and Mexico. A Persian seedless lime [grown in] Mexico that has just been picked . . . looks and tastes the same as a Persian seedless lime [grown in] Florida. (Tr. 338-39.)

4. Hurricane Andrew, which struck southern Florida on August 24, 1992, had a disastrous effect on the Florida lime growers (Tr. 334). The hurricane destroyed 90 percent of the 6,800 [acres of] lime trees then growing in the State of Florida . . . and less than 2,600 acres [of lime trees] have since been replanted (Tr. [334-]35). Lime trees do not immediately start producing fruit after they have been replanted (Tr. 335). Florida lime growers shipped 1.8 million bushels [of limes] annually prior to the hurricane, but[, at the time of the hearing, expected] to ship only 500,000 bushels [of limes in 1997] (Tr. 335-36). Currently, Respondent's best trees are 5 years old and produce 350 bushels [of limes] an acre . . ., which is less than the 500 bushels [of limes] an acre that must be produced before a lime grower can earn a profit (Tr. 335).

5. Because the amount of Florida limes produced and shipped after the hurricane was drastically reduced, Florida lime sellers, such as Respondent, who wished to provide limes to their buyers, were required to obtain the limes from foreign countries (Tr. 337). By 1996, the time of the transactions set forth in the Complaint, approximately 60 percent of the limes provided to buyers were grown in Florida and approximately 40 percent [of the limes provided to buyers were grown in] Mexico (Tr. 338).

6. On the days when Respondent is packing or shipping fruit, it arranges for a USDA [or state] inspector to be present (Tr. 354-55). The inspector provides a stamp, which is placed on [cartons] of Florida limes to certify their

origin (Tr. 291). Inspectors are not present at [Respondent's premises at] all times, as Respondent does not pack or ship fruit every day (Tr. 355-56).

7. Respondent receives Florida limes in bulk and stores them in bins. When Respondent packs . . . Florida limes, it removes them from the bins and packs them into cartons. (Tr. 291.) This process is observed by the inspector; however, if Respondent's bins contained Mexican limes that were placed there at a time when the inspector was not present, the inspector would have no reason to know that the limes being packed were anything but Florida limes (Tr. 357-58).

Findings Related to the Mango Plus Transaction

8. On or about August 12, 1996, Respondent received 1,056 cartons of Mexican limes from San Gabriel (CX 4 at 1, 18, 24, 25). On or about August 13, 1996, Respondent received 550 cartons of Mexican limes from London Fruit, Inc., through R&S Distributors, Inc. (CX 4 at 1, 17, 28, 29). These limes were all assigned the Mexican lot number 633 (CX 4 at 1). Of the 1,606 cartons of Mexican limes that Respondent received, 89 of the cartons purchased from London Fruit, Inc., were dumped, and the remaining 1,517 cartons were sold (CX 4 at 1, 17, 21).

9. On August 15, 1996, Respondent received an order from Mango Plus, through its broker, R&S Distributors, Inc., for 400 forty-pound cartons ("bruce cartons") of Florida limes under Respondent's "Qual-A-Key" label (CX 4 at 4).

10. On August 15, 1996, Respondent issued a manifest for shipment of 400 cartons of Qual-A-Key brand Florida limes to Mango Plus (CX 4 at 5). The limes were shipped the same day and were received by Mango Plus, in New York, New York, on August 18, 1996 (CX 5 at 1). The limes were inspected in New York on August 20, 1996. The inspection certificate shows that the limes were represented to be Florida produce (CX 5 at 3).

11. On August 16, 1996, Respondent issued an invoice to R&S Distributors, Inc., for 400 [cartons] of Qual-A-Key limes sold to Mango Plus. The [item number used on the invoice to describe 250 cartons of the limes indicates that the limes were from] lot number 633. [Lot number 633 consisted of Mexican limes.] (CX 4 at 2.)

12. Respondent's grower sales report for lot number 633 confirms that the 250 [cartons of limes sold through R&S Distributors, Inc., to Mango Plus, were] Mexican limes (CX 4 at 1).

13. The limes sold for $1.65 per [carton] (CX 4 at 2).

Findings Related to the PBA Marketing Transaction

14. On September 9, 1996, Respondent received an order from PBA Marketing, for 150 ten-pound cartons ("pony cartons") and three bruce cartons of Qual-A-Key brand Florida limes (RX 3).

15. On September 11, 1996, Respondent issued a manifest for shipment of 153 cartons of Qual-A-Key brand Florida limes to PBA Marketing in Lakemary, Florida [(CX 7 at 3)].

16. [O]n September 12, 1996, Respondent issued an invoice, billing PBA [Marketing] for 153 cartons of Qual-A-Key limes. The item number used on the invoice to describe the pony cartons [of limes] indicates that the limes were from lot number 637. (CX 7 at 2.) Lot number 637 consisted of Mexican limes (CX 7 at 1, 4, 5, 7, 12).

17. Respondent's grower sales report for lot 637 [confirms] that the 150 pony cartons sold to PBA [Marketing] were Mexican limes [(CX 7 at 2)].

18. Fifty of the pony cartons [of limes were] sold [to PBA Marketing] for $3.35 each, and the other 100 [pony cartons of limes were] sold [to PBA Marketing] for $2.85 each (CX 7 at 2).

Findings related to Carnival Fruit [Transaction]

19. On September 14, 1996, Carnival Fruit ordered 40 pony cartons and 11 bruce cartons of Qual-A-Key brand Florida limes from Respondent (CX [10] at [5]).

20. On September 16, 1996, Respondent issued a manifest for shipment of 51 cartons of Florida limes to Carnival Fruit in Miami, Florida [(CX 10 at 4)].

21. On September 16, 1996, Respondent issued an invoice to Carnival Fruit for the 51 cartons of Qual-A-Key limes [(CX 10 at 2)].

22. The item . . . number used on the invoice to describe the 11 bruce cartons [of limes] indicates that the limes were from lot number 637 (CX 10 at 2). Lot number 637 consisted of Mexican limes (CX 10 at 1, 7, 10, 15).

23. Respondent's grower sales report for lot number 637 confirms [that] the . . . 11 cartons [of limes sold] to Carnival Fruit [were Mexican limes (CX 10 at 1)].

24. [One of the] 11 cartons [of limes] sold for $22, [5 of the 11 cartons of limes sold for] $13, and [5 of the 11 cartons of limes sold for] $11 (CX 10 at 2).

Conclusions of Law

1. Respondent willfully, flagrantly, and repeatedly violated section 2(5) of the PACA [(7 U.S.C. § 499b(5))] by misrepresenting the . . . origin of 411 [cartons] of limes that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

2. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by making false statements regarding the country of origin of 411 [cartons] of limes that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

3. Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA [(7 U.S.C. § 499i)] by maintaining documents which incorrectly disclosed the country of origin of 411 [cartons] of limes that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

Discussion

Complainant alleges that Respondent violated: (1) section 2(5) of the PACA [(7 U.S.C. § 499b(5))] by misrepresenting the country of origin when it shipped 411 [cartons] of limes to [three of Respondent's] customers [(Compl. ¶ III)]; (2) section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by making false and misleading statements, for a fraudulent purpose, by issuing documentation which incorrectly listed the origin of the limes [(Compl. ¶ IV)]; and (3) section 9 of the PACA [(7 U.S.C. § 499i)] by maintaining records that incorrectly identified, or failed to accurately disclose, all the details of the transactions, with respect to the limes [(Compl. ¶ IV)].

Section 2(5) [of the PACA]

. . . .

Complainant alleges that Respondent violated section 2(5) [of the PACA (7 U.S.C. § 499b(5))] by representing that the . . . 411 [cartons] of limes [originated in] Florida, when, in fact, Respondent's grower sales [reports] and

inventory show the [limes originated in] Mexico [(CX 4 at 1, 31, 35, CX 7 at 2, 4, 5, 7, 8, CX 10 at 1, 7, 10)]. Respondent admits that all of its internal records identify the limes as Mexican grown [(Tr. 295-304). Respondent] also admits that the limes were shipped to fill orders for Florida limes, that the limes were shipped in [cartons] that identified the contents as Florida limes, and that it issued manifests that identified the fruit as Florida limes. Respondent claims, however, that there was no misrepresentation because the limes were, in fact, grown in Florida. [(Tr. 286-87.)]

Respondent claims that in each of the transactions, an order was taken for Florida limes and Florida limes were shipped [(Tr. 288-89)]. It was after shipment, that the Mexican lot numbers were supposedly assigned [to the Florida limes]. Herbert Yamamura, Respondent's owner, explained that he knew the limes that were shipped were not going to bring a good price because he had held them . . . too long; [therefore,] instead of letting the Florida growers take the loss, he assigned the limes to the Mexican pool and planned to assign Mexican limes, for which he expected a better price, to the Florida pool in exchange [(Tr. 295-304)].

Respondent's explanation is unconvincing for several reasons. First, Respondent is unable to account for the disposition of the Mexican limes, if they were not sold in the three transactions at issue. Respondent's grower sales report indicates that lot 633 consisted of 1,606 [cartons] of Mexican limes, 1,056 of which were purchased from San Gabriel and 550 of which were purchased from London Fruit[, Inc.,] through R&S [Distributors, Inc.] (CX 4 at 1). Other documents corroborate the number of [cartons of] Mexican limes listed on [Respondent's grower] sales report. Two inspection certificates, each dated August 8, 1996, indicate that San Gabriel shipped Respondent 1,056 [cartons] of Mexican limes (CX 4 at 2[4], 25); and a bill of lading from London Fruit[, Inc.,] and a memorandum from R&S Distributors[, Inc.,] both indicate that they sold Respondent 550 [cartons] of Mexican limes (CX [4 at] 28, 29).

[Respondent's grower] sales report indicates that of the 1,606 [cartons] of Mexican limes in lot 633, 250 [cartons] were sold to Mango Plus [(CX 4 at 1)]. Mr. Yamamura testified that those limes were not sold to Mango Plus; however, he could not say where the limes actually went or what price he received for them (Tr. 340-43); and Respondent presented no documentation to verify the sale of the limes to other customers. It is implausible that Respondent would not document the disposition of all 1,606 cartons of the Mexican limes that it received.

Likewise [Respondent's] grower sales report for Mexican lot number 637

indicates that Respondent sold 11 [cartons of Mexican limes] to Carnival [Fruit] on September 17, 1996, and 150 [pony] cartons [of Mexican limes] to PBA [Marketing] on September 12, 1996 (CX 7 at 1).[1] While there is documentation of the sales to Carnival [Fruit] and PBA [Marketing] indicating Florida grown limes (CX 7 at 2-3, [CX] 10 at 2-5), Respondent presented nothing to show the disposition of the Mexican limes with which they were supposedly switched on the [grower] sales report. Although the record does not contain [documents] which trace the origin of lot number 637, as it does with [lot number] 633, Respondent claims that there was a switch of lot numbers, not that the Florida limes were simply added to the Mexican pool. Accordingly, Respondent still should be able to account for the limes that were supposedly switched out of the Mexican pool and into the Florida pool.

Furthermore, Respondent's assertion that it pooled the Florida sales with Mexican lots because it knew the Florida limes would not receive a good price is belied by the fact that [of the 11 cartons of limes that Respondent sold to Carnival Fruit, one carton sold for $22, 5 cartons sold for $13, and 5 cartons sold for $11 (CX 10 at 2[; Tr. 295-304)]). When questioned about those sales, Mr. Yamamura admitted that those were good prices and stated that . . . the limes [sold to Carnival Fruit] were pooled with the Mexican lot by mistake (Tr. 3[53-54]). In addition, on the sale to PBA Marketing, [Respondent] received $3.35 [per carton for 50 pony cartons] and $2.85 [per carton for 100 pony cartons]. . . . Although there was no testimony as to whether or not those were good prices, they appear to be reasonable in light of the fact that they are consistent with prices received for the other pony [cartons] in lot 637 (CX 7 at 1).

Respondent also contends that it could not have sold Mexican limes in Florida [cartons] because the Mexican limes are imported in cartons, while Florida limes are imported in bulk and packaged under the observation of a USDA [or state] inspector, who stamps the [cartons] certifying that they contain Florida fruit ([RX 2;] Tr. [278-80,] 290-9[5, 356-57]). However, an inspector is not at [Respondent's] plant every day, only at times that fruit is being packed and shipped (Tr. 35[4-57]). Respondent, therefore, could have dumped the Mexican limes into the bins with the Florida limes at a time when an inspector was not present. When the limes were packaged, there would be no way for the

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[1][Respondent's grower] sales report also shows that PBA [Marketing] purchased 18 bruce [cartons] from lot 637 on September 17, 1996 [(CX 7 at 1)]; however, [Respondent is not alleged to have misrepresented the origin of the limes in these 18 bruce cartons.]

inspector to know the bins contained anything other than Florida limes. Respondent claims that an inspector [can distinguish Florida limes from Mexican limes] because Florida limes look "fresh and beautiful" (Tr. 295). This claim, however, is inconsistent with [Respondent's] argument that the Florida limes were added to the Mexican pool because the [Florida limes] were old, and worth less than the Mexican limes.

Respondent admits that it would be possible to combine the limes and package them all as Florida produce, but argues that such a scheme would be illogical because the cost of repackaging would diminish [Respondent's] profit. Respondent would not, however, have lost money on the transactions. Mr. Yamamura testified that there would be some profit after the cost of repacking, although not much. (Tr. 32[7-29].) Respondent relies heavily on the argument that there could be no possible motivation for going to all the trouble of repackaging the limes for only "a few dollars" profit. It is quite possible, however, that Respondent was concerned about keeping its customers happy by filling orders for Florida limes at a time when such fruit was scarce. [Respondent] may have acted out of fear of losing customers, or in the hope of gaining new ones by establishing a reputation for being able to meet demands for Florida limes.

Whatever Respondent's reasons, a preponderance of the evidence shows that Respondent sold 411 [cartons] of Mexican limes to [Mango Plus through] R&S Distributors, [Inc.,] PBA Marketing, and Carnival Fruit and that [Respondent] represented the [limes] to be Florida produce. These misrepresentations were made in violation of section 2(5) of the PACA [(7 U.S.C. § 499b(5))].

Section 2(4) [of the PACA]

. . . .

Respondent made false statements in connection with the Carnival Fruit, PBA Marketing, and Mango Plus transactions by issuing manifests that falsely identify Mexican [limes] as Florida [limes] (CX 4 at 5, [CX] 7 at 3, [CX] 10 at 4). Respondent had a fraudulent intent, as the false manifests were meant to misrepresent the true origin of the [limes]. Respondent defrauded its customers by filling orders for Florida limes with Mexican limes falsely identified as Florida limes. As such, Respondent violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))].

Section 9 [of the PACA]

. . . .

Respondent's records failed to correctly disclose the nature of the transactions with Carnival [Fruit], PBA [Marketing], and R&S [Distributors, Inc.] Respondent maintained records, including manifests, which incorrectly identified Mexican limes as Florida limes (CX 4 at 5, [CX] 7 at 3, [CX] 10 at 4).

Respondent admitted that its records were incorrect, arguing only that it was the internal documents that were false, rather than the manifests [(Tr. 295-304)]. Even if Respondent's argument were accepted, [Respondent's maintenance of internal records that do not fully and correctly disclose all transactions involved in Respondent's business] would be in violation of section 9 of the PACA [(7 U.S.C. § 499i)].

Willful, Flagrant, and Repeated Violations

Respondent argues that [this proceeding to suspend its license was] improperly initiated without first issuing a warning letter and offering Respondent an opportunity to achieve compliance with the [PACA], pursuant to 7 C.F.R. § 46.45(e)(5) and 5 U.S.C. § 558(c). A written warning is not required, however, in cases of willfulness.

Willfulness is defined, for purposes of the Administrative Procedure Act, as intentionally doing an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acting with careless disregard of statutory requirements. *See, e.g., Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, [502 U.S. 860] (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re George Steinberg and Son, Inc.*, 32 Agric. Dec. 236[, 263] (1973), *aff'd*, 491 F.2d 988 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974).

Some jurisdictions follow a stricter standard, considering an act willful only if it is done intentionally, or with gross neglect. *See, e.g., 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).

Under either standard, however, Respondent's acts were willful, as they were intentionally done. Respondent mislabeled [limes] and issued false documentation with the intent to deceive [three of] its customers with respect to the actual origin of the limes. Since Respondent's violations were willful, it was

not necessary for Complainant to issue a written warning or offer an opportunity to [achieve compliance with the PACA,] pursuant to 7 C.F.R. § 46.45(e)(5) [and 5 U.S.C. § 558(c)].

Respondent next contends that Complainant improperly initiated the action because the Regulations only permit formal proceedings for violations of section 2(5) [of the PACA (7 U.S.C. § 499b(5))] in cases in which such violations are flagrant or repeated. Respondent argues that the Regulations classify the type of misbranding in which Respondent engaged as a "very serious violation," as opposed to a "flagrant violation." The Regulations, however, also state that flagrant violations are not limited to the examples given. 7 C.F.R. § 46.45(a)[(3)]. In *Potato Sales Co. v. Department of Agric., supra*, 92 F.3d at 804, the court determined that misrepresentation of the origin of produce could constitute a flagrant violation despite its classification as very serious in the Regulations:

> Examples given in PACA regulations suggest that a "flagrant" violation involves knowing conduct, whereas a "serious" or a "very serious" violation typically involves only accidental or negligent conduct. . . . Other indicia of "flagrant" rather than "serious" or "very serious" violations are a large number of transactions, committed over a period of time. . . .

Respondent's violations were knowing, not merely accidental or negligent; and although the amount of produce involved was significantly less than that in *Potato Sales*, which involved 7,5[54] cartons, Respondent's violations were more than an isolated occurrence. The misbranding encompassed three transactions [involving 411 cartons of limes] over a month's time. As such, Respondent's violations were flagrant, and the initiation of a formal proceeding [in which the sanction recommended by Complainant is] . . . suspension [of Respondent's PACA license] was appropriate.

Furthermore, the Judicial Officer in *Potato Sales* found that even the simultaneous shipment of multiple [cartons] of misbranded produce would constitute repeated violations. *In re Potato Sales Co.* (Decision as to Potato Sales Co.), 54 Agric. Dec. 1382, 1404 (1995). Since Respondent's violations not only involved [411 cartons], but also consisted of three shipments, to three different customers, on three separate occasions, [Respondent's] violations were repeated.

Sanctions

With respect to the appropriate sanction for violations of section 2(4) and (5) [of the PACA (7 U.S.C. § 499b(4), (5)), section 8 of] the PACA provides as follows:

§ 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 . . ., 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.

7 U.S.C. § 499h[(a), (e) (1994 & Supp. II 1996]).

. . . Section 9 [of] the PACA provides that:

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business. . . . If such accounts, records, and

> memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

7 U.S.C. § 499i.

The United States Department of Agriculture's 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 appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Complainant recommends the suspension of Respondent's [PACA] license for a period of 45 days. Complainant does not favor the imposition of a civil penalty, as it does not want to compete with creditors for Respondent's funds; however, it recommends that if a civil penalty is imposed, it should amount to $75,000.

. . . .

. . . Complainant's recommendation is entitled to a degree of deference. . . .

. . . .

Taking the [circumstances of this case] into consideration, I have concluded that a [4]5 day suspension [of Respondent's PACA license] is appropriate. . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant contends in Complainant's Appeal Petition that the 15-day suspension of Respondent's PACA license imposed by the Chief ALJ is too lenient and urges the imposition of a 45-day suspension of Respondent's PACA license (Complainant's Appeal Pet. at 2).

I agree with Complainant's contention that a 15-day suspension of Respondent's PACA license is too lenient and that a 45-day license suspension is appropriate under the circumstances.

I agree with the Chief ALJ's conclusions that: (1) Respondent willfully,

flagrantly, and repeatedly violated section 2(5) of the PACA (7 U.S.C. § 499b(5)) by misrepresenting the origin of 411 cartons of limes that it sold to three customers; (2) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false statements regarding the origin of 411 cartons of limes that it sold to three customers; and (3) Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA (7 U.S.C. § 499i) by maintaining documents which were not correct in that they did not accurately identify the origin of 411 [cartons] of limes that Respondent sold to three customers (Initial Decision and Order at 6-7).

Moreover, I agree with the Chief ALJ's description of Respondent's violations as intentional, knowing, and designed to deceive its customers, as follows:

> . . . Respondent's act were willful, as they were intentionally done. Respondent mislabeled fruit and issued false documentation with the intent to deceive its customers with respect to the actual origin of the limes. . . .
>
> . . . .
>
> Respondent's violations were knowing, not merely accidental or negligent; and although the amount of produce involved was significantly less than that in *Potato Sales*, which involved 7,500 cartons, Respondent's violations were more than an isolated occurrence. The misbranding encompassed three transactions over a month's time. As such Respondent's violations were flagrant. . . .

Initial Decision and Order at 13-14.

Respondent's intentional mislabeling of 411 cartons of limes and falsification of records in an attempt to deceive three of its customers as to the origin of perishable agricultural commodities are the kinds of practices that the PACA is designed to prevent.

Further, as indicated by the Chief ALJ, the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA must be given great weight (Initial Decision and Order at 16). However, Respondent contends that Complainant failed to adequately justify the recommended 45-day suspension of Respondent's PACA license (Respondent's Answer Brief at 4-6).

I disagree with Respondent. Mr. Bruce Summers, a regional director for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, testified regarding the basis for Complainant's recommendation, as follows:

[BY MR. STANTON:]

Q. What is Complainant's view as to the nature of the violations committed by the Respondent in regard to Section 9 of the PACA?

[BY MR. SUMMERS:]

A. That the Respondent violated Section 9 in that it maintained records that incorrectly identified the -- or failed to accurately disclose all the details of the transactions with respect to these limes.

Q. Now, moving back to the alleged 2(5) violations of the PACA. Why does the Complainant consider these violations to be willful and flagrantly repeated in this case?

A. Because we believe that the 2(5) violations, the violations involving the misrepresentation of the 411 boxes that were shipped, were done intentionally in order to misrepresent to their suppliers the origin.

Q. Why would these violations then be considered repeated?

A. They were repeated because there's more than one. 411, I believe, is the allegation in the complaint.

Q. And why would they be considered flagrant?

A. Because of the intentional nature of the violations, the number of boxes, and the period of time that the violations occurred.

Q. Now, with regard to the allegations of the violations of Section 2(4) of the PACA, why would Complainant consider these actions -- Respondent's actions -- to be willful and repeated and flagrant violations of 2(4)?

A. We believe that the Respondent issued the documentation which was -- which misrepresented the origin of limes to its customers for a fraudulent purpose, which was to trick or deceive the customers as to the origin of the limes.

Q. And why does Complainant consider Respondent's actions to be willful and repeated and flagrant violations of Section 9?

A. Again, because the -- many numerous documents in the Respondent's records mischaracterized it or didn't accurately disclose the origin of the limes.

Q. Now, Mr. Summers, what is the sanction which the Complainant recommends in this case?

A. The Complainant would recommend that the administrative law judge issue a 45-day suspension of Limeco, Inc.'s PACA license.

Q. Mr. Summers, what is the basis for this 45-day suspension recommendation?

A. Well, we examined the judicial officer's recent decision involving a company called Potato Sales, and we looked at the factors that he listed there, which generally were the intentional --

Potato Sales involved the misbranding of apples. And the judicial officer decided there were four key elements in that case that were -- the intentional nature of the violations, the large number of cartons in that case, the apparent scheme or organization that went into misbranding those apples, and the misrepresenting the origin of those apples, as well as the international issues that were present in this case. And when we compared this to case to that, there are some similarities.

The Complainant believes that these violations were also intentional, that they weren't the result of a dispute with the inspector as to the condition or quality of the limes before they were shipped.

There's also the international issue, in that this is produce coming

in from outside of the United States -- Mexico, to be exact -- and the Complainant believes strongly that the Respondent's customers, and even the consumers down the line, to the extent that they cared whether or not they were buying foreign produce or Mexican limes, they have a right to rely on the information that's provided to them.

And so we compared those factors and found some similarities with Potato Sales and --

Of course, there's a larger difference here, between Potato Sales case -- where a revocation was handed out -- and this case -- where we're asking for a suspension. As in the number of cartons, there were 7500 cartons of apples in the Potato Sales case and here we're talking about 400, which is the reason for the lesser sanctions in this case.

Q. Now, as I stated in my opening statement, the Complainant's changed its sanction recommendation from the one that was alleged in the complaint, which was a 60-day license suspension. The Complainant has changed that to a 45-day license suspension. What is the reason for the change?

A. Since the filing of this complaint, there have been at least a few other misbranding cases or misrepresentation cases where complaints have been filed or settlements have been reached, and we believe that the 45-day suspension is more in line with those cases and is more appropriate than the 60-day suspension originally asked for.

Q. Now, Mr. Summers, are you aware of the case involving Western Sierra?

A. Yes, I am.

Q. In that case, do you know what the Department -- what the Complainant alleged in that case?

A. In general --

Q. Well, let me back up for a second. Do you know what kind of

violations were alleged?

A. Yeah. They were very similar to the violations in this case. It had to do with misrepresentation as to -- high grade grapefruit (phonetic), for lack of a better word. And it had to do with the variety of grapefruit. But it was a similar sort of allegation, as to the misrepresentation to the Respondent in that case, Western Sierra's customers.

Q. What was the sanction that the Complainant recommended in that case? Do you know?

A. Yes, sir. A 90-day suspension of Western Sierra's PACA license.

Q. Do you know how many cartons were involved in that case?

A. I believe in the neighborhood of 2500 cartons.

Q. Now in this case, we have 411 cartons alleged to have been misbranded, correct?

A. Correct.

Q. That's about one-sixth the number of cartons in the Western Sierra case. Would you agree?

A. Yes, sir.

Q. Now, why wouldn't the Department then -- I'm sorry, the Complainant recommend a license suspension of one-sixth the number of days that it recommended in the Western Sierra case, which would have been --

One-sixth of 90 is 15.

A. Primarily because the one-sixth, or the 15 days, the Department feels is not a serious sanction -- certainly not serious enough for the violations which we have alleged occurred here. The Department only has -- can only issue a suspension up to 90 days, which is the maximum suspension. Beyond the 90-day suspension, the only alternative is a

license revocation. So Western Sierra has been recommended for the most severe suspension possible.

In this case, we do not believe that a 15-day suspension, or one-sixth of what was offered to Western Sierra, would be sufficient. We think the 45 days is commensurate with the violations that have been alleged.

Q. In your experience, do you know whether the Department has ever alleged -- or has ever requested in a complaint or a hearing a suspension of less than 45 days?

A. Not that I'm aware of.

Tr. 202-07.

Respondent contends that the recommended sanction is severe in light of the lack of evidence of Respondent's motive for or benefit from its violations (Respondent's Answer Brief at 2-3). I agree with Respondent that the evidence does not establish Respondent's motive and the evidence indicates that the monetary benefit Respondent received for its misrepresentations was not substantial. The Chief ALJ speculated as to Respondent's motive and benefit, as follows:

Respondent admits that it would be possible to combine the limes and package them all as Florida produce, but argues that such a scheme would be illogical because the cost of repackaging would diminish its profit. Respondent would not, however, have lost money on the transactions. Mr. Yamamura testified that there would be some profit after the cost of repacking, although not much. (Tr. 329). Respondent relies heavily on the argument that there could be no possible motivation for going to all the trouble of repackaging the limes for only "a few dollars" profit. It is quite possible, however, that Respondent was concerned about keeping its customers happy by filling orders for Florida limes at a time when such fruit was scarce. It may have acted out of fear of losing customers, or in the hope of gaining new ones by establishing a reputation for being able to meet demands for Florida limes.

Initial Decision and Order at 11.

While I agree with the Chief ALJ's speculation regarding Respondent's possible motive and adopt it in this Decision and Order, *supra*, the lack of evidence establishing Respondent's motive is not relevant either to a finding that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) or to the sanction to be imposed for Respondent's violations. Further, the fact that the evidence indicates that Respondent's monetary gain from its violations of the PACA was not substantial is not relevant either to a finding that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) or to the sanction to be imposed for Respondent's violations.[2] Whatever Respondent's reasons for its violations of the PACA, a preponderance of the evidence shows that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) and that the violations were willful, flagrant, and repeated.

Respondent contends that the recommended penalty is severe when compared to the sanctions imposed in *In re Potato Sales Co.* (Decision and Order as to Potato Sales Co., Inc.), 54 Agric. Dec. 1382 (1995), *aff'd*, 92 F.3d 800 (9th Cir. 1996); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); and *In re E.J. Harrison & Son, Inc.*, 27 Agric. Dec. 1339 (1968) (Respondent's Answer Brief at 3-4).

I do not find that Complainant's recommended penalty is severe when compared to the sanctions imposed in the cases cited by Respondent. In *In re Potato Sales Co., supra*, the judicial officer revoked Potato Sales Co., Inc.'s PACA license for the misrepresentation of 7,554 cartons of Washington apples as New Zealand apples. While the number of cartons involved in *Potato Sales Co.* was significantly more than the number of cartons involved in this proceeding, Potato Sales Co., Inc., was only found to have violated section 2(5) of the PACA (7 U.S.C. § 499b(5)), whereas I find that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i). Moreover, the revocation of Potato Sales Co., Inc.'s PACA license is a much more severe sanction than the 45-day suspension of Respondent's PACA license

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[2]*See In re Potato Sales, Co.* (Decision and Order at to Potato Sales Co.), 54 Agric. Dec. 1382, 1400 (1995) (stating that the motive for respondent's misrepresentation of the origin of 7,554 cartons of apples is a matter of pure conjecture and the profits were not large, but motive is of no real moment), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

recommended by Complainant.

In *In re Magic Valley Potato Shippers, Inc., supra*, the judicial officer suspended Magic Valley Shippers, Inc.'s PACA license for 30 days for misrepresenting the grade of nine lots of potatoes, which Magic Valley Shippers, Inc., shipped to three different buyers and destinations, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). The judicial officer found that Magic Valley Shippers, Inc., probably had no intention to mislead, but stated that if Magic Valley Shippers, Inc.'s violations had been committed with fraudulent intent, a 90-day suspension would have been imposed. *In re Magic Valley Potato Shippers, Inc., supra*, 40 Agric. Dec. at 1671 n.4. The evidence in this proceeding establishes that, unlike Magic Valley Shippers, Inc., Respondent intended to mislead.

In *In re Maine Potato Growers, Inc., supra*, the judicial officer suspended Maine Potato Growers, Inc.'s PACA license for 60 days for shipping 14 loads of misbranded potatoes over a 4-year period, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

In *In re E.J. Harrison & Son, Inc., supra*, the judicial officer suspended E.J. Harrison & Son, Inc.'s PACA license for 60 days for misrepresenting the grade of six lots of potatoes, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Even if the sanction imposed against Respondent is more severe that the sanction imposed against offenders in similar cases, it would not render the sanction in this proceeding invalid. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases and will be overturned only if it is unwarranted in law or without justification in fact.[3] The Secretary of Agriculture has broad

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[3]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order (continued...)

authority to fashion appropriate sanctions under the PACA, and the PACA has no requirement that there be uniformity in sanctions among violators.[4] The Secretary of Agriculture is clearly authorized under the PACA to suspend Respondent's PACA license for 45 days to deter willful, flagrant, and repeated violations of the PACA, and I find that the facts in this proceeding justify the imposition of a 45-day suspension of Respondent's PACA license.

Respondent contends that the sanction is severe in light of Respondent's cooperation with the investigation of its violations of the PACA (Respondent's Answer Brief at 4). The record establishes that Respondent "gave full and complete cooperation" to PACA Branch employees during their investigation of Respondent's violations of the PACA (Tr. 185, 214). However, Respondent's cooperation with the investigation of its violations of the PACA is not relevant to the sanction to be imposed for Respondent's willful, flagrant, and repeated violations of sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i). Further, Respondent contends that its cooperation with the investigation of its violations indicates a "lack of bad faith" and "lack of intent." I do not find that Respondent's cooperation with the investigation establishes that Respondent lacked bad faith or that Respondent's violations were not intentional. To the contrary, I find that Respondent intentionally misrepresented the origin of 411 cartons of limes to deceive three of its customers.

Respondent contends that a 45-day suspension of its PACA license is severe in light of Respondent's financial condition (Respondent's Answer Brief at 6-7).

The record does establish that Respondent is "probably not" in good financial condition (Tr. 216-17). While section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. II 1996)) does require the Secretary to consider factors relating to a violator's business (the size of a violator's business and the number of a violator's employees) when determining the amount of a civil penalty to be assessed, factors related to a violator's business need not be considered with

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[3](...continued)
Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997).

[4]*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981).

respect to revocation or suspension of a violator's PACA license.[5] I do not find that Respondent's financial condition is relevant to the issue of the length of the period during which Respondent's PACA license should be suspended for its willful, flagrant, and repeated violations of sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), and 499i).

Respondent contends that, in light of the 1995 amendment of the PACA providing for the assessment of civil penalties, the suspension of its PACA license is severe and that Congress intended that a civil monetary penalty would be appropriate in this type of proceeding (Respondent's Answer Brief at 7-8).

I disagree with Respondent's contention that Congress only intended assessment of a civil penalty in proceedings such as the instant proceeding. While the PACA was amended in 1995 to allow the imposition of civil penalties, the amendment does not eliminate the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides that, in lieu of suspending or revoking a license for a violation of section 2 of the PACA (7 U.S.C. § 499b), the Secretary *may* assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues.

The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

> *Section 11—Imposition of civil penalty in lieu of suspension or revocation*
>
> Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity.

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[5] *In re Allred's Produce*, 56 Agric. Dec. 1884, 1903 n.13 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1279 n.8 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225 n.13 (1996), *aff'd*, No. 96-4238 (7th Cir. Aug. 10, 1998).

However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 104-207 at 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

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.

. . . .

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., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the 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., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

The language of section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. II 1996)) and the legislative history make clear that the Secretary of Agriculture may choose to assess a civil penalty for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license revocation or suspension, but that license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) in a deliberate attempt to deceive three of its customers as to the origin of limes. The appropriate sanction under the circumstances is suspension of Respondent's PACA license.

Respondent contends that the sanction imposed must be predicated upon the issues framed in the Complaint which alleges only three transactions to be in violation of the PACA (Respondent's Answer Brief at 8-9).

The Complaint alleges that: (1) Respondent misrepresented the origin of limes and that "[t]hese misrepresentations were *in connection with*" transactions which involved 411 cartons of limes, sold to three customers, shipped to three different destinations, on three different dates (Compl. ¶ III (emphasis added)); (2) Respondent made, for a fraudulent purpose, false and misleading statements

in connection with 411 cartons of limes, sold to three customers, shipped to three different destinations, on three different dates (Compl. ¶ IV); and (3) during at least the period January 1996 through September 1996, Respondent failed to keep such accounts, records, and memoranda that fully and correctly disclose all transactions involved in its business (Compl. ¶ V). The Complaint does not in any way suggest that Respondent committed only three violations of the PACA or that Respondent made only one misrepresentation or false and misleading statement for each of the three transactions identified in paragraph III of the Complaint. Instead, the Complaint clearly alleges that Respondent's numerous misrepresentations and false and misleading statements were *in connection with* three transactions.

In *In re Potato Sales Co., supra*, 54 Agric. Dec. at 1404, the judicial officer found that each misrepresented carton, rather than each shipment, constitutes a violation of section 2(5) of the PACA, as follows:

> In the present case, Respondent misrepresented the place of origin of 7,554 cartons of apples, each of which was a separate violation. But even if we were to count thousands of violations on each shipment as only one violation per shipment (which would not be proper), Respondent prepared three different orders of misrepresented apples, and three separate violations would still be "repeated."

I find that *each* misrepresentation by Respondent of the origin of limes identified in paragraph III of the Complaint constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)), *each* false and misleading statement made by Respondent for a fraudulent purpose in connection with the limes identified in paragraph III of the Complaint constitutes a violation of 2(4) of the PACA (7 U.S.C. § 499b(4)), and *each* failure by Respondent to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business constitutes a violation of section 9 of the PACA (7 U.S.C. § 499i).

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

Order

Respondent's PACA license is suspended for a period of 45 days, effective 60 days after service of this Order on Respondent.

In re: LIMECO, INC.
PACA Docket No. D-97-0017.
Stay Order filed October 26, 1998.

Andrew Y. Stanton, for Complainant.
J. Randolph Liebler, Miami, Florida, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On August 18, 1998, I issued a Decision and Order: (1) concluding that Limeco, Inc. [hereinafter Respondent], willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499b(4), (5), 499i); and (2) suspending Respondent's Perishable Agricultural Commodities Act license for 45 days, effective 60 days after service of the Order on Respondent. *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 10-11, 37 (Aug. 18, 1998). The record establishes that the Order was served on Respondent on August 24, 1998.[1] Therefore, the Order suspending Respondent's license became effective on October 23, 1998.

On October 16, 1998, Respondent filed Motion to Stay Decision and Order [hereinafter Motion for a Stay], requesting a stay of the August 18, 1998, Order pending the outcome of proceedings for judicial review. On October 23, 1998, Complainant filed Complainant's Response to Motion to Stay Decision and Order, stating that "Complainant does not oppose staying the Decision and Order until Respondent's appeal is resolved." On October 23, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for a Stay.

Respondent's Motion for a Stay is granted. The Order issued in this proceeding on August 18, 1998, *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Aug. 18, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order is issued *nunc pro tunc* and is effective October 23, 1998. This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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[1]Domestic Return Receipt for Article Number P 093 143 351.

In re: WESTERN SIERRA PACKERS, INC.
PACA Docket No. D-97-0004.
Decision and Order filed September 30, 1998.

Misrepresentation of produce — Inaccurate records — Willful and repeated violations — Agency recommendation — Civil penalty — License suspension.

The Judicial Officer reversed the Decision by Chief Judge Palmer (Chief ALJ) in which the Chief ALJ only published the facts and circumstances of Respondent's violation of 7 U.S.C. § 499i. The evidence was not sufficient to find that Respondent made the false or misleading statements for a fraudulent purpose, in violation of 7 U.S.C. § 499b(4); however, any misrepresentation of the subject matter described in 7 U.S.C. § 499b(5), even if the misrepresentation is unintentional or accidental, constitutes a violation of 7 U.S.C. § 499b(5), and the Judicial Officer found that Respondent misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit, in violation of 7 U.S.C. § 499b(5). A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Willfulness is reflected by Respondent's violations of express requirements of 7 U.S.C. §§ 499b(5) and 499i and the number of Respondent's violations. Respondent's violations are "repeated" because repeated means more than one. Each misrepresented carton of grapefruit constitutes a separate violation of 7 U.S.C. § 499b(5), and each inaccurate record constitutes a separate violation of 7 U.S.C. § 499i. Sanction recommendations of administrative officials charged with responsibility for achieving the congressional purpose of the PACA are entitled to great weight. However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials. The Judicial Officer rejected the sanction recommendation of administrative officials because it was based, in part, on the allegation that Respondent violated 7 U.S.C. § 499b(4), and the Judicial Officer did not find that Respondent violated 7 U.S.C. § 499b(4). Further, Respondent did not engage in the violations in order to deceive its customers; but rather, the violations appear to have been the result of Respondent's lack of concern for distinguishing between Oroblanco grapefruit and Melogold grapefruit. The Judicial Officer imposed a 20-day suspension of Respondent's PACA license (15 days for violations of 7 U.S.C § 499b(5) and 5 days for violations of 7 U.S.C. § 499i). In lieu of a 20-day suspension, the Judicial Officer assessed Respondent a civil penalty of $19,500 for violations of 7 U.S.C. § 499b(5) and imposed a 5-day suspension of Respondent's PACA license for violations of 7 U.S.C. § 499i.

Andrew Y. Stanton, for Complainant.
Fred V. Spallina, Porterville, California, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and 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 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 16, 1996.

The Complaint alleges that: (1) from approximately October 26, 1995, through November 3, 1995, Western Sierra Packers, Inc. [hereinafter Respondent], misrepresented the character or kind of 2,529 cartons of grapefruit that it packed and/or sold to two customers in the course of interstate or foreign commerce by designating the grapefruit hybrid as the Oroblanco variety, when the grapefruit was the Melogold variety (Compl. ¶ III); (2) Respondent made false and misleading statements, for a fraudulent purpose, in connection with the misbranded grapefruit (Compl. ¶ IV); and (3) Respondent failed to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business in connection with the misbranded grapefruit (Compl. ¶ V). Respondent filed Answer and Request for Hearing [hereinafter Answer] on February 7, 1997, denying the material allegations of the Complaint and raising seven affirmative defenses.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on December 2 through December 4, 1997, in Fresno, California. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Fred V. Spallina, Esq., Spallina & Krause, Porterville, California, represented Respondent.

On March 6, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order; on April 8, 1998, Respondent filed Trial Brief of Respondent Western Sierra Packers, Inc; and on May 1, 1998, Complainant filed Complainant's Reply Brief.

On May 19, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent failed to keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i); (2) concluded that Respondent did not make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluded that Respondent did not misrepresent any perishable agricultural commodity in interstate or foreign commerce, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)); and (4) ordered the publication of the facts and circumstances of Respondent's violation of section 9 of the PACA (7 U.S.C. § 499i) (Initial Decision and Order at 2, 8-9, 16).

On June 19, 1998, Complainant 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).[1] On July 10, 1998, Respondent filed Response Brief of Respondent Western Sierra Packers, Inc. [hereinafter Respondent's Response], and on July 13, 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 with the Chief ALJ that Respondent violated section 9 of the PACA (7 U.S.C. § 499i) and that Respondent did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I disagree with the Chief ALJ's conclusion that Respondent did not violate section 2(5) of the PACA (7 U.S.C. § 499b(5)) and the sanction imposed by the Chief ALJ. Therefore, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

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."

PERTINENT STATUTORY PROVISIONS

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:

. . . .

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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)).

(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.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

> (A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or
>
> (B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to

correct the violation.

§ 499i. Accounts, records, and memoranda; duty of licensees to keep; contents; suspension of license for violation of duty

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

7 U.S.C. §§ 499b(4)-(5), 499i (1994 & Supp. II 1996).

Findings of Fact

1. Respondent, Western Sierra Packers, Inc., is a corporation whose business address is 23590 95th Avenue, Terra Bella, California 93270 (CX 1).

2. Respondent was issued PACA license number 911063 on May 8, 1991, and Respondent is, and at all times material to the Complaint was, licensed under the PACA (CX 1).

3. Respondent is owned jointly by John Guidetti and Craig Nieblas. Mr. Nieblas is also the founder, president, and general manager of Respondent (CX 1; Tr. 367-68).

4. Respondent is a specialty packing house that handles subtropical citrus fruit. Respondent employs contractors to pick fruit for growers, Respondent packs the fruit, and Respondent charges growers fees for packing, state standardization, citrus research assessment, selling, picking, and hauling. (CX 10, CX 11; Tr. 397-98.)

5. Beginning in 1993, Respondent began using a sales agent, Heritage Produce Sales, Inc., to sell the fruit of some of the Respondent's growers (Tr. 400-01). When Heritage Produce Sales, Inc., sold Respondent's growers' fruit, Heritage Produce Sales, Inc., would transmit a copy of the purchase order to Respondent, and Respondent would then ship the fruit based on the purchase order. Heritage Produce Sales, Inc., would then send an invoice to the buyer of the fruit, and after Heritage Produce Sales, Inc., was paid by the buyer, Heritage Produce Sales, Inc., would pay Respondent and send Respondent a copy of the invoice. (Tr. 152-53.) For some of Respondent's growers, Respondent does not

use a sales agent, but instead packs the growers' fruit, sells the fruit, collects payment for the fruit, and remits the amounts collected, minus Respondent's charges for packing, to the growers. Respondent refers to these growers as Western Sierra growers. (Tr. 401.)

6. Respondent maintains growers files in which Respondent keeps records of the fruit picked, records of the fruit that Respondent receives, and records of the fruit that Respondent packs. Respondent maintains growers files for Sierra Victor Ranch Company, Sequoia Enterprises, Inc., and Western Sierra growers. Respondent maintains a separate accounts receivable file in which it keeps all of its invoices. (Tr. 78.)

7. During the 1995-1996 growing season, Respondent contracted with drivers to bring fruit from the growers' fields to Respondent's packing house. When the drivers brought the fruit to Respondent for packing, Respondent issued a receiving ticket, indicating the quantity and type of fruit received. One copy of the receiving ticket would be given to the driver, a copy of the receiving ticket would be attached to the appropriate grower's file, and a third copy of the receiving ticket would be filed with Respondent's master file of receiving tickets. (Tr. 80, 95.) Respondent removed the copy of the receiving ticket attached to the appropriate grower's file after the fruit was packed and attached the copy of the receiving ticket to the record that shows the fruit was packed (Tr. 80).

8. Included among the kinds of fruit Respondent handles are two varieties of hybrid grapefruit known as Melogold and Oroblanco. These hybrid varieties of grapefruit were created at the University of California, Riverside, in 1958, by cross-breeding a grapefruit with a pummelo. Seven different varieties resulted; however, only Melogold and Oroblanco were chosen for further study and propagation. Both Melogold and Oroblanco were ultimately patented; Oroblanco in 1980 and Melogold in 1987. (CX 5; Tr. 30-39.)

9. Oroblanco and Melogold are closely related varieties of grapefruit; and thus, have a similar appearance. However, there are differences by which the two varieties can be distinguished from one another. These differences become more pronounced late in the growing season, as the grapefruit ripens. Melogold tends to be larger than Oroblanco and have a more pear-like shape than Oroblanco. The average peel thickness of Melogold, as a percentage of the diameter of the grapefruit, is thinner than Oroblanco and the juice percentage of Oroblanco is slightly lower than Melogold. Oroblanco is generally considered sweeter than Melogold; however, opinions vary as to which variety of grapefruit has the preferable taste. Early in the growing season both varieties of grapefruit are green, but, as they ripen, Melogold develops a yellowish, gold color, while Oroblanco turns an off-white, light green shade. (CX 5; Tr. 43-45, 218-19, 229, 312-13, 317-

22, 504-06.)

10. Some Melogold have Oroblanco characteristics and vice versa. Even experts cannot always tell them apart. Timothy Williams, a staff research associate for the citrus breeding program at the University of California, Riverside, testified that in order to tell the difference, it is necessary to look at a large sample, such as 20 pieces of each variety of grapefruit. (Tr. 59.)

11. Mr. Nieblas, who at the time of the hearing was 43 years old, has been involved with growing citrus since he was a child. In the mid-1980's, Mr. Nieblas worked for an independent packer, Suntreat. Through the actions of Mr. Nieblas, Suntreat, working with California Citrus Specialties, became the first marketer of Oroblanco and Melogold in the San Joaquin Valley of California. Mr. Nieblas went to Japan on two occasions between 1986 and 1990 to discuss oranges and Oroblanco and Melogold. (Tr. 367-76.)

12. Oroblanco and Melogold grown in California are generally picked and sold early in the growing season, beginning in October, while they are still green (Tr. 305-08, 380-82).

13. There is virtually no domestic market for Oroblanco or Melogold. Oroblanco and Melogold are primarily sold in Japan. The Israelis aggressively market Oroblanco, which they call "Sweeties," in Japan; and hence, Sweeties dominate the Japanese market. Sweeties set the standard for Oroblanco in Japan. As Sweeties are green and sweet, California hybrid grapefruit also must be green and sweet, if it is to be accepted in Japan. (Tr. 52, 379-82.)

14. Until 1995, Sweeties did not arrive in Japan from Israel until approximately December 14 because, after harvest in Israel, Sweeties had to be kept in cold storage for 14 days to kill fruit fly larvae before they were shipped to Japan (Tr. 382, 388). However, beginning in 1995, the Israelis began using a process whereby the Sweeties were subjected to cold storage during transportation from Israel to Japan; thereby enabling the Israelis to get the Sweeties to Japan approximately 2 weeks earlier than in previous years (Tr. 389).

15. Once Sweeties arrive in Japan, it is impossible to market Oroblanco and Melogold from California in Japan (Tr. 494). As a result of the domination of the Japanese grapefruit market by Sweeties, California Oroblanco and Melogold must be shipped to Japan before the Sweeties arrive. Until 1995, the period of time between harvest of the California Oroblanco and Melogold and the time the Sweeties arrived in Japan was approximately 1 month (Tr. 382). In 1995, as a result of the Israelis subjecting the Sweeties to cold storage during transportation, the period between the harvest of the California Oroblanco and Melogold and the time the Sweeties arrived in Japan was reduced to approximately 2 weeks (Tr. 388-89).

16. In Japan, no distinction is made between California Oroblanco and Melogold, all California green grapefruit is sold together (Tr. 223, 301, 305-06, 382-83, 496-97). When grapefruit is displayed in Japanese stores, it is labeled according to origin; for example, Florida grapefruit, California grapefruit, or Israel Sweetie grapefruit (Tr. 300-01).

17. There was no price difference between California Melogold and Oroblanco shipped to Japan during the 1995 season (Tr. 325, 329).

Fresh Pacific Transaction

18. Milton and Elsie Lindner of Lemon Cove, California, owned 7 acres of Melogold trees and 5 acres of Oroblanco trees (Tr. 202). Only Melogold could be harvested from the Lindner's premises in 1995 because the Oroblanco trees had been planted in June 1995 and were not yet capable of producing grapefruit (Tr. 203).

19. Mr. Lindner arranged with Sequoia Enterprises, Inc., to sell the Lindner's Melogold during the 1995-1996 harvesting season (Tr. 209, 515-16). Mr. Lindner's primary contact at Sequoia Enterprises, Inc., was Oleah Wilson, one of the owners and officers of Sequoia Enterprises, Inc. (Tr. 89-90, 209, 513). Mr. Lindner informed Oleah Wilson that he (Mr. Lindner) only had Melogold. Marvin Wilson, Oleah Wilson's son and president of Sequoia Enterprises, Inc., also knew that Mr. Lindner's crop consisted of only Melogold. (Tr. 89-90, 209.)

20. Fresh Pacific Fruit & Vegetable, Inc., is an export company that ships approximately 30 products to Asian markets. Fresh Pacific's business includes the export of green grapefruit to Japan. (Tr. 299-300.)

21. In October 1995, Jim Abbot, who runs the field department for Fresh Pacific Fruit & Vegetable, Inc., visited between 10 and 12 California citrus groves with a Japanese buyer who was looking for green grapefruit. They visited both Oroblanco and Melogold groves. The Japanese buyer was not concerned with the variety of the grapefruit, but was interested in the taste and juice quality. (Tr. 301-03, 306.) Among the groves that Mr. Abbott visited with the Japanese buyer and Oleah and Marvin Wilson was the Lindner's grove in Lemon Cove, California. The Japanese buyer chose to purchase Melogold from the Lindners. (Tr. 303-04, 519.)

22. Sequoia Enterprises, Inc., arranged to pick and pack Mr. Lindner's Melogold (Tr. 409-11). However, the Lindner's grapefruit was too large for Sequoia Enterprises, Inc.'s machines, and Respondent agreed to pack the Lindner's grapefruit (Tr. 516). On October 24, 1995, Sequoia Enterprises, Inc., picked the Lindner's Melogold and delivered it in three loads to Respondent (CX 2 at 1-6, 11,

13, 15).

23. Respondent completed three receiving tickets for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 10, 12, 14; Tr. 433-34).

24. Respondent prepared three picking reports for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 16-18; Tr. 97-99).

25. Respondent prepared three sorter reports for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 20-21, 24, 27; Tr. 100-03).

26. Respondent prepared daily shipment records on October 25, 27, and 31, 1995, reflecting repacking of the grapefruit received from the Lindner's grove. The daily shipment records dated October 25 and 31, 1995, each identify the Lindner's Melogold as Oroblanco. (CX 2 at 25, 26, 28; Tr. 104-06.) The daily shipment record dated October 27, 1995, identifies the grapefruit received from the Lindner's grove as Melogold (CX 2 at 25).

27. Respondent prepared a receiving book which states that the Melogold that it received from the Lindner's grove was Oroblanco (CX 2 at 29; Tr. 106-07).

28. Respondent packed the Lindner Melogold on October 25, 1995. The grapefruit was packed in Fresh Pacific Fruit & Vegetable, Inc.'s cartons bearing its "Super Sonic" logo. The cartons are labeled "California Citrus," and there are boxes on each carton which can be marked so as to identify the contents of the carton as either oranges, grapefruit, or lemons. (CX 2 at 18, RX 5; Tr. 311-12, 416-17.)

29. Sequoia Enterprises, Inc., issued an invoice to Fresh Pacific Fruit & Vegetable, Inc., dated October 31, 1995, for 1,092 cartons of Oroblanco. The invoice, which contains a reference to "PO #F61301," states that the grapefruit was shipped from Terra Bella, California, on October 26, 1995, and shipped to General Fruit Co., Ltd., Tokyo, Japan. (CX 2 at 30-31.)

30. Respondent's file for Sequoia Enterprises, Inc., contained a document entitled "Packer Loading Instructions" issued by Fresh Pacific Fruit & Vegetable, Inc., to Sequoia Enterprises, Inc., which shows that 1,092 cartons of Oroblanco with the Super Sonic label were loaded for transport to General Fruit Co., Ltd., on October 25 and 26, 1995. The Packer Loading Instructions contain a reference to "Order No. F61301." (CX 2 at 32-33; Tr. 108-11.)

31. Fresh Pacific Fruit & Vegetable, Inc., prepared a document entitled "Truck Loading Instructions," which shows that Three Rivers was to transport 1,092 cartons of Oroblanco under the label Super Sonic from Terra Bella, California. The Truck Loading Instructions contains a reference to "Order

F61301." (CX 2 at 34; Tr. 112.)

32. Fresh Pacific Fruit & Vegetable, Inc., prepared two documents entitled "Loading Confirmation," which show that 1,092 cartons of Oroblanco were loaded onto a ship on October 26, 1995 (CX 2 at 35, 38; Tr. 112-14). One of the Loading Confirmation documents contains a reference to "Order Number 961301" (CX 2 at 35); the other Loading Confirmation document refers to "Order Number F61301" (CX 2 at 38).

33. Fresh Pacific Fruit & Vegetable, Inc., prepared two commercial invoices which describe the fruit sold to General Fruit Co., Ltd., as 1,092 cartons of fresh Oroblanco under the Super Sonic label. Each invoice is identified with the number "F61301." (CX 2 at 36, 37; Tr. 113.)

34. Respondent's files contained a bill of lading prepared by Respondent which shows that 1,092 cartons of Oroblanco were shipped to General Fruit Co., Ltd., in Japan, on October 26, 1995. The bill of lading makes reference to "Order Number F61301." (CX 2 at 39-41; Tr. 114-16.)

35. Fresh Pacific Fruit & Vegetable, Inc., issued a check to Sequoia Enterprises, Inc., dated November 14, 1995, for $17,710.90. The check skirt makes reference to invoice number "6502/F61301-01" (CX 2 at 42; Tr. 116).

36. In response to an inquiry by Kloster, Ruddell, Hornsburg, Cochran, Stanton & Smith, a law firm representing Elsie Lindner, regarding the status of her 1995 grapefruit crop (CX 2 at 2), Sequoia Enterprises, Inc., sent a letter dated May 9, 1995, stating that 1,092 cartons of the Lindner's grapefruit had been sold for export for $17,710.90 (CX 2 at 4-6).

37. The Japanese buyers received the grapefruit they had personally selected and purchased prior to picking, packing, and shipment; and there is no evidence of any complaints about the grapefruit.

Umina Brothers Transaction

38. Umina Brothers, Inc., is an exporter of fresh fruit. Its export sales and distribution are handled by Mark Golden. Mr. Golden spends more than half of his time visiting growers and observing the products. He visits Japan approximately twice a year. (Tr. 483-84.)

39. In October 1995, Mr. Golden, along with a group of Japanese buyers, visited several California citrus groves. The Japanese buyers sampled green grapefruit from various groves and selected the grapefruit they wanted to purchase. (Tr. 486.) The Japanese buyers were not interested in whether the grapefruit was Melogold or Oroblanco, but rather were concerned with taste and color (Tr. 488).

40. The Japanese buyers selected grapefruit from three groves belonging to

John Corkins, F. Glenn McDonald, and Sierra Victor Ranch Company, respectively (CX 3a, CX 3b, CX 3c, CX 4a, CX 4b; Tr. 486). All of the grapefruit picked from Mr. Corkins' grove in 1995 was Melogold, and all of the grapefruit, except 1¼ bins of Oroblanco, picked from Mr. McDonald's grove in 1995 was Melogold (CX 3a; Tr. 216, 219, 228, 235). There was no testimony with respect to the variety of grapefruit picked at the Sierra Victor Ranch Company.[2]

41. Respondent picked Mr. Corkins' Melogold on November 1 and November 2, 1995, and transported three truck loads of Mr. Corkins' Melogold to Respondent's packing plant. Respondent completed three receiving tickets for Mr. Corkins' grapefruit, each of which identify Mr. Corkins' Melogold as Oroblanco. (CX 3a at 1-4; Tr. 118.)

42. Mr. Corkins received copies of Respondent's receiving tickets and informed Respondent that the receiving tickets erroneously described his (Mr. Corkins') grapefruit as Oroblanco, rather than Melogold. Mr. Corkins was informed by Mr. Nieblas or "someone in his operation" that "they" meant to write Melogold on the receiving tickets. (Tr. 220-22.)

43. Respondent prepared two documents entitled "Daily Packout Record" for Mr. Corkins' grapefruit which identify the grapefruit as Melogold (CX 3a at 5-6; Tr. 118-19).

44. Respondent prepared a sorter report for Mr. Corkins' grapefruit which identifies the grapefruit as Melogold (CX 3a at 7-9; Tr. 119-20).

45. Respondent's receiving book states that the grapefruit that it received from the Mr. Corkins' grove was Oroblanco (CX 3a at 11; Tr. 121-22).

46. On October 31, 1995, and November 2, 1995, Respondent picked grapefruit from Sierra Victor Ranch Company. The truck bin count sheets identify Sierra Victor Ranch Company's grapefruit as Melogold. (CX 3b at 3, 5, CX 4a at 3, 5, 7.) Respondent completed five receiving tickets for the grapefruit received from Sierra Victor Ranch Company. Lot number 4030 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 3b at 2), lot number 4031 from Sierra Victor Ranch Company is identified as 18½ bins of Melogold (CX 3b at 4), lot number 4015 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 4a at 2), lot number 4019 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 4a at 4), and lot number 4023 from Sierra

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[2]An affidavit, which states that Respondent packed 4,880 cartons of Sierra Victor Ranch Company's Melogold and 29 cartons of Sierra Victor Ranch Company's Oroblanco, is in evidence (CX 3b at 1). However, there is nothing in the affidavit or elsewhere to indicate the affiant's relationship to the Sierra Victor Ranch Company or the source of the affiant's knowledge. The affiant did not testify, nor did the investigator who took the affidavit. As such, the affidavit is not reliable evidence, and no weight has been given to the affidavit.

Victor Ranch Company is identified as 24½ bins of Melogold (CX 4a at 6).

47. Respondent prepared three documents entitled "Daily Packout Record" for Sierra Victor Ranch Company's grapefruit which identify Sierra Victor Ranch Company's grapefruit as Melogold (CX 3b at 6-7, 16, CX 4a at 8-9; Tr. 130, 145-47).

48. Respondent prepared sorter reports which identify Sierra Victor Ranch Company's grapefruit as Oroblanco (CX 3b at 9-10, CX 4a at 12, 15-16; Tr. 132-33, 149).

49. Respondent's receiving book states that lot numbers 4015, 4019, 4023, 4030, and 4031, which Respondent received from the Sierra Victor Ranch Company's grove, were Melogold (CX 3b at 17, CX 3c at 6, CX 4a at 18; Tr. 137, 151-52).

50. Mr. McDonald owned 6 acres of Melogold trees and 4 Oroblanco trees (Tr. 228).

51. On October 26, 1995, Respondent picked Mr. McDonald's grapefruit and transported the grapefruit to Respondent's packing house (Tr. 230-31). When the grapefruit arrived at the packing house, Respondent prepared two receiving tickets. The receiving ticket for lot number 4004 describes the grapefruit received from Mr. McDonald as 50½ bins of Melogold (CX 3c at 2; Tr. 139-40). The receiving ticket for lot number 4006 initially described the grapefruit received from Mr. McDonald as 1¼ bins of Melogold, but a line is drawn through the word "Melogold" and the word "Oroblanco" is written above the word "Melogold" (CX 3c at 1; Tr. 139-40).

52. Respondent prepared a document entitled "Daily Packout Record" for Mr. McDonald's grapefruit which identifies the grapefruit as Melogold (CX 3c at 3, CX 4b at 3; Tr. 140, 157). The Daily Packout Record contains a reference to "1007" next to a reference to 174 cartons of size 32 grapefruit and 42 cartons of size 40 grapefruit (CX 3c at 3).

53. Respondent prepared a document entitled "Daily Shipment Record" for Mr. McDonald's grapefruit which identifies the grapefruit as Melogold (CX 3c at 4; Tr. 141).

54. Respondent prepared a sorter report which identifies Mr. McDonald's grapefruit as Oroblanco (CX 3c at 5; Tr. 142).

55. Respondent's receiving book states that lot numbers 4004 and 4006, which Respondent received from the Mr. McDonald, were Oroblanco (CX 3c at 6; Tr. 142). With respect to lot number 4004, there is a line drawn through the word "Melogolds" and "oro's" is written above the word "Melogolds" (CX 3c at 6).

56. Respondent issued an invoice (invoice number 1007) to Umina Brothers, Inc., dated November 14, 1995, for 1,176 cartons of Oroblanco shipped

from Respondent to Tamagawa Trading Company, Inc., in Japan (CX 3a at 12, CX 3b at 18, CX 3c at 7).

57. Respondent prepared a bill of lading (bill of lading number 1007) which shows that 1,176 cartons of Oroblanco were shipped to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10; Tr. 139). The bill of lading states that the total charge for the 1,176 cartons of grapefruit is $14,492.45 (CX 3a at 15, CX 3b 21, CX 3c at 10). Respondent deposited a check from Umina Brothers, Inc., on December 4, 1995, in the amount of $14,492.45 (CX 3a at 16, CX 3b at 22, CX 3c at 11).

58. The number 1007 on the invoice (CX 3a at 12, CX 3b at 18, CX 3c at 7) and the bill of lading (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10) is also used on Respondent's Daily Packout Record for 295 cartons of Mr. Corkins' Melogold (CX 3a at 5), Respondent's Daily Packout Record for 115 cartons of Sierra Victor Ranch Company's Melogold (CX 3b at 6), and Respondent's Daily Packout Record for 216 cartons of Mr. McDonald's Melogold (CX 3c at 3).

59. Heritage Produce Sales, Inc., issued an invoice (invoice number HP952465) to Umina Brothers, Inc., dated November 14, 1995, for 1,176 cartons of Oroblanco shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 19, CX 4b at 7; Tr. 152-53).

60. Respondent prepared a bill of lading (bill of lading number 1008) for customer number HP952465, which shows that 1,176 cartons of Oroblanco were shipped to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 21, CX 4b at 9; Tr. 154).

61. The number 1008 on the bill of lading (CX 4a at 21, CX 4b at 9) and the number 952465, which appears on the invoice (CX 4a at 19, CX 4b at 7), are also used on Respondent's Daily Packout Record for 328 cartons of Sierra Victor Ranch Company's Melogold (CX 4a at 8), and the Daily Packout Record for 273 cartons of Mr. McDonald's Melogold (CX 4b at 3).

62. Heritage Produce Sales, Inc., issued a shipping document dated November 3, 1995, which states that 1,176 cartons of Oroblanco were sold to Umina Brothers, Inc., and shipped to Tamagawa Trading Company, Inc., in Japan. The shipping document contains a reference to HP952465 (CX 4a at 22-23, CX 4b at 10-11; Tr. 155-56).

63. All of the grapefruit was packed in cartons Respondent purchased from Sequoia Enterprises, Inc. The cartons identified the contents as "Sequoia Grapefruit" (RX 6). Mr. Golden was present while the grapefruit was packed. He inspected and approved all of the grapefruit and placed his stickers on the pallets. (Tr. 418-20, 492-93.)

64. The Japanese buyers received the grapefruit they personally selected and

purchased prior to shipment. The buyers appear to have been happy with the grapefruit, as they did not complain about the grapefruit and continued to do business with Umina Brothers, Inc. (Tr. 488-89.)

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of a perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).
3. Respondent willfully and repeatedly failed to keep such records as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i).

Discussion

Complainant alleges that Respondent willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) by misrepresenting the variety of grapefruit sold to two Japanese buyers as Oroblanco, when the variety was actually Melogold, and by failing to keep accounts, records, and memoranda that fully and correctly disclosed all of the transactions involved in Respondent's business. Complainant does not dispute the fact that the cartons correctly identified the produce as "grapefruit." Respondent admits that its records contained errors with respect to the variety of the grapefruit described. The only question, therefore, is whether those errors constitute violations of the PACA.

Section 2(4) of the PACA

Complainant proved by a preponderance of the evidence that Respondent made false or misleading statements in connection with transactions involving a perishable agricultural commodity by describing Melogold grapefruit as Oroblanco grapefruit on three bills of lading and one invoice in connection with the transactions.[3] However, the record is not sufficient to find, or to infer, that

[3]See: (1) the bill of lading (CX 2 at 39-41; Tr. 114-16), prepared by Respondent, which states that 1,092 cartons of Oroblanco were shipped to General Fruit Co., Ltd., in Japan, on October 26, 1995, when, (continued...)

Respondent made the false or misleading statements for a fraudulent purpose. Complainant states that:

> Respondent was desperate to send as much hybrid grapefruit to Japan as possible before the arrival of the Israeli Sweeties. Respondent knew that the Japanese preferred Oroblanco to Melogold. Therefore, in order to ensure that the Japanese would accept the Melogold, respondent misrepresented it as Oroblanco.

Complainant's Proposed Findings of Fact, Conclusions and Order at 31-32. The record, however, does not support this theory.

There was no need to ensure that the Japanese would accept the grapefruit since it had already been sold. The Melogold in question were visually inspected, tasted, and selected by the Japanese buyers and purchased prior to packing or shipment. Therefore, there is no apparent fraudulent purpose for Respondent's false or misleading statements regarding the variety of the grapefruit.

In addition, the uncontroverted testimony with respect to the Japanese market indicates that, as between Melogold and Oroblanco, the Japanese did not have a preference for Oroblanco and, in fact, did not even distinguish between the two. Complainant asserts that Japanese preference for the Israeli Sweetie proves a preference for Oroblanco in general. There was testimony, however, that Israel has better growing conditions for grapefruit than the United States, enabling Israelis to produce higher quality grapefruit (Tr. 330-31). Also Israel reached the Japanese market first, aggressively marketing its fruit with the name Sweetie (Tr. 52-53). Furthermore, the Japanese prefer the Sweetie to all California green

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[3](...continued)
in fact, the 1,092 cartons of grapefruit to which the bill of lading makes reference were Melogold from the Lindner's grove; (2) invoice number 1007, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 4, 1995 (CX 3a at 12, CX 3b at 18, CX 3c at 7; Tr. 137-38), when, in fact, the 1,176 cartons of grapefruit included 295 cartons of Melogold from Mr. Corkins' grove, 216 cartons of Melogold from Mr. McDonald's grove, and 115 cartons of Melogold from Sierra Victor Ranch Company's grove; (3) bill of lading number 1007, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10; Tr. 139), when, in fact, the 1,176 cartons of grapefruit included 295 cartons of Melogold from Mr. Corkins' grove, 216 cartons of Melogold from Mr. McDonald's grove, and 115 cartons of Melogold from Sierra Victor Ranch Company's grove; and (4) bill of lading number 1008, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 21, CX 4b at 9; Tr. 154), when, in fact, the 1,176 cartons of grapefruit included 273 cartons of Melogold from Mr. McDonald's grove and 328 cartons of Melogold from Sierra Victor Ranch Company's grove.

grapefruit, including Oroblanco. Therefore, it appears to be name recognition and superior quality which account for the preference, not any special affinity for Oroblanco.

Finally, Respondent did not have any financial incentive to misrepresent the Melogold as Oroblanco since Respondent did not receive a commission, but rather was paid by the carton regardless of which variety of the grapefruit Respondent packed. Complainant asserts that Respondent did receive a commission and cites as proof the fact that Respondent issued accounts of sale to Mr. Corkins and Mr. McDonald (CX 10, CX 11). The documents account for all costs, including the "selling charge" to be paid to Heritage Produce Sales, Inc. Respondent's explanation that it agreed to handle the paperwork on small growers because Heritage Produce Sales, Inc., did not want to be bothered for such small amounts of acreage and that Respondent was merely collecting sales charges for Heritage Produce Sales, Inc., is credible (Tr. 478-79).

Complainant further states that it would be ludicrous to find that Respondent was not paid on a commission basis, as Respondent could not otherwise have earned a profit (Complainant's Reply Brief at 6). To the contrary, there is no reason to believe that Respondent would not make a profit by charging only for its packing services and allowing outside sales firms to handle the marketing and receive the sales commission.

Finally, even if Respondent had received a commission, prices were the same for all green grapefruit; thus, eliminating any monetary incentive for misrepresenting the Melogold as Oroblanco.

Complainant failed to prove by a preponderance of the evidence that Respondent's false or misleading statements regarding the variety of the grapefruit in question were made for a fraudulent purpose, and the record does not establish facts upon which I can base an inference that Respondent's false or misleading statements were made for a fraudulent purpose. Therefore, I do not find that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint.

Section 2(5) of the PACA

Complainant proved by a preponderance of the evidence that Respondent misrepresented, by word or statement, the character or kind of grapefruit on three bills of lading and one invoice.[4] Specifically, Respondent stated on three bills of

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[4]See note 3.

lading and one invoice that the grapefruit referenced on each of these documents was Oroblanco, when, in fact, the grapefruit was Melogold.

As originally enacted, section 2(5) of the PACA required that, in order to prove a violation of section 2(5) of the PACA, the misrepresentation had to have been made for a fraudulent purpose.[5] Section 2(5) of the PACA (7 U.S.C. § 499b(5)) has been amended numerous times,[6] and the requirement that the misrepresentation be shown to have been made for a fraudulent purpose was deleted from section 2(5) of the PACA (7 U.S.C. § 499b(5)) in 1956.[7] The Senate Report and House of Representatives Report accompanying H.R. 5337, the bill that was enacted in 1956 and amended section 2(5) of the PACA to eliminate the fraudulent purpose requirement, describe the reason for deleting the fraudulent purpose requirement, as follows:

> Section 2(5) of the Perishable Agricultural Act—as it would be amended by H.R. 5337—would, by deleting the words "for a fraudulent purpose," dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act; evidence of bona fide misrepresentation relative to grade, quality, etc., would represent an adequate base for the declaration of illegal conduct.

S. Rep. No. 84-2507 at 4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3702; H.R. Rep. No. 84-1196 at 3 (1955).

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[5]Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 2(5), 46 Stat. 532-33, provides:

> Sec. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .
>
> (5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to represent by word, act, or deed that any perishable agricultural commodity received in interstate or foreign commerce was produced in a State or in a country other than the State or country in which such commodity was actually produced[.]

[6]Act of Aug. 20, 1937, Pub. L. No. 328, ch. 719, § 2, 50 Stat. 725, 726; Act of June 29, 1940, Pub. L. No. 680, ch. 456, § 4, 54 Stat. 696; Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726; Act of Aug. 10, 1974, Pub. L. No. 93-369, 88 Stat. 423; Act of Oct. 18, 1982, Pub. L. No. 97-352, § 1, 96 Stat. 1667; Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 10, 109 Stat. 430.

[7]Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726.

Further, USDA's views regarding the elimination of the words *for a fraudulent purpose* from section 2(5) of the PACA were incorporated into the Senate Report and the House Report, as follows:

DEPARTMENTAL VIEWS

Following is the letter from the Department of Agriculture recommending enactment of the bill with certain amendments. The amendments proposed by the Department were adopted.

May 25, 1955.

HON. HAROLD D. COOLEY,
Chairman, Committee on Agriculture,
House of Representatives.

DEAR CONGRESSMAN COOLEY: This is in reply to your letter of April 20, 1955, requesting a report on H.R. 5337, a bill to amend the provisions of the Perishable Agricultural Commodities Act of 1930 relating to practices in the marketing of perishable agricultural commodities.

. . . .

Growers, shippers, and buyers are concerned about the existing extent of misbranding and misrepresentation of grade and origin of fresh fruits and vegetables. Although the proposed amendments to the Perishable Agricultural Commodities Act would not correct all malpractices in this field, they would provide significant help. Effective control of misbranding and misrepresentation of fruits and vegetables is difficult under the present statute because no authority is granted to inspect produce in the possession or control of a licensee to determine if it is misbranded unless the licensee requests or grants permission for such inspection. Also, substantial evidence must be produced that the misbranding was done deliberately with the definite intention of defrauding the buyer in order to prove that a fraudulent purpose is involved. The proposed amendments undoubtedly would expedite enforcement of the misbranding provisions of the act and provide for more effective action against licensees who violate these provisions.

. . . .

Sincerely yours,

TRUE D. MORSE,
Acting Secretary.

S. Rep. No. 84-2507 at 5-7 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3703-04; H.R. Rep. No. 84-1196 at 3-5 (1955).

During congressional hearings on H.R. 5337, held on May 26 and May 27, 1955, G.R. Grange, the Deputy Director of the Fruit and Vegetable Division, Agricultural Marketing Service, USDA, testified that the elimination of the *fraudulent purpose provision* would obviate the need to show that the alleged violator intended to mislead the produce buyer and would enable USDA to prove a misbranding violation, even if the buyer knew of, and did not object to, the misbranding, as follows:

MR. GRANGE. . . .

I have a rather brief prepared statement on the bill that has the indorsement of the Department of Agriculture, and with your permission I would like to read it.

MR. GRANT. Yes, you may proceed, sir.

MR. GRANGE. . . .

. . . .

One major purpose of the bill is to strengthen the provisions regarding misbranding or misrepresentation of grade and origin of fresh fruits and vegetables. This objective is accomplished by eliminating the necessity to prove fraudulent purpose for such actions and by authorizing the Secretary or his representatives to inspect produce held by licensees to determine if any misbranding or misrepresentation exists. Proving that a fraudulent purpose is involved in a misbranding case means that substantial evidence must be obtained to show the intent of the person committing the violation. On a practicable basis such evidence is usually exceedingly difficult to obtain because the person involved generally pleads that he acted in good faith and that the misbranding or misrepresentation was unintentional. Also, we have encountered the situation a number of times where the shipper or repacker has misbranded the produce as to grade or origin but

claims that he was not defrauding the buyer since the latter knew of, and did not object to, the misbranding.

. . . .

The foregoing statement outlines briefly the Department's recommendations for passage of this legislation and gives its interpretation of some of the major factors which would be involved in carrying out the provisions of these amendments.

That, gentlemen is a brief summary of the Department's viewpoint on these bills. We will be glad to give such further information or to answer such questions as you may have.

. . . .

MR. GRANT. . . .

. . . does not this [bill] in a way preclude legal action until the Department has failed to get the interested parties together?

. . . .

MR. GRANGE. My understanding of the misbranding provisions, referring solely to them, is that misbranding per se would be a violation of the PAC Act.

Of [sic] the moment with the necessity of proving fraudulent purpose we have to contact the second party concerned to determine how it was represented to him, did he buy it at that lower price, and was there actually an action on the part of the person doing the misbranding that would give us grounds to find that a fraudulent purpose was involved.

If it were no longer necessary to obtain evidence concerning the intent of the individual doing this misbranding, in my opinion then it would to a large extent remove the necessity of having to dig into the relationship between the two parties concerned.

Marketing of Perishable Agricultural Commodities: Hearings on H.R. 5337 and

H.R. 5818 Before the Subcomm. on Domestic Marketing of the House Comm. on Agriculture, 84th Cong., 1st Sess. 6-8, 10 (1955) (statement of G.R. Grange, Deputy Director, Fruit and Vegetable Division, AMS, USDA).

The legislative history applicable to the Act of July 30, 1956, is discussed at great length in *In re Harrisburg Daily Market, Inc.*, 20 Agric. Dec. 955 (1961), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963), as follows:

> Respondents contend that the proscribed act of misrepresenting must be willful or intentional. It is recognized that a licensee making an untrue representation may not possess guilty knowledge of wrongful intent. For example, a false or untrue representation may be made innocently, negligently, knowingly and intentionally or for a fraudulent purpose. Cf. *e.g., Jones v. United States*, 207 F.2d 563, 564 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954); *National Mfg. Co. v. United States*, 210 F.2d 263, 275-76 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954); *United States v. Jerome*, 115 F.Supp. 818, 822 (S.D.N.Y. 1953). See also, *e.g.*, Prosser on Torts § 87 (1941); Black's Law Dictionary (4th ed. 1951). Yet, no qualifications were legislated in section 2(5) with respect to the degree of knowledge or the intent of the commission merchant, dealer, or broker making a misrepresentation otherwise prohibited thereunder. Such omission is especially significant as the Congress, in the enactment of Public Law 842, was directly concerned with the question of the mental element required to constitute a violation of section 2(5). The purpose of the 1956 amendment was, in part, to eliminate the phrase, "for a fraudulent purpose" and, of necessity, the Congress was confronted with the effect of such delegation and the degree of culpability to be required in its stead. In interpreting section 2(5) of the act we are precluded from inserting words, such as "willfully" or "knowingly," which are not in the statute. *United States v. Great Northern Railway Co.*, 343 U.S. 562, 575 (1952); *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). It appears, therefore, that Congress did not intend to so qualify a misrepresentation defined in section 2(5) and that the act of misrepresenting by the means specified therein in connection with the subject matter there described constitutes a violation of such section irrespective of the intent of the licensee to misrepresent or even knowledge that the representation is untrue. . . .
>
> This conclusion is clearly affirmed by examination of the legislative history of the 1956 amendment to section 2(5). Prior to such amendment

and the elimination of the phrase "for a fraudulent purpose" it was necessary in order to find a violation of section 2(5) to present substantial evidence "that the misbranding was done deliberately with the definite intention of defrauding the buyer." H.R. Rep. No. 1196, 84th Cong., 1st Sess. 4 (1955). See *e.g., In re Flaten-Meberg*, 14 [Agric. Dec.] 952 (1955). It was the declared purpose, in part, of the amendment in issue to "dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act" and to substitute therefor merely "evidence of bona fide misrepresentations relative to grade, quality, etc.," as an "adequate base for the declaration of illegal conduct." H.R. Rep. No. 1196, *supra*, at p. 3. See also S. Rep. No. 2507, 84th Cong. 2d Sess. 4 (1956). The committees obviously did not use the term "bona fide" in its literal sense. Otherwise, they would be saying that a good faith misrepresentation would be illegal conduct. They evidently used the term in the sense of real, actual, material, or a matter of substance. Cf. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 384-85 (1935); *Middle Tennessee Electric Membership Corp. v. State ex rel. Adams*, 246 S.W.2d 958, 959-60 (Tenn. 1952). As thus construed, a "bona fide misrepresentation" consists of an actual representation of a material fact which representation is false.

That all subjective mental elements were removed from section 2(5) of the act is further apparent from the congressional hearings on the then proposed amendment. *Hearings before the Subcommittee on Domestic Marketing of the House Committee on Agriculture*, 84th Cong., 1st Sess. on H.R. 5337 and H.R. 5818 (1955). The principal witness and proponent of the bill so understood the effect and consequences of the change, as did other witnesses at the hearings. *Hearings, supra*, at pp. 10, 22, and 39. In addition, the reintroduction of the requirement of knowledge or intent into section 2(5) was proposed and considered. *Hearings, supra*, at pp. 19-20. It was not adopted. . . .

. . . .

. . . [C]ulpability does not depend on the licensee's lack of good faith or whether or not the misrepresentations were made intentionally, deliberately, or accidentally.

In re Harrisburg Daily Market, Inc., supra, 20 Agric. Dec. at 969-73 (footnotes omitted).

The United States Court of Appeals for the District of Columbia Circuit, in affirming the *Harrisburg* decision, stated, as follows:

> The Perishable Agricultural Commodities Act, 1930, required proof of fraudulent purpose as an element of the misrepresentation violations. 46 Stat. 533 (1930). To achieve stricter enforcement as the legislative history discloses, the act was amended in 1956 to eliminate the need to show the existence of fraudulent purpose. 70 Stat. 726 (1956), 7 U.S.C.A. § 499b(5). See H.R. Rep. No. 1196, 84th Cong., 1st Sess., 3-4; S. Rep. No. 2507, 84th Cong., 2d Sess. 4,6, U.S. Code Cong. & Adm. News 1956, p. 3699. See also, *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606 (3d Cir. 1960).

Harrisburg Daily Market, Inc. v. Freeman, 309 F.2d 646, 647 (D.C. Cir. 1962) (per curiam), *cert. denied*, 372 U.S. 976 (1963).

The legislative history applicable to the Act of July 30, 1956, makes clear that any representation of the subject matter described in section 2(5) of the PACA, which is false, even if the misrepresentation is unintentional or accidental, constitutes a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). Proof of a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)) is not dependent on a showing: (1) that the commission merchant, dealer, or broker defrauded, or intended to defraud, the recipient or buyer of the misrepresented produce; (2) that the commission merchant, dealer, or broker intended to benefit by the misrepresentation; (3) that the commission merchant, dealer, or broker knew or believed that the recipient or buyer of the produce would rely on the misrepresentation; (4) that the recipient or buyer of the misrepresented produce relied on, or was injured by, the misrepresentation; or (5) that the recipient or buyer of the misrepresented produce was aware of the misrepresented fact.[8]

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[8]*See In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1564 (1981) (stating that respondent's contention that it did not intend to violate section 2(5) of the PACA is probably true; however, intent to defraud is irrelevant), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Robert J. Wilkinson*, 36 Agric. Dec. 454, 455-56 (1977) (stating that respondent's contention that he violated section 2(5) of the PACA, but that it was not a knowing violation, is not a defense); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 797 (1975) (stating that the record supports respondent's view that its violations of section 2(5) of the PACA were unintentional, but intent is not an element of the violations), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Harrisburg Daily Market, Inc.*, 20 Agric. Dec. 955, 973 (1961) (stating that culpability for a violation of section 2(5) of the PACA does not depend on lack of good faith or whether or not the

(continued...)

The record clearly establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Section 9 of the PACA

Numerous records kept by Respondent pertaining to the Melogold, which was shipped to General Fruit Co., Ltd., and to Tamagawa Trading Company, Inc., in Japan, incorrectly refer to the grapefruit as Oroblanco.[9] Respondent does not deny that its records were incorrect, and Mr. Nieblas admits that he did not pay close attention to the varieties of grapefruit that were recorded on Respondent's records since the specific variety of the green grapefruit was not relevant to the transactions (Tr. 435-38).

There is no evidence that the errors in Respondent's internal records had the

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[8](...continued)
misrepresentations were made intentionally, deliberately, or accidentally), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

[9]See for example: (1) three receiving tickets completed by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 10, 12, 14); (2) three picking reports prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 16-18); (3) three sorter reports prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 20-21, 24, 27); (4) two daily shipment records prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 25-26, 28); (5) a receiving book prepared by Respondent which states that the Melogold received from the Lindner's grove was Oroblanco (CX 2 at 29); (6) packer loading instructions issued by Fresh Pacific Fruit & Vegetable, Inc., and kept by Respondent, which describe the Lindner's Melogold as Oroblanco (CX 2 at 32-33); (7) a bill of lading prepared by Respondent which describes the Lindner's Melogold as Oroblanco (CX 2 at 39-41); (8) three receiving tickets completed by Respondent for grapefruit received from Mr. Corkins' grove, each of which identify Mr. Corkins' Melogold as Oroblanco (CX 3a at 1-4); (9) a receiving book prepared by Respondent which states that the Melogold received from Mr. Corkins' grove was Oroblanco (CX 3a at 11); (10) sorter reports prepared by Respondent for grapefruit from Sierra Victor Ranch Company's grove which identify Sierra Victor Ranch Company's Melogold as Oroblanco (CX 3b at 9-10, CX 4a at 12, 15-16); (11) a sorter report prepared by Respondent for grapefruit from Mr. McDonald's grove which identifies Mr. McDonald's Melogold as Oroblanco (CX 3c at 5); (12) a receiving book prepared by Respondent which states that the Melogold received from Mr. Corkins' grove was Oroblanco (CX 3c at 6); (13) bill of lading number 1007, prepared by Respondent, which describes Mr. McDonald's, Mr. Corkins', and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10); (14) invoice number 1007, issued by Respondent, which describes Mr. McDonald's, Mr. Corkins', and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 3a at 12, CX 3b at 18, CX 3c at 7); and (15) bill of lading number 1008, prepared by Respondent, which describes Mr. McDonald's and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 4a at 21, CX 4b at 9).

purpose or effect of deceiving anyone. The PACA, however, requires that records fully and correctly disclose all transactions, regardless of any deceptive intent or lack thereof. Therefore, I find that Respondent willfully and repeatedly failed to keep such records as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i), as alleged in the Complaint.

Sanctions

Respondent's violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499(b)(5), 499i) were willful and repeated as a matter of law.

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.[10] Willfulness is reflected by

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[10]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th 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 Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 17 (Aug. 18, 1998); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552 (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), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *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), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *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 (continued...)

Respondent's violations of express requirements of the PACA (7 U.S.C. §§ 499b(5), 499i) and the number of Respondent's violations. Respondent knew, or should have known, that the grapefruit in question was the Melogold variety. Mr. Nieblas, Respondent's founder, president, co-owner, and general manager, has had a great deal of experience with Melogold and Oroblanco and admitted that he did not pay close attention to the descriptions of the grapefruit that were recorded on Respondent's documents (Tr. 367-76, 435-38). Moreover, one of Respondent's growers, Mr. Corkins, brought to Respondent's attention that the receiving tickets Respondent prepared for Mr. Corkins' grapefruit erroneously identified Mr. Corkins' grapefruit as Oroblanco (Tr. 220-22). Nonetheless, Respondent represented at least 2,319 cartons of Melogold as Oroblanco[11] and kept numerous records[12] that did not correctly disclose the transactions involved in Respondent's business.

Respondent's violations were also repeated. Respondent's violations are "repeated" because repeated means more than one. Respondent misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit. Each misrepresented carton constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).[13] Respondent also kept numerous records which did not fully and correctly disclose all transactions involved in its business. Each inaccurate record constitutes a separate violation of section 9 of the PACA (7 U.S.C. § 499i).

Complainant recommends a 90-day suspension of Respondent's PACA license or, in lieu of a 90-day suspension, a $115,000 civil penalty. This case is governed by USDA'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:

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[10](...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. 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.

[11]See note 3.

[12]See note 9.

[13]*In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 35-36 (Aug. 18, 1998); *In re Potato Sales Co.*, 54 Agric. Dec. 1382, 1404 (1995), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

> [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.

However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[14] I have not adopted the sanction recommendation of administrative officials because their sanction recommendation is based, in part, on the allegation that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and, as explained in this Decision and Order, *supra*, I do not find that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Further, while Respondent's violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499b(5), 499i) were willful in the sense that Respondent exhibited a careless disregard of statutory requirements, I do not find that Respondent engaged in the violations in order to deceive its customers. Rather, the violations appear to have been the result of Respondent's lack of concern for distinguishing between Oroblanco grapefruit and Melogold grapefruit. Moreover, Respondent has implemented a new system to ensure that the variety of grapefruit handled by Respondent is correctly recorded on its documents in future transactions. (Tr. 415, 418-22.) Nonetheless, Respondent's violations were willful and repeated, involving at least 2,319 cartons of grapefruit and numerous incorrect records, and Respondent's violations put at risk the integrity of exports of products from the United States (Tr. 258-59).

Section 8 of the PACA provides that, if the Secretary determines that a

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[14] *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Mar. 30, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998) *appeal dismissed*, No. 98-3296 (8th Cir. Oct. 29, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 573-74 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918 (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).

commission merchant, dealer, or broker has violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary may publish the facts and circumstances of the violation, suspend or revoke the license of the offender, or assess a civil penalty, as follows:

> **§ 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 . . ., 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.

7 U.S.C. § 499h(a), (e) (1994 & Supp. II 1996).

No civil penalty may be assessed for a violation of section 9 of the PACA; however, section 9 does provide that the Secretary may publish the facts and circumstances of the violation or suspend the license of the offender for a period not to exceed 90 days (7 U.S.C. § 499i).

Based on the record, I find that a 20-day suspension of Respondent's PACA license (15 days for Respondent's violations of section 2(5) of the PACA and 5 days for Respondent's violations of section 9 of the PACA) would have a deterrent effect on Respondent and others in the perishable agricultural commodities

industry.

Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. II 1996)) provides that I may assess a civil penalty in lieu of the suspension of Respondent's license for its violations of section 2(5) of the PACA. In assessing the amount of the civil penalty, due consideration must be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. The seriousness, nature, and amount of Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) are discussed in this Decision and Order, *supra*. Respondent has between 30 and 35 employees (Tr. 296). Respondent operates a large business, and the record establishes that each day that Respondent's license is suspended would cost Respondent approximately $1,300 (Tr. 264-67). Based on these factors, I find that the assessment of a $19,500 civil penalty for Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)), in lieu of the 15-day suspension of Respondent's PACA license for Respondent's violations of section 2(5) of the PACA, would be appropriate.

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

Order

1. Respondent's PACA license is suspended for a period of 5 days and Respondent is assessed a civil penalty of $19,500, which shall be paid by certified check or money order made payable to the "Treasurer of the United States" and forwarded to: James Frazier, United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch, Room 2095 South Building, 1400 Independence Avenue, SW, Washington, D.C. 20250. The certified check or money order shall be received by Mr. Frazier within 60 days after service of this Order on Respondent, and Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. 97-0004. The 5-day suspension of Respondent's PACA license shall take effect beginning on the 61st day after service of this Order on Respondent.

2. In the event that the PACA Branch does not receive a certified check or money order in accordance with paragraph 1 of this Order, Respondent's PACA license is suspended for 20 days, and the 20-day suspension shall take effect beginning on the 62nd day after service of this Order on Respondent.

In re: MICHAEL J. MENDENHALL.
PACA-APP Docket No. 97-0008.
Decision and Order filed November 10, 1998.

Responsibly connected — Stockholder — Stock certificates — Corporate stock records — De novo proceeding.

The Judicial Officer affirmed Judge Baker's (ALJ) decision that Petitioner was responsibly connected with Mendenhall Produce, Inc., during the time that Mendenhall Produce, Inc., violated the PACA. The Judicial Officer rejected Petitioner's contention that a proceeding instituted by a petition for review is limited to review of the Chief of the PACA Branch's responsibly connected determination and held that a petition for review filed pursuant to 7 C.F.R. § 1.133(b) commences a *de novo* proceeding. The Judicial Officer found that Petitioner was a holder of 100 per centum of the outstanding stock of Mendenhall Produce, Inc., during the period that Mendenhall Produce, Inc., violated the PACA, that Petitioner was not a nominal stockholder, and that Petitioner actively participated in activities resulting in Mendenhall Produce, Inc.'s violations. The Judicial Officer rejected Petitioner's argument that he was not a stockholder because no stock certificates had been transferred to him and there was no change of ownership on the corporation's records indicating that Petitioner was a stockholder. The Judicial Officer held that a stock certificate is only evidence of stock ownership and stock ownership is determined by an examination of all the facts relevant to ownership. The Judicial Officer also held that while a corporate stock record book is evidence that the person identified as a stockholder is in fact a stockholder, that evidence may be rebutted and generally the failure to register a transfer on the records of a corporation does not affect the validity of the transfer as between the transferor and transferee, even if corporate bylaws require recordation of transfers on the books of the corporation.

Eric Paul, for Respondent.
Stephen P. McCarron, 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.

Michael J. Mendenhall [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 letter dated August 6, 1997 [hereinafter Petition], on August 11, 1997.

The Petition challenges the July 18, 1997, determination by the Acting 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 Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the PACA,[1] in that

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[1]During the period August 1995 through November 1995, Mendenhall Produce, Inc., received and accepted in interstate commerce 66 lots of perishable agricultural commodities from 16 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $219,913.17.
(continued...)

Petitioner was a 100 percent shareholder of Mendenhall Produce, Inc. (RECX-9).

On November 5, 1997, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] conducted an oral hearing in Phoenix, Arizona. Mr. Stephen P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioner. Mr. Eric Paul, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On February 13, 1998, Petitioner filed Petitioner's Proposed Findings of Fact, Conclusions of Law and Brief in Support; on March 20, 1998, Respondent filed Respondent's Proposed Findings of Fact, Conclusions and Order; and on April 15, 1998, Petitioner filed Petitioner's Reply Brief.

On July 17, 1998, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order]: (1) affirming Respondent's determination that Petitioner was responsibly connected with Mendenhall Produce, Inc., during the time Mendenhall Produce, Inc., was found to have violated section 2 of the PACA (7 U.S.C. § 499b); and (2) stating that Petitioner is subject to the employment and licensing restrictions in sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) (Initial Decision and Order at 39).

On September 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 United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to the Rules of Practice (7 C.F.R. § 2.35).[2] On October 7, 1998, Respondent filed Respondent's Response to Petitioner's Appeal Petition, and the case was referred to the Judicial Officer for a decision.

Based upon a careful consideration of the record, 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 and conclusions.

Petitioner's exhibits are designated by the letters "PX"; Respondent's exhibits are designated by the letters "CX" and "AX"; documents which comprise the

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[1](...continued)
Mendenhall Produce, Inc.'s failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2 of the PACA (7 U.S.C. § 499b). *In re Mendenhall Produce, Inc.*, 57 Agric. Dec. 806 (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)).

certified agency record upon which Respondent based the July 18, 1997, responsibly connected determination are designated by the letters "RECX"; and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(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.

(10) The term "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.

. . . .

§ 499d. Issuance of license

. . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application 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[.]

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished

is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded 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 upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

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 of 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.

7 U.S.C. §§ 499a(b)(9)-(10), 499d(b)(A)-(B), (c), 499h(b) (1994 & Supp. II 1996).

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

. . . .

Petitioner and one additional witness testified for Petitioner and Petitioner's exhibits, PX-1 through PX-10, were accepted in evidence. Respondent presented testimony from six witnesses and Respondent's exhibits, CX-1 through CX-23 and AX-1 through AX-17, were accepted in evidence. Exhibits RECX-1 through RECX-7 were already part of the record as the certified agency record upon which [Respondent] had made [the July 18, 1997,] responsibly connected determination. However, [exhibits RECX-1 through RECX-7] were also admitted as exhibits. Two other documents contained in the [certified] agency . . . record without

identifying numbers were copies of the July 18, 1997, certified mail letter signed by J. R. Frazier which constitutes [Respondent's] determination [that the Petitioner was responsibly connected with Mendenhall Produce, Inc.,] and the August 6, 1997, letter signed by Petitioner which constitutes the Petition. . . . These documents were numbered as RECX-9 and RECX-8, respectively. . . .

Although each of the parties agrees that the issue for ultimate determination is whether or not [Petitioner] was responsibly connected with Mendenhall Produce, Inc., the parties do not agree upon the extent of evidence which may be considered with respect [to that issue].

With respect to the responsibly connected proceeding, Petitioner has timely raised . . . the extent to which evidence, other than that upon which [Respondent] relied for [the July 18, 1997, responsibly connected] determination, may be adduced and relied upon in this proceeding. Essentially, . . . Petitioner's position [is, as follows]:

> This is a review proceeding of the Chief's determination that Petitioner was responsibly connected to Mendenhall Produce, Inc. ("MPI") as the 100% shareholder of MPI. The Chief made his determination based on records which are contained in the agency record.
>
> Petitioner has the opportunity to rebut this determination in this review proceeding by offering documents and testimony. Respondent is entitled only to offer evidence in rebuttal to evidence proffered by petitioner to show that petitioner's evidence is incorrect or unworthy of belief. However, respondent's evidence in rebuttal cannot be used to uphold the Chief's determination. The Chief's determination must rise or fall based on the agency record and petitioner's evidence, subject to rebuttal. If it is determined that petitioner's evidence is successfully rebutted, then the Chief's determination must be reviewed based solely on the agency's record. Any rebuttal evidence from respondent should not be used substantively to support the Chief's determination.

Petitioner's Notice of Objection to Complainant's Exhibits and Witnesses on the Responsibly Connected Case.

Petitioner was granted a continuing objection with respect to the Respondent's reliance upon evidence that was not relied upon [by Respondent] in [the July 18, 1997, responsibly connected] determination. . . .

Petitioner maintains that inasmuch as [Respondent], in his determination letter of July 18, 1997, stated that the basis of the determination of "responsibly

connected" was that Petitioner was listed with USDA as a 100 percent shareholder of Mendenhall Produce, Inc., that is the only issue to be adjudicated in this proceeding. Namely, whether the [Respondent's] determination is correct or incorrect, premised upon Petitioner being a 100 percent shareholder of Mendenhall Produce, Inc. Petitioner argues this is not a *de novo* proceeding where other matters not considered by [Respondent] may be [introduced].

. . . Respondent [argues] first that [Petitioner] was actually a shareholder of Mendenhall Produce, Inc., or alternatively, that [Petitioner] was the *alter ego* of Mendenhall Produce, Inc. Briefly summarized, Respondent's position is that Petitioner was, from the beginning of Mendenhall Produce, Inc., the holder of a hidden major ownership interest; that Petitioner exercised his ownership interest when he held himself out to employees of Mendenhall Produce, Inc., as an owner of the business; and that when he directed the firm's produce operations and made management and policy decisions, he was acting as a *de facto* majority owner. [Respondent] . . . also argue[s] that Petitioner's *de facto* ownership interest in Mendenhall Produce, Inc., became a *de jure* ownership of the business subsequent to the resignation of Suzanne D. Mendenhall as president of Mendenhall Produce, Inc., on May 12, 1995, as a result of a marital settlement. [(Respondent's Proposed Findings of Fact, Conclusions and Order at 29-30.)] . . . .

. . . .

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 PACA. Responsible connection is determined by the status of the individual in the violating entity. [Section 1(b)(9) of] the PACA [defines the term "responsibly connected" 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. 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.

7 U.S.C. § 499a(b)(9) (Supp. II 1996).

The second sentence] of the definition [of the term "responsibly connected"] was added on November 15, 1995, by the Perishable Agricultural Commodities Act Amendments of 1995 (Pub. L. No. 104-48[, 109 Stat. 424 (1995)) [hereinafter PACAA-1995]].

A person who has been determined to be responsibly connected may not be employed by a licensee under the PACA for one year in any capacity and may be employed in the second year only when the employing licensee [furnishes and maintains a surety] bond in [form and] amount satisfactory to the Secretary.

As originally enacted in 1930, section 8 of the PACA empowered the Secretary to suspend or revoke the authority of a licensee to do business subject to the PACA, but had no provisions imposing employment or licensing restrictions on [persons] who were personally involved in the violations. The PACA was amended in 1934 (Act of Apr. 13, 1934, [Pub. L. No. 159,] ch. 120, § 14, 48 Stat. 588) and 1956 (Act of July 30, 1956, [Pub. L. No. 842,] ch. 786, § 5, 70 Stat. 727) to authorize the Secretary to revoke a license when, after notice, a PACA licensee continued to employ someone whose own license had been suspended or revoked or who had been "responsibly connected" with a licensee whose license had been suspended or revoked. The [1934 and 1956] amendments to the PACA gave no direction as to who would be considered "responsibly connected" with the suspended or revoked licensee.

To [avoid any possible] confusion, the PACA was amended again in 1962 ([Act of] Oct. 1, 1962, Pub. L. No. 87-725, 76 Stat. 673) to include a definition of "responsibly connected" (7 U.S.C. § 499a[(b)](9)). The House of Representatives Report (H.R. Rep. No. 87-1546 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749-55) explains that establishing a definition of "responsibly connected" would give the term "specific meaning, thus avoiding possible confusion as to interpretations" (1962 U.S.C.C.A.N. at 2751). The [House of Representatives] Report states that such a definition would clarify the section of the PACA regarding the denial of a license to an applicant responsibly connected with a violator (7 U.S.C. § 499d(b)), as the license could be refused "without showing (as is now required) that the applicant, officer, director, or member was responsible in whole or in part for such conduct" (1962 U.S.C.C.A.N. at 2753). The House [of Representatives] Report also states that the "responsibly connected" definition was intended to "[i]mprove and clarify provisions dealing with the eligibility for license, or for employment by licensees, of persons guilty of specified acts and persons affiliated with them" (1962 U.S.C.C.A.N. at 2750).

Until 1975, the "responsibly connected" definition in section 1[(b)](9) of the PACA was given a *per se* interpretation, that is, a person who was an officer,

director, or [holder of more] than 10 per centum [of the outstanding stock] of a corporation at the time that corporation had violated the PACA was considered *per se* responsibly connected with the corporation and thus subject to the licensing and employment restrictions. The person considered responsibly connected was not given the opportunity to contest this determination. The *per se* standard was first enunciated in *Birkenfield v. United States,* 369 F.2d 491 (3d Cir. 1966), where the court found that the 1962 amendment to the PACA creating the responsibly connected definition was intended to establish a "'*per se*' exclusionary standard" whereby any person affiliated or connected with a PACA violator as an officer, director, or [holder of more] than 10 per centum [of the outstanding stock] would be subject to the Secretary of Agriculture's power to prohibit employment under 7 U.S.C. § 499h(b) without being able to establish a defense, such as lack of any real authority. The [United States Court of Appeals for the] Second Circuit, in *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.)[, *cert. denied*, 389 U.S. 835 (1967),] cited with approval the Third Circuit's *per se* approach in *Birkenfield.*

In 1975, the [United States Court of Appeals for the] District of Columbia Circuit decided in *Quinn v. Butz,* 510 F.2d 743 (D.C. Cir. 1975), that a person who appears to meet the criteria for responsible connection set forth in section 1[(b)](9) [of the PACA] must be allowed to rebut the presumption of responsible connection. The court acknowledged that the PACA "was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves." [*Id.* at 755.] However, the court decided that [the individual alleged to be responsibly connected] should have the opportunity to present evidence to prove that his position [in the violating entity] was merely nominal, as he had no real power. The court also stated that [the person alleged to be responsibly connected] should be given a chance to establish that the violating [entity] was merely a fiction, being operated, in effect, as a sole proprietorship by the corporate president.

As a result of the decision in *Quinn*, [the Agricultural Marketing Service] initiated a . . . proce[dure by] which a person who wished to contest a determination that he or she was responsibly connected could do so. The proceeding took place before a presiding officer, employed by [USDA], and the burden of proof rested with the [person] challenging the responsibly connected determination. This proceeding would not occur until after resolution of the disciplinary case against the firm with which the [person] was alleged to be responsibly connected.

Subsequent to 1975, the [United States Court of Appeals for the] District of Columbia Circuit continued to follow the doctrine expressed in *Quinn.* The court found a lack of responsible connection in *Minotto v. United States Dep't of Agric.*,

711 F.2d 406 (D.C. Cir. 1983), which concerned a person who had been the bookkeeper of a corporation and who was told by its president that she would henceforth be a director, although her salary and responsibilities did not change. The court found that there was insufficient evidence that "Minotto knew or should have known of the Company's misdeeds" and stated that "[a] finding of liability under section 499h of the Act must be premised upon personal fault or the failure to `counteract or obviate the fault of others.'" [*Id.* at 408.] The court concluded that Minotto was not responsibly connected because evidence was lacking "of an actual, significant nexus with the violating company." [*Id.* at 409.] The [United States Court of Appeals for the] District of Columbia Circuit next found in *Martino v. United States Dep't of Agric.*, 801 F.2d 1410 (D.C. Cir. 1986), that the petitioner[s] therein w[ere] not "enticed or coerced by an employer into the position that render [them] `responsibly connected'" and held that the fact that Martino [and Schmidt were each owners of] 22.2 [per centum of the outstanding stock] constituted the required "nexus" to warrant a finding of responsible connection. [*Id.* at 1414.] In *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601 (D.C. Cir 1987), the [court] considered three appeals taken from decisions where Veg-Mix, Inc., was found to have committed flagrant and repeated violations of section 2(4) of the PACA in a disciplinary proceeding, and petitioners therein, Kuzzens, Inc., and Charles M. Harris, were determined to be "responsibly connected" with Veg-Mix, Inc., in separate "responsibly connected" proceedings. The court approved the Secretary's taking notice of admissions of unpaid produce debt and of stock ownership and the holding of corporate office, in pleadings filed in Veg-Mix, Inc.'s bankruptcy proceeding. When considering the issue of responsible connection based upon stock ownership, the court determined that petitioner Kuzzens, Inc., became a 60 percent shareholder regardless of whether a stock certificate physically issued, since the pre-incorporation agreement and bankruptcy pleadings both listed Kuzzens, Inc., as 60 percent shareholder, and the former clearly recited the consideration of $12,000. The court found that there was a stock certificate for 12 shares of the company issued to Kuzzens, Inc., and that even if there was some technical problem with the certificate, it would not matter because the pre-incorporation agreement and the bankruptcy pleadings both listed Kuzzens, Inc., as 60 percent shareholder. . . . The court ruled that Kuzzens, Inc., a majority stockholder, was responsibly connected because [its] majority ownership constituted the necessary "nexus" set forth in *Minotto.* [*Id.* at 611.] In *Siegel v. Lyng,* 851 F.2d 412 (D.C. Cir. 1988), the court emphasized that majority ownership alone rendered Siegel responsibly connected under the standards of *Martino* and *Veg-Mix, Inc.* In *Bell v. United States Dep't of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), the court

explained that in the District of Columbia Circuit a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder if: (1) the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality; or (2) the petitioner proves that at the time of the violations he was only a nominal officer, director, or shareholder. [*Id.* at 1201.] The court once again held that the presumption that an officer, director, or holder of more than 10 per centum of the [outstanding] stock of a corporation is responsibly connected is a rebuttable presumption in *Hart v. United States Dep't of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997).

While the [United States Court of Appeals for the] District of Columbia Circuit adhered to its rebuttable presumption standard, other circuit courts of appeals continued to apply the *per se* standard, upholding the literal definition of responsible connection found in section 1[(b)](9) of the PACA. The *per se* interpretation was utilized in the Eighth Circuit in *Conforti v. United States,* 74 F.3d 838, 841 (8th Cir.) (stating that the court applies a *per se* rule to the definition of the term responsibly connected in section 1 of the PACA; actual responsibilities or interests are irrelevant to the question of responsible connection to a PACA violator), *cert. denied,* [519 U.S. 807] (1996), and *Pupillo v. United States,* 755 F.2d 638 (8th Cir. 1985), and in the Fifth Circuit in *Hawkins v. Agricultural Marketing Service,* 10 F.3d 1125 (5th Cir. 1993), and *Faour v. United States Dep't of Agric.*, 985 F.2d 217 (5th Cir. 1993).

In November 1995, the PACA was amended . . . by the [PACAA-1995]. Section 1[(b)](9) of the PACA, which defines "responsibly connected," currently reads 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. 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 or its owners.

7 U.S.C. § 499a[(b)](9) [(Supp. II 1996)] (emphasis added).

The last sentence of this definition was added by section 12(a) of PACAA-1995 in order "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation." H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458. The House of Representatives Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of "responsibly connected" would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation." H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

This revised definition of "responsibly connected" has been interpreted by the Secretary of Agriculture in three recent decisions decided by the . . . Judicial Officer. They are: (1) *In re Michael Norinsberg*, [56 Agric. Dec. 1840] (. . . 1997)[, *remanded*, No. 98-1065 (D.C. Cir. Dec. 22, 1998)]; . . . (2) *In re Steven J. Rodgers*, [56 Agric. Dec. 1919] (. . . 1997)[, *aff'd per curiam*, No. 98-1057 (D.C. Cir. Oct. 19, 1998)]; and (3) *In re Lawrence D. Salins*, [57 Agric. Dec. ___] (Feb. 26, 1998).

In *Michael Norinsberg,* the administrative law judge . . . had found that [Michael Norinsberg] (a secretary, treasurer, director, and stockholder of The Norinsberg Corporation) was not responsibly connected with The Norinsberg Corporation during the April 1991 through February 1992 period of time in which [The Norinsberg Corporation] . . . willful[ly], flagrant[ly], and repeat[ly violated] section 2(4) of the PACA (7 U.S.C. § 499b(4)). The firm's license was revoked in *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, [516 U.S. 974] (1995). The [administrative law judge] held [in the Initial Decision and Order in *In re Michael Norinsberg*, *supra*,] that Robert M. Norinsberg ([Michael Norinsberg's] father) was the *alter ego* of the corporation, that . . . Michael Norinsberg was only nominally a secretary, a treasurer, a director, and a stockholder, and that [Michael Norinsberg] was not actively involved in the activities resulting in the violation. . . . Respondent therein appealed, and the Judicial Officer agreed with the administrative law judge's conclusions that Robert M. Norinsberg was the *alter ego* of [T]he [Norinsberg] [C]orporation and that [Michael Norinsberg] was a nominal officer and director (but not a nominal stockholder), and held that [Michael Norinsberg] was responsibly connected because the Judicial Officer found, unlike the administrative law judge, that Petitioner's signing of . . . 14 checks . . ., totaling $59,728.60, payable to persons who were not produce creditors, constituted active

involvement in the activities, resulting in a violation. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857-59]. The initial and final decisions differ on the proper interpretation to be given to the statutory phrase "actively involved in the activities resulting in a violation." The administrative law judge appeared to have relied upon the District of Columbia Circuit's holdings in the *Bell, Minotto,* and *Quinn* cases as establishing a requirement that a person held to be responsibly connected possess "personal fault or a realistic capacity to counteract or obviate the fault of others," and added to that [requirement] a conclusion that active participation in decision making at the *management* level is required for a petitioner who is nominally an officer, director, or stockholder. . . . The interpretation of the Secretary, as expressed by the . . . Judicial Officer, is that there is "nothing in section 12(a) of the PACAA-1995 or the applicable legislative history to indicate that Congress intended to limit active involvement in activities resulting in a violation of the PACA to `active participation at a managerial level in decision making activities that resulted in the violation.'" [*In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1858.] Interpreting the [definition of "responsibl[y] connected," as amended in 1995, the Judicial Officer found that the defense that The Norinsberg Corporation was the *alter ego* of Robert M. Norinsberg was not available to [Michael Norinsberg] because [he] held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation. Therefore, [Michael Norinsberg] could not avoid responsibly connected status because he could not establish that he was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners. [*In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1864-65. Michael Norinsberg contended in his] petition for reconsideration . . . that, under the PACA definition prior to the 1995 amendment, as interpreted by the [United States Court of Appeals for the District of Columbia] Circuit, [he] would not have been found responsibly connected, since the sole basis for the finding of responsible connection was based on the Judicial Officer's conclusion that [he (Michael Norinsberg)] was actively involved in the violations, which basis did not come into existence until the 1995 amendment. [Michael Norinsberg] claimed that, since this case arose prior to the 1995 amendment, the amendment should not have been given retroactive effect. [Michael Norinsberg's] petition for reconsideration was denied by the Judicial Officer because the ground asserted, the inapplicability of the definition of "responsibly connected" set forth in the PACAA-1995 to violations that occurred in 1991 and 1992, had not been timely raised, and, in fact, constituted a complete reversal of the position affirmatively urged by [Michael Norinsberg] at all prior stages of the proceeding. . . .

In *In re Steven J. Rodgers, supra*, the Judicial Officer found that [Steven J.

Rodgers], a vice-president and [holder of] 33.3 [per centum of the outstanding stock of World Wide Consultants, Inc.,] was actively involved in nonpayment and employment violations [of the PACA] committed by World Wide Consultants, Inc. These findings alone were . . . found sufficient to conclude that [Steven J. Rodgers] was responsibly connected with Wor[l]d Wide Consultants, Inc. . . . [T]he Judicial Officer [found] that [Steven J. Rodgers] was aware of the unlawful employment of Marvin Offutt, signed corporate checks, and played a major role in making corporate decisions. Therefore, [Steven J. Rodgers] was precluded from establishing that he was a nominal officer and stockholder. The Judicial Officer, citing the [United States Court of Appeals for the District of Columbia] Circuit decisions in *Veg-Mix, Inc., Martino,* and *Siegel* . . ., explained that it is extremely difficult to demonstrate that one is only a nominal stockholder when one owns a substantial per centum of the outstanding stock of the corporation or association. The Judicial Officer stated that [Steven J. Rodgers'] ownership of 33.3 [per centum] of the [outstanding] stock is "very strong evidence" that he is responsibly connected. [*In re Steven J. Rodgers, supra*, 56 Agric. Dec. at 1943.] In addition, the Judicial Officer concluded that even if [Steven J. Rodgers] had been able to prove that Mrs. Volpe (the [holder of] 66.6 [per centum of the outstanding stock]) was the *alter ego* of World Wide Consultants, Inc., [he] would not have been able to avoid responsibly connected status because [he] . . . was . . . an owner of the violating licensee. . . . [*In re Steven J. Rodgers, supra*, 56 Agric. Dec. at 1956.]

. . . .

In *In re Lawrence D. Salins, supra*, the Judicial Officer concluded that [Lawrence D. Salins], the admitted secretary/treasurer of Sol Salins, Inc., was deemed to be responsibly connected, unless [he] satisfied a two-prong test, demonstrating by a preponderance of the evidence both that [he] was not actively involved in the activities resulting in a violation of the PACA and either that [he] was only nominally an officer of Sol Salins, Inc., or that [he] was not an owner of Sol Salins, Inc., which was the *alter ego* of its owners. [*In re Lawrence D. Salins, supra*, slip op. at 20.] The Judicial Officer disagreed with the administrative law judge's emphasis on the fact that [Lawrence D. Salins] never purchased produce as an indicator of active involvement and concluded that [he] was actively involved because of his role in corporate decision making even though [he] did not . . . purchase . . . produce [on behalf of Sol Salins, Inc. Lawrence D. Salins'] active involvement was shown through his attendance at weekly staff management meetings, his issuance of large numbers of corporate checks each month, in some instances choosing which past due bills to pay. The Judicial Officer strongly emphasized [Lawrence D. Salins'] role in making *all* payments from the "operations" account during the period of violations. The Judicial Officer found

that [Lawrence D. Salins'] participation in making payments for produce constituted active involvement on a working level in activities resulting in violations of the PACA and that by commenting on policy, offering suggestions, recommending courses of action, and providing financial information to assist in the decision making process, [he] had also demonstrated active involvement in activities resulting in violations of the PACA on a managerial level. [*In re Lawrence D. Salins, supra*, slip op. at 20-26.] Having established that [Lawrence D. Salins] failed to satisfy the first prong of the two-prong test, [set forth in section 1(b)(9) of the PACA], and was responsibly connected, the Judicial Officer nevertheless continued the analysis of [Lawrence D. Salins'] status under the remaining prong of the definition. [The Judicial Officer] noted seven factors that weighed against [Lawrence D. Salins] being a nominal officer. The factors were [Lawrence D. Salins'] access to corporate records, knowledge of the corporation's financial troubles, relations with unpaid creditors, active participation in corporate decision making, check-writing responsibilities, responsibility for [signing] corporate documents, and salary. [*In re Lawrence D. Salins, supra*, slip op. at 26-31.] The Judicial Officer concluded that [Lawrence D. Salins] failed to meet the second prong of the test, demonstrating that he was only a nominal officer, because the range of his activities went far beyond what a nominal officer, an officer in name only, would be doing. [*In re Lawrence D. Salins, supra*, slip op. at 34.] The alternative provided in the second prong of the test (that he was not an owner of [the violating licensee which was the *alter ego* of its owners]) was not available to [Lawrence D.] Salins since [he] had not claimed that Sol Salins, Inc., was the *alter ego* of any of its owners and there was no evidence to support such a finding. [*In re Lawrence D. Salins, supra*, slip op. at 31.]

In summary, these three final decisions of the Secretary of Agriculture, issued following the PACAA-1995 revision of the definition of "responsibly connected," . . . establish that any person meeting the definition of "responsibly connected" in the first sentence of section 1[(b)](9) [of the PACA] as an officer, director, or [holder of more] than 10 per centum [of the outstanding stock] may rebut this responsibly connected status 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 PACA. As the test is stated in the conjunctive, *and*, a petitioner failing to satisfy the first prong cannot successfully rebut the responsibly connected determination 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

1. Mendenhall Produce, Inc., . . . is a corporation organized and existing under the laws of the State of New Mexico. It was incorporated on March 7, 1994, and the Articles of Incorporation show that the initial directors were Suzanne D. Mendenhall and Kevin Martin and that the incorporator was Suzanne D. Mendenhall. The business address of Mendenhall Produce, Inc., is 31[00] Harrelson, Mesilla Park, New Mexico 88047-1438. Its mailing address is P.O. Box 1438, Mesilla Park, New Mexico 88047-1438. [(RECX-2 at 2, 4-5, PX-3 at 1, PX-4 at 1, CX-1 at 7.)]

2. The Notice of Organization Meeting of [Incorporation of] Mendenhall Produce, Inc., dated April 20, 1994, was signed by Kevin Martin as the secretary [(RECX-2 at 6)]. Both Suzanne D. Mendenhall, as incorporator, and Kevin Martin, as secretary, signed the Waiver of Notice of Organization Meeting [of Incorporation of Mendenhall Produce, Inc.,] dated April 30, 1994 [(RECX-2 at 7)].

3. According to the minutes of the first organization meeting [of incorporation of Mendenhall Produce, Inc.,] held on April 30, 1994, Suzanne D. Mendenhall was elected chairman and Kevin Martin was elected secretary for the meeting. Suzanne D. Mendenhall, as incorporator, elected herself and Kevin Martin as directors. Kevin Martin signed the minutes, as the secretary of the corporation. [(RECX-2 at 8-9.)]

4. Kevin Martin, as the secretary of the corporation, signed the Notice of Meeting of Shareholders [of Mendenhall Produce, Inc.,] and the Notice of the Organization Meeting of the Board of Directors [of Mendenhall Produce, Inc]. Both Suzanne D. Mendenhall and Kevin Martin, as directors, signed the Waiver of [Notice of] Organization Meeting of Board of Directors [of Mendenhall Produce, Inc.,] which was held April 30, 1994. [(RECX-2 at 10-11, 13.)]

5. The Minutes of Organization Meeting of First Board of Directors [of Mendenhall Produce, Inc.,] was signed by Kevin Martin, as the secretary [(RECX-2 at 14)]. According to the Organizational Resolutions Adopted by the Board of Directors [of Mendenhall Produce, Inc.,], Suzanne D. Mendenhall was elected president and Kevin Martin was elected both treasurer and secretary [of Mendenhall Produce, Inc. (RECX-2 at 15).] Suzanne D. Mendenhall remained

the president of Mendenhall Produce, Inc., until May 12, 1995, when she resigned as president and substantially terminated her involvement in the daily operations of [Mendenhall Produce, Inc. (RECX-2 at 20, 22)]. In addition, 1,000 shares of stock in [Mendenhall Produce, Inc.,] was issued to the Suzanne D. Mendenhall Irrevocable Trust for consideration of $1,000 [(RECX-2 at 15-16)].

6. PACA License No. 940906 was issued to Mendenhall Produce, Inc., 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 Mendenhall Produce, Inc., failed to pay the required annual renewal fee [(CX-1 at 1-2, 7)].

7. On May 12, 1995, Kevin Martin, as director and secretary, signed a Waiver of Notice of a Special Meeting of Board of Directors [of Mendenhall Produce, Inc. (RECX-2 at 19)]. According to the minutes of the special meeting of the board of directors, on May 12, 1995, Suzanne D. Mendenhall resigned as president of the company and the directors elected Michael J. Mendenhall as the president. The minutes were signed by Kevin Martin, as the secretary, and approved by Michael J. Mendenhall, as president. [(RECX-2 at 21-22.)]

8. On June 2[], 1995, both Suzanne D. Mendenhall and Kevin Martin, as directors, and Kevin Martin, as secretary, signed a Waiver of Notice of a Special Meeting of Board of Directors of Mendenhall Produce, Inc. [(RECX-2 at 25).] The special meeting was held on June 2, 1995, at 12:00 noon at which time Michael J. Mendenhall submitted his resignation to the board [of directors,] which accepted it. The board [of directors] then elected Kevin Martin as the president [of Mendenhall Produce, Inc. The board [of directors] also elected Margaret Nunez as the secretary of Mendenhall Produce, Inc. The minutes were signed by Margaret Nunez, as secretary, and approved by Kevin Martin, as president. [(RECX-2 at 26-27.)]

9. On July 20, 1995, Suzanne D. Mendenhall and Kevin Martin, as directors, and Rhonda Ambrose, as the secretary of [Mendenhall Produce, Inc.,] signed a Waiver of Notice of a Special Meeting [of Board of Directors of Mendenhall Produce, Inc. During the meeting of the board of directors held on July 20, 1995,] it was announced that Margaret Nunez had resigned as secretary and treasurer. On a motion made by Kevin Martin and seconded by Suzanne D. Mendenhall, Rhonda Ambrose was elected secretary and treasurer of Mendenhall Produce, Inc. [(RECX-2 at 28-29.)]

10. Rhonda Ambrose resigned on November 25, 1995, as secretary and treasurer of Mendenhall Produce, Inc., and terminated her employment with the company [(RECX-2 at 31)].

11. Section 2 of article 6 of the bylaws of Mendenhall Produce, Inc., states that to transfer shares of the corporation, there must be a transfer on the stock

transfer books [of the corporation] and "[t]he person in whose name shares stand on the books of the corporation shall be deemed by the corporation to be the owner [of the shares] for all purposes" [(RECX-2 at 41)].

12. During the period August 1995 through November 1995, Mendenhall Produce, Inc., 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 (Tr. 25-26). The unpaid invoices in these 66 transactions were introduced into evidence as CX-[8] through CX-23. In 12 of these transactions, totaling $33,990.37, the produce was not received by Mendenhall Produce, Inc., before the November 15, 1995, amendment of the term "responsibly connected" (CX-11, CX-13, CX-14, CX-17, CX-18, CX-21, CX-22, CX-23). There were another 10 transactions totaling $27,907.65 where payment did not become due for the purchased produce until after November 15, 1995 (CX-13, CX-14, CX-20, CX-21, CX-22). In addition, Mendenhall Produce, Inc., failed to satisfy reparation orders issued to eight of these 16 [produce] sellers between May 20, 1996, and December 3, 1996, involving over $195,000 (CX-6; RECX-6; Tr. 26).

13. Before Suzanne D. Mendenhall's resignation as president [of Mendenhall Produce, Inc.,] on May 12, 1995, she regularly worked in the firm's office. She took care of accounts payable and other financial matters. She did not purchase and sell produce, and she had no prior experience in produce operations. She remained a director after her resignation. [(Tr. 52-53, 119, 231-32.)] She was replaced as president by Petitioner . . . who served as president until June 2, 1995, when his verbal resignation was accepted by the board of directors (Suzanne D. Mendenhall and Kevin Martin) and Kevin Martin was elected president (CX-2 at 30-32, 36-37). Kevin Martin retained the position of president until he terminated his employment with Mendenhall Produce, Inc., on or about November 25, 1995 (Tr. 148, 166, 289). The offices of secretary and treasurer of Mendenhall Produce, Inc., were held by Kevin Martin's fiancee and future wife, Rhonda Ambrose, who was employed as accounts manager, between July 20, 1995, and November 25, 1995 (CX-2 at 39-41).

14. Suzanne D. Mendenhall, using the signature Suzi D. Mendenhall, represented that she was the holder of 100 percent of Mendenhall Produce, Inc.'s stock when Mendenhall Produce, Inc., applied for a PACA license on March 28, 1994, and when Mendenhall Produce, Inc., applied for license renewal in 1995 (RECX-1). In reality, she was the sole beneficiary and one of three trustees (along with Petitioner's father and brother) of the Suzanne D. Mendenhall Irrevocable Trust Agreement, dated February 17, 1994 (AX-14).

15. . . . [O]n April 30, 1994, the board of directors authorized the issuance

of 1,000 shares of stock, all shares to be issued to the Suzanne D. Mendenhall Irrevocable Trust [(RECX-2 at 15-16)]. Mendenhall Produce Share Certificate No. 1 for 1,000 shares of stock was issued on the same day to "Suzanne D. Mendenhall Irrevocable Trust" (PX-1).

16. On September 26, 1995, and on September 28, 1995, respectively, Suzanne D. Mendenhall and Michael J. Mendenhall signed a "Marital Settlement Agreement" in connection with formal divorce proceedings which, in relevant part, reads:

> This Agreement is made and entered into between Suzanne D. Mendenhall, Petitioner, and Mike Mendenhall[,] Respondent. In consideration of the mutual covenants and conditions contained in this Agreement, Petitioner and Respondent hereby stipulate, contract, covenant and agree as follows:
>
> Recitals
>
> 1. The parties hereto are husband and wife, and were married on June 8, 1991. The parties are residents of New Mexico and have been for more than six months.
>
> 2. Petitioner and Respondent are incompatible.
>
> 3. Petitioner is represented by Kevin T. Riedel, Esq., and Respondent is pro se.
>
> 4. No children have been born of this marriage.
>
> 5. Respondent shall take as his sole and separate property the following described property:
>
> A. All shares in OMI, Inc., the primary asset of which is that certain bar/restaurant business in Creed, Colorado known as "The Old Miners Inn;"
>
> B. All shares in Mendenhall Produce, Inc.;
>
> C. All bank accounts in his name;
>
> D. 1995 Dodge Ram Truck;
>
> E. His personal items, including clothing and jewelry; and
>
> F. One-half of all household items not specifically referred to herein.
>
> 6. Petitioner shall take as her sole and separate property the following described property:
>
> A. All bank accounts in her name;
>
> B. Her personal items, including clothing and jewelry; and

C. One-half of all household items not specifically referred to herein.

7. Petitioner's interest as beneficiary of the Suzanne D. Mendenhall Irrevocable Trust Agreement dated February 17, 1994, and all assets of such trust, including without limitation residential real estate at 1280 Vista del Monte, Las Cruces, New Mexico, residential real estate at 25017½ Highway 60, South Fork, Colorado, and all furniture and artwork in both residences, are Petitioner's separate property, not subject to any right, title or claim by Respondent and therefore not subject to distribution herein. All debts associated with those properties shall be treated as debts of the Trust.

. . . .

11. Respondent shall assume as his sole and separate obligation the following community debts:

. . . .

H. All debts arising out of the acquisition and operation of OMI, Inc.

L. All debts arising out of the acquisition and operation of Mendenhall Produce, Inc.

12. The following debts have at all times been and shall continue to be the separate obligations of Respondent:

A. All debts arising out of the business S. Akins, Inc., d/b/a Big River Sales and other business activities of Respondent, including without limitation the Big River sales computer loan by Citizen's Bank personally guaranteed by Petitioner as an accommodation to Respondent; and

B. All debts, if any, related to claims made against the parties in Tri-State Chemicals, Inc. v. S. Akins Enterprises, Inc., et al. and Art Morgan Containers v. Rubinstein, et al., two civil actions pending in Dona Ana County District Court, New Mexico; and

C. All other debts incurred by Respondent without Petitioner's knowledge.

. . . .

16. Each party will execute all deeds, documents of title and other instruments necessary to transfer title to the property herein and further necessary to carry out the terms and conditions of this Agreement. Should either party fail or refuse to execute such documents within 20 days from the date of this Agreement, the noncomplying party agrees to pay

reasonable attorney's fees. . . .

. . . .

18. The foregoing division of property shall, from the execution of this Marital Settlement Agreement, operate to divest each party from any interest he/she had or may claim in the property set aside for the other.

. . . .

20. This Agreement shall be filed in the above action and each party requests the Court approve this Agreement and incorporate this Agreement into the Court's Final Decree.

RECX-3.

[17.] The Final Decree of Dissolution of Marriage that was entered expressly provides that:

IT IS . . . ORDERED, ADJUDGED AND DECREED that:

. . . .

B. The Marital Settlement Agreement between the parties, which is on file herein, is hereby ratified, incorporated and merged into this Decree as an integral and nonseparable part hereof;

C. The parties are ordered to carry out the terms and provisions of the Marital Settlement Agreement[.]

RECX-4.

1[8]. The share certificate for 1,000 shares was not produced except for a copy of the front side of [certificate number] 1, and the location of the original share certificate was not made known [(PX-1)]. No shares of stock of Mendenhall Produce, Inc., were ever transferred by way of a stock certificate to Petitioner, and the stock transfer books of Mendenhall Produce, Inc., never showed that Petitioner was a shareholder. According to the terms of the Marital Settlement Agreement, each party [to the Marital Settlement Agreement] was obligated to "execute all deeds, documents of title and other instruments necessary to transfer title to the property herein and further necessary to carry out the terms and conditions of [the] Agreement" [(RECX-3 at 4)]. [Suzanne D.] Mendenhall was legally obligated to do any and all things necessary to transfer to Petitioner "[a]ll shares in Mendenhall Produce, Inc." [(RECX-3 at 1).]

1[9]. Suzanne D. Mendenhall was the sole trustee and beneficiary of the Suzanne D. Mendenhall Irrevocable Trust at the time that she entered into the Marital Settlement Agreement, as well as later when she sold the two private residences that were titled in the trust (Tr. 244-46). Although the Irrevocable

Trust Agreement requires that there be three trustees and that replacement trustees be appointed before conducting any other business (AX-14 [at 11-12]), no replacement trustees were appointed after George Mendenhall and Bill Mendenhall resigned as trustees on May 25, 1995 (AX-15, AX-16).

[20]. In March 1994, with just over one year of experience as a produce salesman, Kevin Martin was asked by Petitioner, who was the president and owner of S. Akins Enterprises, d/b/a Big River Sales, and Martin's supervisor, to leave Big River Sales and go to Mendenhall Produce, Inc. At that time, Mr. Martin was 23 years of age. (Tr. 115-18.) Petitioner's offer was made in the context that Big River Sales was going to go out of business, and Petitioner and Kevin Martin would both be moving over to Mendenhall Produce, Inc. (Tr. 118).

2[1]. Kevin Martin became secretary and treasurer of Mendenhall Produce, Inc., while still at Big River [Sales], and Mendenhall Produce, Inc.'s initial purchases were made by Petitioner and Kevin Martin using the Big River [Sales] name because Mendenhall Produce, Inc., did not have credit upon which to buy (Tr. 119[-20]). [Kevin] Martin moved over to Mendenhall Produce, Inc.'s building first, and he was later followed by Petitioner, who did not fully sever his ties to Big River [Sales] until approximately February or March of 1995 (Tr. 12[3]-25). The salary of Kevin Martin at both Big River Sales and Mendenhall Produce, Inc., was $1,000 per week (Tr. 156-57).

2[2]. Petitioner was the boss at Mendenhall Produce, Inc., "from day one" (Tr. 119). Petitioner hired the firm's top salesman on his own (Tr. 121). Petitioner fired employees and directed Kevin Martin to fire other employees (Tr. 128-29, 145). Petitioner had the final say as to hiring, inventory, purchases, and sales (Tr. 119-21). Petitioner ran the business through Kevin Martin, who operated with limited authority, within parameters that Petitioner controlled (Tr. 300).

2[3. In June 1994,] Gary Cooper, who had 8 years' management experience as the manager of Sears catalog stores (Tr. 275), was hired as a salesman at Mendenhall Produce, Inc., by Petitioner, who identified himself as the owner of Mendenhall Produce, Inc. (Tr. 275-76, 284). Although Gary Cooper was initially employed to sell on a truck route, he was moved into the office with Petitioner and Kevin Martin by January 1995 (Tr. 277-78).

2[4]. Petitioner personally placed purchase orders for Mendenhall Produce, Inc., in the presence of both Kevin Martin and Gary Cooper (Tr. 136-37, 279), and on at least one occasion, Kevin Martin and Gary Cooper learned about a truckload purchase of lettuce arranged by Petitioner just before delivery and had to rush to find customers (Tr. 283).

2[5]. Petitioner sometimes instructed Kevin Martin to pay certain produce

suppliers before others (Tr. [303-]04), and when there were insufficient funds available, Petitioner would instruct Kevin Martin to take money from Sun Pak, the unincorporated truck brokerage business that Mac Salicos was operating at the same business location [as Mendenhall Produce, Inc.] (Tr. 14[0]-43, 2[79]-81).

2[6]. Petitioner maintained control over the daily operations of Mendenhall Produce, Inc., by making frequent telephone calls to Kevin Martin and Gary Cooper during the summer, while Petitioner and [Suzanne D.] Mendenhall resided in Colorado and Petitioner conducted his annual Colorado lettuce marketing deal. After returning to New Mexico in the fall of 1995, Petitioner took the ability to pay bills away from Kevin Martin by placing Mendenhall Produce, Inc.'s receivables in Prima Roma Sales, Inc.'s bank account and by writing checks in payment for Mendenhall Produce, Inc., purchases using Prima Roma Sales, Inc.'s checks. (Tr. 122[-23], 133, 281-8[4].)

2[7]. Petitioner ordered Mendenhall Produce, Inc., inventory transferred without invoices to M & M Produce, Inc., in El Paso, Texas (Tr. [146-47,] 286). Petitioner and Kevin Martin were two of the initial directors of M & M Produce, Inc., a Texas corporation, which was incorporated on August I, 1995 (RECX-5 at 21-23). Petitioner . . . [used] Mendenhall Produce, Inc.'s funds to build a cooler at M & M Produce, Inc.'s facility [(Tr. 291)]. Th[e cost for this cooler] was shown on Mendenhall Produce, Inc.'s balance sheet dated July 31, 1995, as a $11,1[8]2.43 expense for "Building Improvements-El Paso" (AX-5). [Between] late September [and the] middle [of] October 1995, Petitioner ordered Kevin Martin to ship Mendenhall Produce, Inc.'s inventory having an approximate value of $50,000 to M & M Produce in El Paso[, Texas,] without the issuance of invoices (Tr. 143, 146-47). At that time, Mendenhall Produce, Inc., [was in] poor financial [condition and had] a deficit of over $100,000 in the business, and [Mendenhall Produce, Inc.'s] flash profit and loss statements . . . show[ed] a negative bank balance (Tr. 143-4[5]). [In addition,] . . . tomatoes [worth $60,000 were] sent [from Mendenhall Produce, Inc.,] to M & M Produce, Inc., . . . for shipment into Mexico pursuant to sales made by Aaron Molina of M & M Produce, Inc. (Tr. 147[-48]).

2[8]. Although Petitioner directed Kevin Martin to utilize Mendenhall Produce, Inc.'s funds and produce inventory in the start-up of M & M Produce, Inc., Petitioner did not approve, in his capacity as a director of M & M Produce, Inc., the issuance of any stock of M & M Produce, Inc., to Mendenhall Produce, Inc. Instead, Petitioner first approved a corporate resolution, as a director of M & M Produce, Inc., on August 4, 1995, that authorized the issuance of 500 shares of stock to Aaron Molina and 500 shares of stock to Prima Roma Sales, Inc. (a corporation owned by Petitioner) [(Tr. 54)], and then approved a second corporate

resolution of M & M Produce, Inc., on November 28, 1995, that authorized the issuance to Gary Cooper of the 500 shares that were to have gone to Prima Roma Sales, Inc. (CX-5 at 8-9). The share certificate naming Gary Cooper the holder of 500 shares of M & M Produce, Inc., was never issued (RECX-5; Tr. 291-93).

2[9]. The November 28, 1995, corporate resolution of M & M Produce, Inc., approved by Petitioner, as director, also accepted the resignation of Kevin Martin as an officer and director of M & M Produce, Inc., effective November 25, 1995, and approved the election of Aaron Molina as president and treasurer and Gary Cooper as vice-president and secretary [(CX-5 at 8-9)]. On December 15, 1995, a PACA license was issued to M & M Produce, Inc., pursuant to an application that showed Aaron Molina as director and 50 percent stockholder and Gary Cooper as director and 50 percent stockholder (CX-5 at 14-19).

[30]. Kevin Martin left Mendenhall Produce, Inc., after deciding not to comply with orders he received from Petitioner on November 21 or 22, 1995, to close down Mendenhall Produce, Inc., and to move everything to M & M Produce, Inc., in El Paso[, Texas] (Tr. 148-49). Following the departure of Kevin Martin from Mendenhall Produce, Inc., on or about November 25, 1995, Petitioner ordered Gary Cooper to close down Mendenhall Produce, Inc., and to transfer the inventory and equipment on hand to M & M Produce, Inc. (Tr. 286-89, 291-92). At the direction of Petitioner, Gary Cooper moved to El Paso, [Texas,] where he participated in the operation of M & M Produce, Inc., under the direction and orders of Petitioner [(Tr. 291-93)].

3[1]. Gary Cooper resigned his office and terminated his employment at M & M Produce, Inc., in January 1996, when Petitioner refused to provide him with financial control (RECX-5; Tr. 292-93). While at M & M Produce, Inc., Gary Cooper observed that $51,000 or $52,000 worth of Mendenhall Produce, Inc.'s transferred produce and a $60,000 account receivable created by the sale of tomatoes belonging to Mendenhall Produce, Inc., . . . was being carried on M & M Produce, Inc.'s computer as a payable to Petitioner instead of as a payable to Mendenhall Produce, Inc. (Tr. [147-48,] 287).

3[2]. On the day that Kevin Martin and Rhonda Ambrose left Mendenhall Produce, Inc., Kevin Martin deposited a customer check that he had picked up with Mendenhall Produce, Inc.'s mail into a Mendenhall Produce, Inc., account, and he utilized this deposit to make a payroll payment of [approximately] $10,000 in claimed back wages to Rhonda Ambrose after consulting an attorney (Tr. 151-53).

3[3]. The volume of business conducted by Mendenhall Produce, Inc., did not support the firm's high salary structure and the payments made to [Suzanne D.] Mendenhall as interest on trust funds made available to the business (AX-5;

Tr. 145, 156, 308). Although Petitioner did not receive a salary, [approximately] $6,000 a month was paid to [Suzanne D.] Mendenhall (Tr. 157, 237[, 308-09]). It was understood that Mendenhall Produce, Inc.'s credit might be adversely affected if Petitioner received a salary because of his involvement with Big River Sales and that Petitioner would have the benefit of funds paid to [Suzanne D.] Mendenhall (Tr. 157[, 162]). In addition, Petitioner obtained produce for his Old Miner's Inn restaurant in Colorado from Mendenhall Produce, Inc., without payment (Tr. 158-59, 30[8-09]).

3[4]. On April 18, 1996, well after the failure of Mendenhall Produce, Inc., and the transfer of some of its assets to M & M Produce, Inc., for the individual benefit of Petitioner, two bobtail tractors that had been used in Mendenhall Produce, Inc.'s operations were sold, and [approximately] $14,371.03 of the proceeds were paid by [H. Suzanne Delph (known prior to the Final Decree of Dissolution of Marriage as Suzanne D. Mendenhall)] to Petitioner's firm, Prima Roma Sales, Inc. ([RECX-4 at 2,] AX-17; Tr. 246-51).

3[5]. At the time of an investigation [of the payment practices of Mendenhall Produce, Inc.,] conducted by PACA Marketing Specialist Jeffrey Spradlin in August 1996, Petitioner had possession of the business records of Mendenhall Produce, Inc., at his residence in Colorado (Tr. 111-12).

3[6]. Unpaid produce suppliers [filed a complaint] in the United States District Court for the District of Arizona on March 14, 1996, captioned *Kent Northcross d/b/a Northcross Distributing, Greg Leonard Produce, Inc., O.P. Murphy Produce Co., Inc. d/b/a O.P. Murphy & Sons, ARP Trading, Inc. d/b/a AAA Produce Distributing, Liberty Strawberry Sales, Jessi Produce, Inc. and Yurosek Marketing, Inc. v. Michael J. Mendenhall, Suzanne Mendenhall, Mendenhall Produce, Inc., M & M Produce, Inc., Kevin Martin, Aaron Molina, and Gary Cooper*, No. CIV 96-0693 PHX-PGR (AX-9 . . .). On August 22, 1996, Petitioner, through attorney Barton L. Baker, without the knowledge and prior approval of [Petitioner's] former wife, who had not yet received service of the complaint (Tr. 219), filed an answer [(AX-10)], individually and on behalf of Mendenhall Produce, Inc., and M & M Produce, Inc., to [the] complaint. Petitioner admitted in paragraph 6 of the answer that he was a stockholder of Mendenhall Produce, Inc. (AX-10 [at 2]). Petitioner admitted in paragraph 38 of the answer that he and Suzanne Mendenhall owned Mendenhall Produce, Inc., but denied that they were responsibly connected with Mendenhall Produce, Inc. (AX-10 [at 5-6]). The answer filed August 22, 1996, on behalf of Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc., stated, *inter alia*:

Deny Michael Mendenhall resides in Phoenix, Arizona, but admits Mendenhall was a stockholder of Mendenhall Produce, Inc.

. . . .

Admit . . . that Michael Mendenhall and Suzanne Mendenhall owned Mendenhall Produce. . . .

AX-10 ¶¶ 6, 38.

3[7]. After th[e] complaint was served [in *Northcross v. Mendenhall*, No. CIV 96-0693 PHX-PGR, attorney Barton [L.] Baker telephoned Richard Cole, one of the attorneys representing the plaintiff creditors, and represented to [Mr. Cole] that he [(Mr. Barton)] had been retained by [Michael J.] Mendenhall and would be representing [Michael J.] Mendenhall and the two entities, Mendenhall Produce, Inc., and M & M Produce, Inc. (Tr. 218).

3[8]. On July 21, 1997, Petitioner approved, . . . through attorney Barton [L.] Baker, a "Stipulation and Agreed Order Consenting to Judgment Between Plaintiffs and Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc." (AX-11). The total amount of the five judgments that Petitioner agreed to, jointly and severally, by this stipulation, was $202,478.59, including prejudgment interest. Petitioner stipulated in paragraph 2(a) of the [Stipulation and Agreed Order Consenting to Judgment Between Plaintiffs and Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc.,] that he was:

MICHAEL J. MENDENHALL, an individual residing in Arizona, and who at all times relevant in the Plaintiffs' Complaint operated as a commission merchant, dealer, or broker in perishable agricultural commodities ("produce") in interstate commerce within the meaning of 7 U.S.C. § 499a(6), and was an owner and operator, involved in the day-to-day operations of Mendenhall Produce, Inc., and M&M Produce, Inc.

AX-11 at 2.

Petitioner stipulated in paragraph 10 of the [Stipulation and Agreed Order Consenting to Judgment Between Plaintiffs and Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc.]:

The parties stipulate that the judgment may be immediately enforceable; however, neither party is precluded from raising the issue of dischargeability in the event Michael Mendenhall files a bankruptcy

proceeding.

[AX-11 at 3.]

3[9]. On August 12, 1997, judgment was entered, jointly and severally, against Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc., [in *Northcross v. Mendenhall*, No. CIV 96-0693 PHX-PGR,] pursuant to the [S]tipulation [and Agreed Order Consenting to Judgment Between Plaintiffs and Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc.,] and [A]greed [O]rder [Consenting to Judgment] entered by the court (AX-12, AX-13).

[40]. A few weeks after this judgment was entered, in early September [1997], Petitioner participated in a telephone conference call with attorneys Barton [L.] Baker and Richard Cole (Tr. 65). During this telephone conference call, Mr. Cole specifically mentioned the judgment entered against Petitioner [in *Northcross v. Mendenhall*, No. CIV 96-0693 PHX-PGR, and Petitioner] expressed no surprise and was aware of the judgment (Tr. 221-22).

4[1]. Petitioner Michael J. Mendenhall was responsibly connected with Mendenhall Produce, Inc., during the time it was found to have violated the PACA.

Discussion and Conclusions

Petitioner maintains that he was not responsibly connected [with Mendenhall Produce, Inc., during the time it was found to have violated the PACA] because he never received a stock certificate evidencing his stock ownership in Mendenhall Produce, Inc. In order to so contend, Petitioner would disregard the [M]arital [S]ettlement [A]greement reached between Petitioner and his former wife [(RECX-3)]. . . . Petitioner [contends] that the stock was not owned by Suzanne D. Mendenhall but rather by the Suzanne D. Mendenhall Irrevocable Trust and that the [Marital Settlement A]greement could not work a transfer of the stock which could only be accomplished by the actual giving of the stock and a transfer of the stock on the corporate books. These contentions of the Petitioner [are] examined [in this Decision and Order] and are found not to have merit.

Also, Petitioner raised an objection at the commencement of the hearing on November 5, 1997, to the introduction of testimony and exhibits that Respondent offered with respect to the determination of Petitioner's responsibly connected status. Petitioner argued that this is an appeal proceeding on a certified written agency record under Rules of Practice which allegedly do not authorize a full evidentiary hearing. Petitioner was granted a continuing objection. Petitioner

would limit the evidence in a proceeding of this nature to [the certified agency record upon which the Chief, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, based a responsibly connected determination].

This proceeding was instituted [by Petitioner] . . . under section 1.133([b])(2) of the Rules of Practice (7 C.F.R. § 1.133([b])(2)), which became effective April 2[2], 1996, to review [Respondent's responsibly connected] determination. Prior to [April 22, 1996,] . . . a determination made by the Chief, PACA Branch[, Fruit and Vegetable Division, Agricultural Marketing Service, USDA,] that a person was responsibly connected with a commission merchant, dealer, or broker, as officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation would be reviewed in a hearing obtained by filing a petition with the Administrator, Agricultural Marketing Service, [USDA [hereinafter Administrator]], under . . . rules [of practice] promulgated by the Agricultural Marketing Service[, USDA] (7 C.F.R. §§ 47.[47-.68]). Full evidentiary hearings [were] routinely . . . provided in these proceedings when tried before a presiding officer appointed by the Administrator. The replacement of these agency rules of practice with amendments to the Rules of Practice promulgated by the Office of the Secretary, effective April 2[2], 1996 (7 C.F.R. §§ 1.130[-.151]), has not altered the scope of the hearing. A petition for review under the Rules of Practice is: (1) a request "to have determined the facts with respect to such responsibly connected status" (7 C.F.R. § 1.133(b)(2)); and (2) "a request for a hearing" (7 C.F.R. § 1.141(a)). The filing of a petition for review commences an administrative proceeding . . . [which] is far broader in nature than an appeal court's review of a trial court's determination made upon a full oral hearing record. The Judicial Officer has followed this line of reasoning in cases decided by him. *See In re Michael Norinsberg, [supra]*; *In re Steven J. Rodgers, [supra]*; and *In re Lawrence D. Salins, [supra]*. In these cases, the [respondent] was properly permitted to introduce relevant and material evidence at the hearing without being limited to a rebuttal of evidence presented by the petitioner therein and, this evidence could be relied upon to support the required substantive determinations.

The determination of responsibly connected was made in this case by Respondent, and he found that Petitioner was responsibly connected with Mendenhall Produce, Inc. The only basis mentioned in Respondent's determination letter of July 18, 1997, was that Petitioner was listed with USDA as a 100 percent shareholder of Mendenhall Produce, Inc. [(RECX-9).] The license records show that Suzanne D. Mendenhall was the holder of 100 percent of [the stock of Mendenhall Produce, Inc. (RECX-1)]. The information before [Respondent, at the time of his July 18, 1997, responsibly connected

determination,] showed Petitioner's ownership was actually through the [M]arital [S]ettlement [A]greement (RECX-3) and the [F]inal [D]ecree of [D]issolution of [M]arriage (RECX-4), which documents establish that Petitioner and Suzanne D. Mendenhall had formerly agreed to a change of stock ownership, effective September 28, 1995, and were subject to a final decree dated October 23, 1995, that dissolved their marriage and ordered them to carry out the agreed transfer of stock. In addition, at the time that he made [the July 18, 1997, responsibly connected determination], Respondent was aware that seven unpaid Default Orders had been entered against Mendenhall Produce, Inc., in reparation proceedings (RECX-6). The dates in which interest was assessed on these awards indicates that, in six of these [reparation proceedings], the violations occurred after the execution of the [M]arital [S]ettlement [A]greement.

Petitioner argues that, inasmuch as there was no actual stock certificate transferred and there was no change of ownership on [Mendenhall Produce, Inc.'s] books, the transfer of property as set forth in the [M]arital [S]ettlement [A]greement was not effective. [However, generally a stock certificate is only evidence of stock ownership and stock ownership is determined by an examination of all the facts relevant to ownership.[3] Further, while a corporate stock record

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[3]*See Eisner v. Macomber*, 252 U.S. 189, 208 (1920) (stating that the interest of the stockholder is a capital interest, and his certificates are but the evidence of that interest); *Richardson v. Shaw*, 209 U.S. 365, 378 (1908) (stating that the certificate of shares of stock is not the property itself, it is but evidence of property in the shares; the certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named); *Harriman v. Northern Securities Co.*, 197 U.S. 244, 294 (1905) (stating that each stock certificate is a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 13 (1900) (stating that certificates are only evidence of ownership of shares); *Pacific National Bank v. Eaton*, 141 U.S. 227, 234 (1891) (stating that millions of dollars of capital stock are held without any certificate; or, if certificates are made out, without their ever being delivered; a certificate is authentic evidence of title to stock, but it is not the stock itself, nor is it necessary to the existence of stock; a certificate certifies to a fact which exists independently of itself); *Dewing v. Perdicaries*, 96 U.S. 193, 196 (1878) (stating that the stock of a corporation may be held by a valid title without a certificate; the certificate is only one indicia of title); *McAllister v. Kuhn*, 96 U.S. 87, 89 (1878) (stating that a certificate of stock is not stock itself, but is documentary evidence of title to stock); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611-12 (D.C. Cir. 1987) (stating that one can be a shareholder without a stock certificate having been physically issued, and even if there is some technical inadequacy in the stock certificate, it would matter little, since the pre-incorporation agreement and bankruptcy pleadings both list the petitioner as 60 percent shareholder); *KDI Corp. v. Former Shareholders of Labtron of America*, 536 F.2d 1146, 1148 (6th Cir. 1976) (stating that the accepted rule is that share certificates merely evidence ownership of shares and are not essential to ownership); *Bonsall v. Commissioner*, 317 F.2d 61, 63 (2d Cir. 1963) (stating that a stock certificate is merely evidence of ownership, which is an independently existing fact to be determined by inquiry into the nature of the transaction as a whole); *Swenson v. Commissioner*, 309 F.2d 672, 673-74 (8th Cir. 1962) (stating that cases considering a person's holding period for stock

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[1](...continued)
have not required the actual issuance of stock to start or end the holding period; it has been held frequently that the holding period of corporate stock begins or ends when a purchaser acquires substantial contractual rights which will ripen into full ownership unless defeated by breach of contract by the other contracting party); *Hoppe v. Rittenhouse*, 279 F.2d 3, 8 (9th Cir. 1960) (stating that the mere mechanical act of issuing stock certificates is not necessary to constitute subscribers shareholders); *Commissioner v. Landers Corp.*, 210 F.2d 188, 192 (6th Cir. 1954) (stating that the issuance of a stock certificate is not necessary to create the status of stockholder, the certificate being merely the evidence of the relationship); *C.M. Hall Lamp Co. v. United States*, 201 F.2d 465, 468 (6th Cir. 1953) (stating that the physical issuance of a stock certificate is merely delivery of the formal paper evidencing a shareholder's interest as a stockholder); *Seiden v. Southland Chenilles', Inc.*, 195 F.2d 899, 903 (5th Cir. 1952) (stating that a stock certificate is merely evidence of property rights); *Helvering v. Kaufmann*, 136 F.2d 356, 358 (4th Cir. 1943) (stating that stock certificates are only evidence of ownership and the failure to deliver possession of certificates does not of itself prevent the passing of title to stock from an owner to an assignee, if such is the intention of the parties); *In re Penfield Distilling Co.*, 131 F.2d 694, 698 (6th Cir. 1942) (stating that a stock certificate is mere paper evidence of title to stock and not the stock itself; a stock certificate is not necessary to the existence of the stock and merely certifies to an independently existing fact; title to shares may pass without the actual delivery of stock certificates; whether a person is a stockholder is a question of fact); *Kansas, O. & G. Ry. Co. v. Helvering*, 124 F.2d 460, 463 (3d Cir. 1941) (stating that stock certificates are not property itself, but evidence of property in the shares); *FDIC v. Gunderson*, 106 F.2d 633, 634 (8th Cir. 1939) (stating that a stock certificate is merely evidence of the stockholder's ownership of shares); *Commissioner v. Scatena*, 85 F.2d 729, 732 (9th Cir. 1936) (stating that a certificate of stock is a symbol or paper evidence of ownership of shares; the certificate is not the stock itself, it is merely written evidence, and then only prima facie evidence, of the ownership); *Moore v. Panama Ice & Fish Co.*, 81 F.2d 837, 839 (5th Cir. 1936) (stating that the certificate for corporate stock is not the holder's share or interest in the corporate enterprise, but is merely evidence of ownership of such share or interest); *Blythe v. Doheny*, 73 F.2d 799, 803 (9th Cir. 1934) (stating that to effectuate an issue of stock, a certificate is not necessary); *Snyder v. Commissioner*, 73 F.2d 5, 7 (3d Cir. 1934) (stating that a certificate of stock is the symbol or paper evidence of the ownership of shares, it is not the stock itself; a stock certificate is merely written evidence, and then only prima facie evidence, of the ownership thereof by the person designated therein and a stockholder may prove his ownership of shares by evidence other than the certificate), *aff'd*, 295 U.S. 134 (1935); *Hoffman v. Commissioner*, 71 F.2d 929, 930 (2d Cir. 1934) (stating that it is well settled that nondelivery of possession of certificates does not preclude title to stock passing to the purchaser if that is the intention of the parties); *Lincoln Theaters Corp. v. Fleming*, 66 F.2d 441, 448 (4th Cir. 1933) (stating that in legal effect a person who had paid for stock is entitled to all rights of a stockholder, even though the stockholder lacked a certificate which is only evidence of ownership); *Lavien v. Norman*, 55 F.2d 91, 96 (1st Cir. 1932) (stating that certificates are only evidence of ownership of stock); *Elko Lamoille Power Co. v. Commissioner*, 50 F.2d 595, 596 (9th Cir. 1931) (stating that a stock certificate is evidence of the shares owned); *Los Angeles Fisheries, Inc. v. Crook*, 47 F.2d 1031, 1035 (9th Cir. 1931) (stating that to effectuate an issue of stock, it is not necessary that a certificate issue); *Howbert v. Penrose*, 38 F.2d 577, 579 (10th Cir. 1930) (stating that in law and fact, certificates are only evidence of the ownership of shares and a muniment of the holder's title to a proportionate interest in the corporate estate); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 F. 746, 755 (2d Cir. 1922) (stating that a share of stock and the certificate of the share are two very different matters; the certificate is not the stock itself, but mere evidence of the stockholder's interest in the corporation); *Swobe v. Brictson Mfg. Co.*, 279 F. 560, 562 (8th Cir. 1922) (stating that stock certificates are only written evidence of ownership and not necessary to complete ownership of stock); *Edwards v. Wabash Ry. Co.*, 264 F. 610, 615 (2d Cir. 1920) (stating that a stock (continued...)

book is evidence that the person identified as a stockholder is in fact a stockholder, that evidence may be rebutted, and generally the failure to register a transfer on the records of a corporation does not affect the validity of the transfer as between the transferor and transferee, even if corporate bylaws require recordation of transfers on the books of the corporation.[4] Moreover, Mendenhall Produce, Inc.,

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[3](...continued)
certificate is a document which is the evidence of the number of shares of stock which the holder of it owns); *Shaw v. Goebel Brewing Co.*, 202 F. 408, 413 (6th Cir. 1913) (stating that certificates are simply evidence of title).

[4]*See Early v. Richardson*, 280 U.S. 496, 498-99 (1930) (stating that when a buyer receives certificates indorsed by the seller, title passed and the transfer was complete between the parties although the buyer's name does not appear upon the transfer books of the bank); *Johnston v. Laflin*, 103 U.S. 800, 804 (1881) (stating that entry of a transfer of stock on the books of the bank is not required for transfer of title to the shares, but for the protection of the parties and others dealing with the bank and to enable the bank to know who are its stockholders entitled to vote at meetings and to receive dividends when declared); *Willco Kuwait (Trading) S.A.K. v. deSavary*, 843 F.2d 618, 625-26 (1st Cir. 1988) (stating that (1) the hornbook rule is that where a person's name appears upon the stock book or stock ledger of a corporation, the book is competent evidence to show that the person is a subscriber or stockholder, and is prima facie proof and raises a prima facie presumption of that fact and that, in an action against the named stockholder, the named stockholder has the burden of showing that he is not the stockholder; (2) plaintiff wishes to infer a presumption that if a name does not appear in the stock book, there is a presumption that he is not an owner; however, even if we presume that where a person's name does not appear upon the stock book of a corporation, the person is not an owner of the corporation, the presumption can be rebutted by evidence that establishes that the person is an owner); *Manbourne, Inc. v. Conrad*, 796 F.2d 884, 889 (7th Cir. 1986) (stating that despite a corporation's refusal to record a transfer of preferred stock and a conversion of the preferred stock to common stock, the stockholder owned common stock as a result of the transfer and conversion); *Swenson v. Commissioner*, 309 F.2d 672, 673-74 (8th Cir. 1962) (stating that cases considering a person's holding period for stock have not required the transfer of stock on the corporate books to start or end the holding period; it has been held frequently that the holding period of corporate stock begins or ends when a purchaser acquires substantial contractual rights which will ripen into full ownership unless defeated by breach of contract by the other contracting party); *Rule v. Commissioner*, 127 F.2d 979, 981 (10th Cir. 1942) (stating that registration of a transfer of shares on the books of the corporation is not necessary to a valid transfer; even where the charter or bylaws of a corporation, or the general law under which the corporation is organized, provide that stock shall be transferable on the books of the corporation, it is well settled that as between the parties, an unregistered transfer is valid); *Commissioner v. Southern Bell Telephone & Telegraph Co.*, 102 F.2d 397, 402 (6th Cir. 1939) (stating that delivery of stock certificates indorsed in blank to an escrow agent, to be held until payment of the remainder of the purchase price, passed equitable title to the stock without the need of transferring the stock on the books of the corporation); *Commissioner v. Scatena*, 85 F.2d 729, 732 (9th Cir. 1936) (stating that as between a seller and buyer of stock, the buyer may become a new owner though the transfer as between the new owner and the corporation is not complete until made on the books of the corporation); *Helvering v. Miller*, 75 F.2d 474, 475 (2d Cir. 1935) (stating that a stockholder's deed of his shares to himself, his wife, and his children effected a transfer of his interest in the shares without registry on the corporation's books); *Dulin v. Commissioner*, 70 F.2d 828, 831 (6th Cir. 1934) (stating that the transfer of stock on the books of the corporation is not indispensable to the validity of a gift of stock as between the donor and the donee; the
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was incorporated in the State of New Mexico (RECX-2 at 2) and New Mexico law does not appear to be contrary to these general principles. Chapter 53 of the New Mexico Statutes provides that "shares of a corporation shall be *represented* by certificates or shall be uncertificated shares" N.M. Stat. Ann. § 53-11-23 (Michie 1996) (emphasis added), indicating that under New Mexico law, stock certificates are merely evidence of the ownership of shares of a corporation. Further, chapter 53 of the New Mexico Statutes indicates that corporate stock transfer books are only prima facie evidence of the identity of shareholders, as follows:

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[4](...continued)
requirement of a statute and corporate bylaws that transfers of stock must be recorded on the books of the corporation, as a condition precedent to effectiveness of the transfer, is for the protection of the corporation and the failure to comply with the requirement does not affect the legality of the transfer between the parties themselves); *Owen v. Commissioner*, 53 F.2d 329, 333 (9th Cir. 1931) (stating that the failure to record a transfer of stock on the books of the corporation does not prevent title from passing between the donor of shares and the donee); *Clarke v. Kelley*, 19 F.2d 920, 921 (8th Cir. 1927) (stating that the legal presumption is that the record owner of stock is the real owner, but the question whether a person is a stockholder is a question of fact); *Grissom v. Sternberger*, 10 F.2d 764, 766 (4th Cir. 1926) (stating that the North Carolina statute at issue which required the entry of transfers on the books of the corporation was only for the protection of the corporation and had no effect on the legality of the transfer as between the parties themselves); *Eubank v. Bryan County State Bank of Caddo*, 216 F. 833, 839 (8th Cir. 1914) (stating that a good-faith purchaser or pledgee of the stock of a banking corporation to whom the certificates have been assigned and delivered is the owner in equity of such stock, though the certificates have not been transferred to him upon the corporate books, as required by a bylaw of the corporation; the entry on the corporate books is not for the purpose of transferring beneficial ownership of the stock in the absence of a statute so requiring, but is for the protection of the parties dealing with the bank and to enable the bank to know who are its stockholders entitled to vote at its meetings and to receive dividends when declared; in other words, it is intended to prescribe a method of transfer which shall be deemed effectual in all matters relating to internal government and management of the corporation, rather than to prescribe a method of transfer which is to be observed between a stockholder and third parties); *O'Neil v. Wolcott Mining Co.*, 174 F. 527, 534 (8th Cir. 1909) (stating that a blank assignment and power of attorney to transfer stock upon the certificate thereof estops the transferor from claiming title to or interest in the stock against subsequent bona-fide transferees thereof, although the transfer is not recorded in the books of the corporation); *Masury v. Arkansas Nat. Bank*, 93 F. 603, 604-05 (8th Cir. 1899) (stating that a provision in a corporate charter, corporate bylaws, or in a general incorporation act that shares may only be transferred on the books of the corporation in the form the directors shall prescribe, is intended only to prescribe a method of transfer which shall be effectual as between the corporation and its stockholders in all matters relating to the internal government and management of the corporation, rather than to prescribe a method of transfer which must be observed between a stockholder and third parties); *Hubbard v. Bank of United States*, 12 F. Cas. 777, 778 (C.C.S.D.N.Y. 1840) (No. 6,815) (stating that the existence of bylaws of a bank prohibiting any transfer of stock, except on the books of the bank, affects only the corporation or individual corporators, and cannot control the rights of third parties; an assignee becomes an absolute owner of stock without a transfer on the books of the bank notwithstanding any prohibitory bylaw); *Smith v. The James Irvine Foundation*, 277 F. Supp. 774, 792 (C.D. Cal. 1967) (stating that the failure to transfer shares on the stock record book of a company is not determinative as to the respective interests of the stockholder of record and the charitable corporation named trustee of the shares by the stockholder), *aff'd*, 402 F.2d 772 (9th Cir. 1968), *cert. denied*, 394 U.S. 1000 (1969).

53-11-31. Voting list.

> The officer or agent having charge of the stock transfer books for shares of a corporation shall make . . . a complete list of the shareholders entitled to vote at the meeting or any adjournment thereof, arranged in alphabetical order, with the address of, and the number of shares held by, each, which list . . . shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. The list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. *The original stock transfer books shall be prima facie evidence as to who are the shareholders entitled to examine the list or transfer books or to vote at any meeting of shareholders.*

N.M. Stat. Ann. § 53-11-31 (Michie 1996) (emphasis added).

The record establishes that Michael J. Mendenhall and Suzanne D. Mendenhall] were legally obligated to do any and all things necessary to achieve compliance with the [M]arital [S]ettlement [A]greement [(RECX-3 at 4, RECX-4 at 2). Either party could have sought] specific performance and execution on their [M]arital [S]ettlement [A]greement. The fact that there was neglect in making a . . . transfer does not render it ineffective.

The credible oral testimony of witnesses and . . . exhibits introduced into evidence at the hearing establish that . . . Petitioner was actually the person primarily responsible for the establishment of Mendenhall Produce, Inc., and that Petitioner was, from the beginning of Mendenhall Produce, Inc., the holder of a hidden major ownership interest. He exercised his ownership interest when he held himself out to employees of Mendenhall Produce, Inc., as an owner of the business and when he directed the firm's produce operations and made management and policy decisions as a *de facto* majority owner. The record also establishes that Petitioner's *de facto* ownership interest in Mendenhall Produce, Inc., became a *de jure* ownership of the business . . . and that Petitioner and Suzanne D. Mendenhall gave due recognition to this reality in their [M]arital [S]ettlement [A]greement [(RECX-3)], which became effective September 28, 1995, and was merged into the [F]inal [D]ecree of [D]issolution of [M]arriage on October 23, 1995 [(RECX-4)].

By an entirely separate set of admissions, Petitioner has further established the existence of his ownership of Mendenhall Produce, Inc., by admitting that he and his former wife were the owners of Mendenhall Produce, Inc., in [*Northcross v.*

Mendenhall, No. CIV 96-0693 PHX-PGR,] a civil action brought by unpaid produce sellers. Petitioner . . . admitted his . . . ownership interest in Mendenhall Produce, Inc., in the answer that he filed [in response] to the complaint [filed in *Northcross*] (AX-9, AX-10). Petitioner submitted this answer individually and on behalf of Mendenhall Produce, Inc., and M & M Produce, Inc., the firm to which Petitioner diverted much of Mendenhall Produce, Inc.'s assets. Eleven months after filing this answer, Petitioner confirmed his admission of shared ownership and demonstrated the controlling nature of his ownership of Mendenhall Produce, Inc., by stipulating to the judgment that made Petitioner, Mendenhall Produce, Inc., and M & M Produce, Inc., jointly and severally liable for most of Mendenhall Produce, Inc.'s debt (AX-11, AX-12). Therefore, Petitioner was *de facto* and *de jure* a [holder of] more than 10 percent [of the outstanding] stock of Mendenhall Produce, Inc., and meets the requirements of the first sentence of the definition of "responsibly connected" found in section 1[(b)](9) of the PACA [(7 U.S.C. § 499a(b)(9))].

Not only was Petitioner a stockholder of Mendenhall Produce, Inc., a licensee under the PACA, he was also actively involved in the activities that resulted in Mendenhall Produce, Inc.'s failures to make full payment for purchases of perishable agricultural commodities in repeated and flagrant violation of section 2 of the PACA (7 U.S.C. § 499b).

Petitioner's active involvement is established by credible evidence: that he personally made purchases and payments for produce for Mendenhall Produce, Inc.; that he directed the produce purchases and sales made by Kevin Martin, Gary Cooper, and other employees of Mendenhall Produce, Inc.; . . . [and that he] directed the diversion of funds, inventories, and accounts receivable that should have been utilized to pay . . . Mendenhall Produce, Inc.'s produce debt, but which were in fact utilized for the benefit of Petitioner, OMI, Inc., d/b/a The Old Miner's Inn (Petitioner's restaurant), and M & M Produce, Inc., and Prima Roma Sales, Inc., the two other produce firms in which Petitioner had direct or indirect ownership interest.

The evidence clearly and convincingly establishes that Petitioner was responsibly connected with Mendenhall Produce, Inc., during the time in which Mendenhall Produce, Inc., violated the PACA, and he is subject to the licensing and employment restrictions that flow from that relationship. Also, the evidence precludes Petitioner from arguing that he was only a nominal stockholder of a violating licensee or entity subject to license, or that Mendenhall Produce, Inc., was the *alter ego* of another person. Petitioner was the sole or controlling owner of Mendenhall Produce, Inc., during the time that Mendenhall Produce, Inc., violated the PACA. Also, there is no merit to a defense that Mendenhall Produce,

Inc., was the *alter ego* of Suzanne D. Mendenhall or some other owner.

Under the circumstances of the present case, Petitioner shared ownership of Mendenhall Produce, Inc., with his wife initially, and later acquired complete ownership, and related complete control, on or about September 28, 1995. Petitioner demonstrated that he possessed a substantial ownership interest in Mendenhall Produce, Inc., prior to September 28, 1995, by informing Gary Cooper that he was the owner of Mendenhall Produce, Inc., at the time he hired Mr. Cooper as a salesman (Tr. 284). Furthermore, Petitioner demonstrated that he possessed a substantial ownership interest in Mendenhall Produce, Inc., prior to September 28, 1995, by expending substantial amounts of time managing the affairs of the corporation, including directing Kevin Martin, Gary Cooper, and other employees (Tr. 124[-]33, . . . [277-]78).

Petitioner had previously been associated with a firm doing business as Big River Sales and as a result of this association, he became a defendant in private lawsuits arising out of the failure of Big River Sales and the claims of creditors (RECX-3 at 3; Tr. 241-42). Petitioner obtained the assistance of his wife Suzanne D. Mendenhall and his father and brother, George and Bill Mendenhall, in attempting to conceal his actual ownership interest in Mendenhall Produce, Inc., and thereby preserve the assets of Mendenhall Produce, Inc., from the reaches of litigation. Credible testimony confirms that Kevin Martin was Petitioner's front man for the buying and selling of produce, although Kevin Martin always acted under Petitioner's direction and control.

The evidence . . . establishes that Petitioner was [an] . . . owner of Mendenhall Produce, Inc., from the time of its incorporation and at all times prior to September 28, 1995. The testimony of Suzanne D. Mendenhall to the contrary is not deemed credible. Petitioner obtained complete stock ownership when he signed the [M]arital [S]ettlement [A]greement, which made Petitioner a [holder of] 100 per centum [of the outstanding] stock [of] Mendenhall Produce, Inc. Under [the Marital Settlement A]greement, Petitioner was given "[a]ll shares in Mendenhall Produce, Inc." (RECX-3 [at 1]). The physical act of transfer of shares on the books of [Mendenhall Produce, Inc.,] was an action that was fully mandated by the [Final Decree of Dissolution of Marriage issued by the Second Judicial District Court, County of Bernalillo, State of New Mexico (RECX-4),] and if not performed, should be regarded as if performed for purposes of the PACA. In addition, there was further admission by Petitioner[, through his attorney, in connection with *Northcross v. Mendenhall*, No. CIV 96-0693 PHX-PGR,] that he was a[n owner] . . . of Mendenhall Produce, Inc.'s stock. . . . Respondent's evidence clearly shows that Petitioner was actively involved in the activities resulting in the payment violations [by Mendenhall Produce, Inc.,] and that

Mendenhall Produce, Inc., was at all times a produce firm personally operated by Petitioner or by persons acting under his instructions.

Premised upon observation of demeanor at the hearing, and the weighing of the testimony thereof, little reliance has been accorded the testimony of either Petitioner or Suzanne D. Mendenhall. Both seemed to have memory lapses or disavowed knowledge of events that would have been of importance to them and which one would reasonably expect them to remember.

Petitioner was actively involved in both the purchase of perishable agricultural commodities by Mendenhall Produce, Inc., and the diversion of the inventory and proceeds obtained from these purchases to Petitioner and three other businesses, which Petitioner owned and controlled. As the owner of Mendenhall Produce, Inc., and the person who directed its operations, Petitioner possessed the power to stop Mendenhall Produce, Inc.'s purchase operations well before the transactions occurred that had gone unpaid. He had knowledge, from monthly financial statements, that Mendenhall Produce, Inc., was at the brink of financial failure (AX-5; Tr. 282), and Petitioner continued the purchase of produce while diverting assets required for payment. Petitioner restricted the parameters within which Kevin Martin operated Mendenhall Produce, Inc., under Petitioner's direction, after Petitioner returned from Colorado in September 1995. Petitioner arranged to have customers' payments deposited directly into a Prima Roma Sales, Inc.'s bank account instead of a Mendenhall Produce, Inc., bank account. Petitioner was observed making payment for some of Mendenhall Produce, Inc.'s produce debt using this Prima Roma Sales, Inc.'s checking account. Petitioner directly impeded the ability of Mendenhall Produce, Inc., to make full payment promptly for purchases of perishable agricultural commodities by these actions. Petitioner has shown a high degree of "personal fault" [with respect to violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) committed by Mendenhall Produce, Inc., during the period August 1995 through November 1995].

Petitioner was not a nominal shareholder of a violating licensee, and Petitioner was an owner of a violating licensee which was not the *alter ego* of its owners.

Petitioner was the sole or majority stockholder of Mendenhall Produce, Inc., and actively involved in all aspects of its produce operations, the management of these operations, and the financial affairs of Mendenhall Produce, Inc., during the time period in which Mendenhall Produce, Inc., engaged in willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner was responsibly connected with Mendenhall Produce, Inc., and is subject to the licensing and employment restrictions under the PACA.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner contends in Petitioner's Appeal Petition that the ALJ erred in ruling that the filing of a petition for review pursuant to section 1.133(b)(2) of the Rules of Practice (7 C.F.R. § 1.133(b)(2)) commences a *de novo* proceeding.

I disagree with Petitioner's contention that the ALJ erred in ruling that a petition for review under section 1.133(b)(2) of the Rules of Practice (7 C.F.R. § 1.133(b)(2)) commences a *de novo* proceeding. In 1975, the United States Court of Appeals for the District of Columbia Circuit decided in *Quinn v. Butz,* 510 F.2d 743 (D.C. Cir. 1975), that a person who appears to meet the criteria for responsible connection set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) must be allowed to rebut the presumption of responsible connection. In response to *Quinn*, the Agricultural Marketing Service proposed a procedure by which a person who wished to contest a determination that he or she was "responsibly connected" could do so. The notice of proposed rulemaking describes the proposed procedure, as follows:

> The Department of Agriculture is considering the promulgation of rules of practice governing the administrative determination as to whether a person is responsibly connected as defined under the [PACA]. . . .
>
> . . . .
>
> In order to provide each individual a full opportunity to challenge an initial administrative determination that he is or was responsibly connected with a licensee, the proposed rules would establish a procedure under which such person may present evidence in an oral hearing before a Presiding Officer designated to conduct such hearings for the Agricultural Marketing Service, Department of Agriculture, that his status is not that which was previously determined. The Presiding Officer would then issue a report including his proposed findings of fact. Either party to the proceeding may, within 30 days, file objections to the proposed findings of fact with the Administrator. The Administrator will issue a final decision as to whether petitioner is, or was, responsibly connected.
>
> In the event a licensee fails to satisfy a reparation order issued under the [PACA] against it, or is found to have committed flagrant or repeated violations of the [PACA], or its license is otherwise suspended or revoked, the licensee and responsibly connected persons are subject to restrictions

with respect to relicensing, or employment by another licensee.

There have been several instances where the person who has been reported to be responsibly connected with a licensee has challenged the Department's determination and records. These persons have requested formal hearings for the purpose of obtaining an official determination of their status. However, there are presently no provisions for such hearings, nor is there an established procedure to govern this type of proceeding.

It is proposed to establish rules of practice applicable only to the administrative determination of who is a responsibly connected person.

41 Fed. Reg. at 32,231-32.

The proposed rules of practice applicable to the determination as to whether a person is responsibly connected were adopted and became effective on September 21, 1976 (41 Fed. Reg. 41,075-77). The Rules Applicable to the Determination as to Whether a Person Is Responsibly Connected With a Licensee Under the Perishable Agricultural Commodities Act (7 C.F.R. §§ 47.47-.68 (1977)) [hereinafter Responsibly Connected Rules of Practice] provided a person determined to be "responsibly connected" by the Chief of the Regulatory Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, with an opportunity for a full evidentiary oral hearing conducted by a presiding officer assigned by the Chairman of the Board of Contract Appeals.[5] The Responsibly Connected Rules of Practice did not limit the parties to a review of the basis for the Chief of the Regulatory Branch's responsibly connected determination. Instead, the Responsibly Connected Rules of Practice provided for a full evidentiary hearing under which the presiding officer was required to admit all evidence relevant and material to the responsibly connected status of the person, except unduly repetitious evidence.[6]

The Responsibly Connected Rules of Practice were amended on four occasions between September 21, 1976, and February 1995; however, none of these revisions

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[5] 7 C.F.R. §§ 47.47(d), .49(e)-(f) (1977).

[6] 7 C.F.R. § 47.58(a) (1977).

limited the scope of the proceeding before the presiding officer.[7]

On July 3, 1995, the Office of the Secretary proposed to provide that the responsibly connected proceedings would be conducted in accordance with the Rules of Practice (60 Fed. Reg. 34,474-76 (1995)). The notice of proposed rulemaking states that the proposal is designed to provide a mechanism for consolidating hearings in disciplinary cases under the PACA and related determinations of responsibly connected status and to provide for review of the Chief of the PACA Branch's responsibly connected determinations by an administrative law judge rather than by a presiding officer.[8] The notice of proposed rulemaking further describes the differences between conducting responsibly connected proceedings under the Rules of Practice and conducting responsibly connected proceedings under the Responsibly Connected Rules of Practice and the benefits USDA expected to follow from conducting responsibly connected proceedings pursuant to the Rules of Practice, as follows:

> Instead of filing a petition for review with the Administrator of [the Agricultural Marketing Service], under the proposed procedures, the individual contesting the final determination by the Chief, PACA Branch, that he or she is responsibly connected will file a petition for review with the Office of the Hearing Clerk, and the petition will be decided by an Administrative Law Judge, after opportunity for oral hearing. Any hearing on a responsibly connected determination will be consolidated with the hearing, if any, on the disciplinary matters out of which the issue of responsibly connected status arose. Likewise, all responsibly connected hearings arising out of the relationship between more than one individual and one particular PACA licensee will be consolidated.
>
> . . . .
>
> USDA believes that the proposed procedures, by reducing the incidence of multiple hearings, will facilitate speedy enforcement of the PACA and will result in savings in employee time and travel expense. They will also

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[7]*See* 60 Fed. Reg. 8446-67 (1995) (authorizing hearings by audio-visual communication and telephone); 56 Fed. Reg. 173-75 (1991) (changing the method of service of documents, the time of service, and the time for filing documents); 46 Fed. Reg. 51,593-94 (1981) (providing for the designation of any person as a presiding officer); 43 Fed. Reg. 30,787-90 (1978) (providing for the designation of officials of the Packers and Stockyards Administration, Agricultural Marketing Service, USDA, as presiding officers).

[8]60 Fed. Reg. at 34,475.

abolish the need for [the Agricultural Marketing Service] to employ individuals to act as presiding officers at responsibly connected proceedings.

60 Fed. Reg. at 34,475.

A final rule, adopting the July 3, 1995, proposed rule, was published on March 21, 1996, and became effective on April 22, 1996 (61 Fed. Reg. 11,501-04). Neither the July 3, 1995, notice of proposed rulemaking nor the March 21, 1996, final rulemaking document indicates that the purpose of the rulemaking proceeding was to limit the evidence that may be introduced in responsibly connected proceedings or to limit the scope of responsibly connected proceedings. Instead, the March 21, 1996, final rulemaking document amended section 1.133(b) of the Rules of Practice to provide that a person determined to be "responsibly connected" by the Chief of the PACA Branch could institute a proceeding to have the facts regarding responsibly connected status determined, as follows:

§ 1.133 Institution of proceedings.

. . . .

(b) *Filing of complaint or petition for review.* . . .

(2) Any person determined by the Chief, PACA Branch, pursuant to 7 CFR 47.47-47.[49] to have been responsibly connected within the meaning of 7 U.S.C. 499a[(b)](9) to a licensee who is subject or potentially subject to license suspension or revocation as a result of an alleged violation of 7 U.S.C. 499b or 499h(b) or as provided in 7 U.S.C. 499g(d) shall be entitled to institute a proceeding under this section and *to have determined the facts with respect to such responsibly connected status by filing with the Hearing Clerk a petition for review of such determination.*

7 C.F.R. § 1.133(b)(2) (emphasis added).

Moreover, the March 21, 1996, final rulemaking document amended section 1.141(a) of the Rules of Practice to provide that "[a] petition for review shall be deemed a request for a hearing" (7 C.F.R. § 1.141(a)). The Rules of Practice do not limit the parties to a review of the basis for the Chief of the PACA Branch's responsibly connected determination. Instead, section 1.141(h) of the Rules of Practice (7 C.F.R. § 1.141(h)) provides that testimony and exhibits may be introduced at the hearing and with respect to the exclusion of evidence, provides

that "[e]vidence which is immaterial, irrelevant, and 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 find that a petition for review filed in accordance with section 1.133(b)(2) of the Rules of Practice (7 C.F.R. § 1.133(b)(2)) commences a *de novo* proceeding, and the Rules of Practice provide for a full evidentiary hearing under which all reliable evidence that is relevant and material to the responsibly connected status of the person, except unduly repetitious evidence, may be admitted into evidence.[9] The administrative law judge and, on appeal, the Judicial Officer, may consider all reliable relevant and material evidence properly introduced in a proceeding in order to determine whether a petitioner was responsibly connected with a PACA licensee at the time that the licensee violated the PACA.

The certified agency record upon which Respondent based the July 18, 1997, responsibly connected determination, and the other evidence introduced during this proceeding, support the ALJ's finding that Petitioner Michael J. Mendenhall was responsibly connected with Mendenhall Produce, Inc., during the time it violated the PACA, and the ALJ's conclusion in which she upheld the Respondent's July 18, 1997, responsibly connected determination.

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

Order

Petitioner Michael J. Mendenhall was responsibly connected with Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the PACA. Accordingly, Petitioner Michael J. Mendenhall is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 65 days after service on Petitioner.

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[9]While the issue of the scope of the responsibly connected proceeding was not raised in previous responsibly connected proceedings conducted under the Rules of Practice, full evidentiary hearings, in which the respondents therein were not limited to rebuttal of evidence presented by the petitioners, were conducted. *See In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997), *remanded*, No. 98-1065 (D.C. Dec. 22, 1998); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997), *aff'd per curiam*, No. 98-1057 (D.C. Cir. Oct. 19, 1998); and *In re Lawrence D. Salins*, 57 Agric. Dec. ___ (Feb. 26, 1998).

In re: STEVEN J. RODGERS.
PACA-APP Docket No. 96-0002.
Order Lifting Stay filed December 14, 1998.

Andrew Y. Stanton, for Respondent.
Mark L. Johansen and Steven R. Block, Dallas, Texas, 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. 1919, 1957 (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 8, 1998, I granted Respondent's Motion for Stay Order. *In re Steven J. Rodgers*, 57 Agric. Dec. 804 (1998).

On December 9, 1998, Respondent filed Motion to Lift Stay Order, stating that: (1) proceedings for judicial review of *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997), had been concluded and the United States Court of Appeals for the District of Columbia Circuit had affirmed *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997); and (2) "Petitioner's counsel has informed . . . counsel for Respondent that Petitioner . . . would like the April 8, 1998, Stay Order lifted immediately so that the employment sanction resulting from Petitioner's responsibly connected status (7 U.S.C. § 499h(b)), as found by the Judicial Officer and affirmed by the Court of Appeals, will take effect as soon as possible." On December 11, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion to Lift Stay Order.

Respondent's Motion to Lift Stay Order is granted. The Stay Order issued April 8, 1998, *In re Steven J. Rodgers*, 57 Agric. Dec. 804 (1998), is lifted. The Order issued in *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997), affirming the determination of the Chief of the PACA Branch, Fruit and Vegetable Division,

Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with World Wide Consultants, Inc., during the period of time that World Wide Consultants, Inc., violated the PACA, is effective 14 days after service of this Order Lifting Stay, on Petitioner.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

MESA PRODUCE, INC. v. ROMNEY & ASSOCIATES, INC., d/b/a R & R DISTRIBUTORS, AND SUPER FRESH, INC.
PACA Docket No. R-97-0144.
Decision and Order filed July 17, 1998.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Mark C.H. Mandell, Annandale, NJ, 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 $114,979.15 in connection with twelve transactions in interstate commerce involving mixed produce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondents. Respondent Romney & Associates, Inc., filed an answer thereto denying liability to Complainant. This answer included a counterclaim arising out of the same transactions as those involved in the formal complaint, and also referred to four additional transactions. Complainant did not file a reply to the counterclaim. Respondent Super Fresh, Inc., did not file an answer, but instead, through its attorney Dennis Joy, notified the Department that "[i]n lieu of an Answer" it had filed an independent action in the United States District Court for the District of New Jersey against Complainant. Respondent Super Fresh, Inc., is therefore in default. However, it is the longstanding practice in these proceedings to not issue a default order against a co-respondent where the action continues as to the remaining Respondent. This is predicated on the possibility that facts developed by reason of the continuation of the proceeding may exonerate the Respondent who is in default.

The amount claimed in the formal complaint exceeds $30,000.00, 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 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, none of the parties did so. None of the parties filed a brief.

On November 25, 1997, following completion of the shortened procedure, Respondent Super Fresh, Inc., through new counsel, filed a motion to reopen the proceeding to take further evidence, and to dismiss the complaint as to Super Fresh, Inc. This motion was served on Complainant, and on January 20, 1998, Complainant filed a response objecting to the motion.

On December 18, 1997, an order was issued staying this proceeding as to the complaint against Romney & Associates, Inc., due to that firm having filed a petition in bankruptcy.

Respondent Super Fresh, Inc.'s motion to reopen is well founded in that it sets forth good reason why the evidence sought to be adduced was not adduced under the shortened procedure. However, it is not well founded in that, as to the dispositive issue involving Super Fresh, Inc., it fails to show that the evidence sought to be adduced is not merely cumulative. The motion is, therefore, denied.

Findings of Fact

1. Complainant, Mesa Produce Inc., is a corporation whose address is P. O. Box 777, Mesa, Arizona. At the time of the transactions involved herein Complainant was licensed under the Act.

2. Respondent, Romney & Associates, Inc., (hereafter sometimes Romney) at the time of the transactions involved herein, was a corporation doing business as R & R Distributors, whose address was P. O. Box 2087, Mesa, Arizona. At the time of the transactions involved herein this Respondent was licensed under the Act. The complaint as against this Respondent has been stayed.

3. Respondent, Super Fresh, Inc., (hereafter sometimes Super) is a corporation whose address is 41A Dundee Avenue, Patterson, New Jersey. At the time of the transactions involved herein this Respondent was licensed under the Act.

4. Complainant sold mixed produce to Respondent Romney under the terms, conditions, and at the prices indicated below:

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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).

Inv. Date	Ord. Date	C's Ord. #	Purch. Ord. #	FOB	Quantity	Description	Unit Price	Extended Price
4/2?/96	4/??/96	6808	1454	origin	1,672 ctns.	5x5 Toms Ryan	$ 9.90 23.50	$16,552.80 23.50 $16,576.30
4/16/96	4/16/96	6775	1433	destin-ation	41,692 lbs.	Watermelons 4'	$ 0.22	$9,172.24
4/18/96	4/18/96	6790	1446	origin	42,516 lbs.	Watermelons	$ 0.22	$9,353.52
4/22/96	4/22/96	6795	1447	origin	42,295 lbs.	Watermelons	$ 0.18	$7,613.10
4/22/96	4/22/96	6797	1449	origin	41,797 lbs.	Watermelons	$ 0.24	$10,031.28
4/25/96	4/25/96	6806	1452	origin	40,803 lbs.	Watermelons	$ 0.235	$9,588.71
4/20/96	4/20/96	6779	1439	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/20/96	4/20/96	6784	1443	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/21/96	4/21/96	6778	1438	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/21/96	4/21/96	6780	1440	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/22/96	4/22/96	6781	1441	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/24/96	4/24/96	67812	1442	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/29/96	4/29/96	6815	1462	destin-ation	1,632 ctns. 394 ctns.	12' Mangos 14' Mangos	$ 4.50 4.50	$7,344.00 1,773.00 $9,117.00
4/4/96	4/4/96	6767	1428	origin	41,537 lbs.	Watermelons	$ .20	$8,307.40
4/15/96	4/15/96	6776	1434	destin-ation	45,092 lbs.	Watermelons '4	$ .165	$7,440.18
4/27/96	4/27/96	6811	1457	origin	9,536lbs 34,774lbs	Watermelons '4 Watermelons '5	$ .185 .16	$1,764.16 5,563.84 $7,328.00

4/30/96	4/30/96	6824	1448	origin	10,275lbs	Watermelons '4	$ .185	$1,900.87
					33,675lbs	Watermelons '5	.16	5,388.00
								$7.288.87

5. The loads of produce listed in Finding of Fact 4 were shipped at the direction of Respondent Romney to Respondent Super, and accepted by Respondent Romney on arrival.

6. The informal complaint, covering the first 12 transactions listed in Finding of Fact 4, was filed on May 30, 1996, which was within nine months after the causes of action alleged therein accrued. The informal counterclaim, covering the first 13 transactions listed in Finding of Fact 4, was filed on June 26, 1996, which was within nine months after the causes of action alleged therein accrued.

Conclusions

The record shows, without question, that there was no privity of contract between Complainant and Respondent Super. However, Complainant alleges that Super Fresh, Inc., engaged in misrepresentation, constructive fraud, and unjust enrichment along with Romney. The misdeed complained of is the alleged deception by Respondents in leading Complainant to believe that the produce was going to an affiliate of A&P Markets, namely, Super Fresh Markets in Florence, New Jersey. Complainant has failed to prove by a preponderance of the evidence herein that Respondent Super participated in any way in the alleged deception. Accordingly, the complaint as against Respondent Super should be dismissed.

Respondent Romney's counterclaim alleges the sale and shipment by Complainant of 17 loads of mixed produce. These are the same loads as set forth in Finding of Fact 4. However, Romney alleges no damages as to the last 4 loads, and we are at a loss as to why the loads were listed in the counterclaim. As to the first 12 loads, Respondent Romney alleged in the counterclaim that damages in the total amount of $116,514.50 were due from Complainant. The alleged damages result from alleged breaches of warranty as to the loads, and federal inspections appear to substantiate most of these alleged breaches. The total damage figure was arrived at by assigning an alleged prevailing market price at time of arrival for conforming merchandise to each shipment, deducting the actual alleged gross proceeds, and adding a 15 percent commission, a $1.00 per carton handling fee, and the cost of the federal inspections. Assuming for the moment that there was a breach of warranty as to each load, and that the alleged gross proceeds were as claimed, there are two respects in which Respondent Romney has erroneously computed the amount claimed in its counterclaim. First, Romney's deduction of a commission and handling fee is not permitted as incidental damages under UCC

section 2 - 714(3) and 2 - 715. This is true because the proper method of computing damages, i.e., the difference between the value the goods would have had if they had been as warranted, and the value they actually had as a result of the breach, automatically credits a profit to the buyer if the market price at time of arrival would have entailed a profit, and because a purchase and sale contract does not contemplate the payment of a commission. Second, in computing the amount due, Romney did not deduct the invoice cost (which totaled $114,979.15) for the 12 loads. When we disallow the erroneously claimed commission and handling charges as to the 12 loads, the amount of Romney's claimed damages comes to $95,450.40. When we add the $4,547.20 allegedly due to Romney on the 13th transaction to the reduced damage amount of $95,450.40, and then deduct the invoice cost of the 12 loads, nothing remains of Respondent Romney's counterclaim. We conclude that the counterclaim should be dismissed.

The order of December 18, 1997, staying this proceeding as against Respondent Romney, is still in effect pending final disposition of the bankruptcy proceeding.

Order

The complaint as against Respondent Super Fresh, Inc., is dismissed.
The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

ALGER FARMS, INC. v. JACKIE D. FOSTER, d/b/a FOSTER FARMS OF GEORGIA.
PACA Docket No. R-98-0045.
Decision and Order filed July 20, 1998.

Suitable Shipping Condition Warranty – Applicable only at Contract Destination – Evidence – Standard of Proof.

In an f.o.b. sale of four truckloads of sweet corn the invoices stated that the produce was to be shipped to Respondent at Bainbridge, Georgia, and the bills of lading stated the destination as Respondent without giving an address. The contract was negotiated between a grower's agent, representing Complainant, and an employee of Respondent. The parties offered no testimony as to the contractual agreement, but Complainant's representative admitted that the truck driver requested of Complainant's dock foreman that phytosanitary certificates be issued as to three of the loads because they were going to Canada. The dock foreman was unprepared for the request and the certificates were supplied later to Respondent. It was held that the contract destination was Bainbridge, Georgia.

By analogy to the judicial exception to the requirement that transportation be normal in order for the warranty of suitable shipping condition to apply, it was found that Canadian inspections could be used to attempt proof that the corn was not in suitable shipping condition. This proof would relate to the condition of the corn that would have been shown by a timely inspection following a timely arrival at the contract destination in Bainbridge, Georgia, and would have to demonstrate the breach of the warranty at that point with reasonable certainty. It was found that, although the condition factors shown by the Canadian inspections were extensive, the standard of reasonable certainty had not been met.

George S. Whitten, Presiding Officer.
Mike D. Bess, Orlando, FL, for Complainant.
Lawrence H., Meuers, Naples, FL, 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 $33,388.00 in connection with four transactions in interstate commerce involving sweet corn.

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 exceeds $30,000.00, 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 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. Both parties filed briefs. Complainant's brief consisted of the affidavit of Pete Johnson, reported elsewhere in the record to have been involved in the contract negotiations. Respondent's attorney moved that the brief be stricken from the record on the ground that briefs are to be filed after the conclusion of the presentation of evidence. Respondent's motion is denied for the reason that the brief was never a part of the record herein. The fact that a brief is sworn to by a party, and includes evidentiary matter, does not transform it into anything other than a brief. The brief filed by Complainant will be looked to for argument only, and all evidentiary matter therein will be ignored.

[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).

Findings of Fact

1. Complainant, Alger Farms, Inc., is a corporation whose address is P. O. Box 1253, Homestead, Florida.

2. Respondent, Jackie D. Foster, is an individual doing business as Foster Farms of Georgia whose address is P. O. Box 7251, Bainbridge, Georgia. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about March 11, 1996, Complainant sold to Respondent 1,050 containers of yellow sweet corn at $7.00 per container, or $7,350.00, plus $1.00 per container for precooling, or $1,050.00, plus 12 units of ice at $13.00, or $156.00, and one temperature recorder at $13.00, or a total for the truck load of $8,569.00. The contract destination for the load was Bainbridge, Georgia.

4. On March 11, 1996, Complainant shipped the load of sweet corn referred to in Finding of Fact 3 to Respondent in Bainbridge, Georgia, on a truck bearing license number F-41790 AL. The bill of lading stated that temperature was to be maintained at 36° F. Respondent diverted to truck to its customer, Safeway Stores, Inc., in Tracy, California, and the corn was federally inspected at that location on March 15, 1996, at 10:30 a.m., while still loaded on the truck, with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/ MARKINGS	ORIGIN	LOT ID.	NO. OF CONTAINERS	INSP. COUNT
A	37 to 40 °F	Sweet Corn	"Alger Farms"	FL		1050 Crts	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	15	%	00	%		%	Quality (12 to 20%) poorly filled	From 6¼ to 7½ inches in length
	10	%	00	%		%	Discolored Husks (8 to 1?%)	
	00	%	00	%		%	DECAY	
	25	%	00	%		%	Check Sum	

GRADE: fails to grade U.S. No. 1 account of grade defects.

REMARKS: Inspected during the process of unloading.

5. On or about March 12, 1996, Complainant sold to Respondent 1,000

containers of yellow sweet corn at $7.00 per container, or $7,000.00, plus $1.00 per container for precooling, or $1,000.00, plus 12 units of ice at $13.00, or $156.00, plus 24 pallets at $4.50, or $108.00, plus one phytosanitary certificate at $20.00, and one temperature recorder at $13.00, or a total for the truck load of $8,297.00. The contract destination for the load was Bainbridge, Georgia.

6. On March 12, 1996, Complainant shipped the load of sweet corn referred to in Finding of Fact 5 to Respondent in Bainbridge, Georgia, on a truck bearing license number 31R-329 TX. The bill of lading stated that temperature was to be maintained at 38° F. Respondent diverted the truck to its customer, MacDonalds Consolidated Div. of Canada Safeway Ltd., in Calgary, Alberta, Canada, and the corn was subjected to Canadian inspection at that location on March 19, 1996, between the hours of 8:42 and 10:23 a.m., at the applicant's warehouse, with the following results in relevant part:

PULP TEMP 1/T 6 C
PULP TEMP 2/T 8 C
WAREHOUSE 2 C

PRODUCE DESCRIPTION: 1000, Applicant's Count 40 lbs. Wooden crate florida super sweet yellow sweet corn Brand Name: ALGER FARMS

CONDITION: Decay affecting cob and silk avg 86 (illegible) range 00 to 100 Brown discoloration of the husks avg 14% range Nil to 40%

REMARKS: Clean cartons in good order, properly packed (illegible) evidence in samples inspected. Lot consists of 24 pallets total of 1000 crates.

CERTIFICATION: Inspection requested for and certificate restricted to condition only.

7. On or about March 13, 1996, Complainant sold to Respondent 1,000 containers of yellow sweet corn at $7.00 per container, or $7,000.00, plus $1.00 per container for precooling, or $1,000.00, plus 12 units of ice at $13.00, or $156.00, plus 24 pallets at $4.50, or $108.00, plus one phytosanitary certificate at $20.00. and one temperature recorder at $13.00, or a total for the truck load of $8,297.00. The contract destination for the load was Bainbridge, Georgia.

8. On March 13, 1996, Complainant shipped the load of sweet corn referred to in Finding of Fact 7 to Respondent in Bainbridge, Georgia, on a truck

bearing license number 404982 MO. The bill of lading stated that temperature was to be maintained at 38° F. Respondent diverted the truck to its customer, MacDonalds Consolidated Div. of Canada Safeway Ltd., in Calgary, Alberta, Canada, and the corn was subjected to Canadian inspection at that location on March 21, 1996, between the hours of 10:01 and 11:58 a.m., at the applicant's warehouse, with the following results in relevant part:

PULP TEMP 1/T ?5 C
PULP TEMP 2/T 5.5 C
WAREHOUSE 5 C

PRODUCE DESCRIPTION: 1000, Applicant's Count Wood wire bound crates SWEET CORN Brand Name: NO BRAND NAME
PRODUCE OF USA. FLORIDA SWEET YELLOW CORN 9 BU 8X11(?)
ALGER FARMS, HOMESTEAD, FL 33030

CONDITION: Decay which is mostly found in the kernels at the silken tassel end avg 57%, range 35% to 80%. Some specimens show dark brown wet and slimy silken tassels. In addition many specimens show brown watery discolored husks. Specimens showing BROWN WATERY DISCOLORED HUSKS ONLY avg 20%, range Nil to 30%.

PERMANENT DEFECTS: SPECIMENS SHOWING IRREGULAR AND SUNKEN ROWS OF KERNELS avg (illegible)

REMARKS: Clean containers in good order, properly packed
P.O. # 387896
24 BOARDS CONTAINING 42 W. B. CRATES EACH.

CERTIFICATION: Inspection requested for and certificate restricted to condition only.

9. On or about March 13, 1996, Complainant sold to Respondent 1,000 containers of yellow sweet corn at $7.00 per container, or $7,000.00, plus $1.00 per container for precooling, or $1,000.00, plus 12 units of ice at $13.00, or $156.00, one temperature recorder at $13.00, 8 pallets at $4.50 each, or $36.00, and one phytosanitary certificate at $20.00, or a total for the truck load of $8,225.00. The contract destination for the load was Bainbridge, Georgia.

10. On March 13, 1996, Complainant shipped the load of sweet corn

referred to in Finding of Fact 9 to Respondent in Bainbridge, Georgia, on a truck bearing license number 22259 N.D. The bill of lading stated that temperature was to be maintained at 38° F. Respondent diverted the truck to its customer, MacDonalds Consolidated Div. of Canada Safeway Ltd., in Calgary, Alberta, Canada, and the corn was subjected to Canadian inspection at that location on March 21, 1996, between the hours of 12:04 and 1:57 p.m., at the applicant's warehouse, with the following results in relevant part:

PULP TEMP 1/T 6 C
PULP TEMP 2/T 6 C
WAREHOUSE 6 C

PRODUCE DESCRIPTION: 1000, Applicant's Count. Wood wire bound crates SWEET CORN Brand Name: NO BRAND NAME
PRODUCE OF USA. FLORIDA SWEET YELLOW CORN 9 BU 8X11(?)
ALGER FARMS, HOMESTEAD, FL 33030

CONDITION: Decay which is mostly found affecting the kernels at the silken tassel end avg 44%, range 20% to 60%. Some specimens show dark brown wet and slimy silken tassels. In addition many specimens show brown watery discolored husks. Specimens showing BROWN WATERY DISCOLORED HUSKS ONLY avg 16%, range Nil to 35%.

PERMANENT DEFECTS: SPECIMENS SHOWING IRREGULAR AND SUNKEN ROWS OF KERNELS avg 5%, range Nil to 25%

REMARKS: Clean containers in good order, properly packed. P.O. # 387897. 24 BOARDS CONTAINING 42 W. B. CRATES EACH.

CERTIFICATION: Inspection requested for and certificate restricted to condition only.

11. The informal complaint was filed on October 10, 1996, which was within nine months after the causes of action herein accrued.

Conclusions

Both parties agree that the four loads of sweet corn were sold to Respondent

by Complainant on an f.o.b. basis. The Regulations,[2] 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,[3] 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."

Complainant's representative contended that there were no contract destinations agreed to by the parties, and that consequently the suitable shipping condition warranty does not apply to any of the transactions. Respondent's attorney asserted that the contract destination was California, as to the first load, and Vancouver, British Columbia, Canada, as to the last three loads.

The invoices all state that the loads are to be shipped to "Foster Farms of Georgia, P. O. Box 7251, Bainbridge GA 31717." The bills of lading all state that the loads are consigned to "Foster Farms," and do not give an address. However, placed next to the "Foster Farms" designation on each bill of lading is reference to a purchase order number. The purchase orders were not placed in evidence by either party, but the invoices each state the relevant purchase order number. Therefore, as far as the documentation of record shows, the destination for all the loads was Foster Farms at Bainbridge, Georgia. Why Complainant makes the contention that there was no contract destination is never stated. Even more mystifying is the contention by respondent that the loads shipped to Canada were destined for and arrived in Vancouver, British Columbia. This assertion was introduced for the first time in the reply made by Respondent's attorney to the Department's initial inquiry. So powerful was the suggestion that the Department was carried along with the misconception, and thereafter its personnel consistently gave the arrival point for the last three loads as Vancouver. Even after Complainant's representative pointed out that the inspection applicant was located in Calgary, Alberta, both the Department and Complainant's attorney continued

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[2] 7 C.F.R. § 46.43(i).

[3] 7 C.F.R. § 46.43(j).

to refer to the actual destination as Vancouver, British Columbia.[4]

In a recent case we pointed out that:

> . . . the suitable shipping condition warranty is applicable to the contract destination agreed upon between the parties. The destinations specified in freight contracts made by a seller or buyer with the transportation company are not what is referred to by the applicable regulation. It is true that the two will very often be the same. And, it is also true that the destination shown on a bill of lading may be taken in some factual contexts as an indication of what the parties agreed upon as a contract destination. However, the two are not the same, and it is entirely possible for a buyer to take full control of a commodity at shipping point, but for the contract destination under the f.o.b. terms to be some distant location. This is what occurs under the trade term f.o.b. acceptance. The Regulations state that:
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> > "F.o.b. acceptance" or "Shipping point acceptance" means that the buyer accepts the produce at shipping point and has no right of rejection. The buyer has recourse against the seller, if the produce was not in suitable shipping condition . . ., providing the shipment is not rejected. The buyer's remedy under this method of purchase is by recovery of damages from the seller and not by rejection. (Footnote omitted.)[5]

In another case we attempted to set forth factors that would be considered important for making the determination as to the agreed contract destination:

> The crucial and ultimate question is what did the parties consider to be the contract destination as to the contract between themselves. Or, put another way, did they intend that the seller was to assume the obligation of shipping goods that would carry, without abnormal deterioration, to the ultimate destination, or only to the intermediate point? If we were to list the significant factors for determining intended contract destination

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[4]Complainant's representative stated: "The applicant is located in Calgary, Alberta, which is 14 hours driving time away from Vancouver. When did the corn arrive in Vancouver? Why was the corn inspected in Calgary, if the customer was in Vancouver? Did the corn go to Vancouver and then back to Calgary?"

[5]Ontario International, Inc. v. The Nunes Company, Inc., 52 Agric. Dec. 1661, 1671 (1993).

in descending order of importance they would rank as follows:

1). Indication in writing, such as a broker's memorandum or other contract memorandum, of the agreed contract destination.

2). Indication of knowledge on the part of the seller as to the ultimate destination. This might be shown by a freight contract, phytosanitary certificates, or other documents, or it might be admitted.

3). The absence of an intermediate point of acceptance by the buyer.[6]

In this case we are singularly without relevant testimony by the persons involved in the contract negotiations. According to Complainant's representative the contract was negotiated on Complainant's behalf by Pete Johnson of Quality First Produce, Inc., the firm which was handling all sales on Complainant's behalf. However, the sworn formal complaint is a bare bones complaint signed by John Alger, who was admittedly not involved in the contract negotiations. The sworn formal answer is signed by Jackie D. Foster, but there is no indication that Jackie Foster should be identified with the Billy Foster who is stated by Complainant's representative to have been the person with whom Pete Johnson dealt. Moreover, the answer does little more than deny that Complainant shipped the corn to Bainbridge, Georgia. Neither party thought it necessary to submit evidence under the shortened procedure.

The dominant facts of record are the destinations specified on the invoices, and bills of lading. Alongside this is the representation, which scarcely even rises to the level of hearsay, of Complainant's representative:

> Mr. Johnson a salesman at Quality First Produce Inc., received the order from respondent's Billy Foster. Mr. Foster ordered four trucklots of sweet corn, at a total FOB price of $33,388.00. Complainant placed a temperature recorder on each of the trucks, which is shown on the bill of lading and signed for by the driver. Mr. Foster never told Mr. Johnson that the three loads at issue were going into Canada.

This bare assertion at least has the virtue of being a part of the evidence in that it is a part of the Department's Report of Investigation. There is no treatment, in evidence, by Respondent of the subject. In the brief there is the assertion by

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[6]Clark Produce v. Primary Export International, Inc., 52 Agric. Dec. 1715, 1720-21 (1993).

Respondent's attorney that Complainant was informed of the Canadian destination prior to shipment, but this relates to information given by the trucker to Complainant's dock foreman, not to anything told by Billy Foster to Pete Johnson.

To be weighed against the documentation showing the contract destination as Bainbridge, Georgia, is an admission by Complainant's representative:

> For invoice no. 101428, when the truck arrived at Alger Farms packing-house, the driver advised Mr. Earl Gordon, the dock foreman, that the corn was going into Canada and that he would need a phyto certificate. Mr. Gordan notified Penny in Alger's shipping office, who ordered the Phyto. The following day on March 13, both driver's also advised that they were going to Canada. Since Respondent did not notify Mr. Johnson that the loads were going to Canada, the phytos were not done when the trucks arrived. Instead the corn was shipped without them, which is not standard procedure. The phytos are normally given to the driver along with the bill of lading.

We do not think that this admission shows that Canada was the contract destination agreed to by the parties as to the last three loads.[7] At the point that the disclosure was made the contract had already been formed. Moreover, the disclosure was made only to the dock foreman of the shipper, and was made by a third party, namely the truck driver. In addition, the contracting, as was known by Respondent, was not being handled by the shipper, but by a different firm acting as the shipper's agent. The information contained in an invoice and/or bill of lading is not necessarily conclusive evidence of the destination specified in the contract of sale. However, it is certainly substantial evidence of such destination. It is of course possible that a product might be shipped to an agreed diversion point, with only that address being specified on the invoice and bill of lading, and the intent of the parties be that the goods will thereafter be diverted to one of several contract destinations as agreed by the parties as a part of the contract. This might be established by preponderant testimony.[8] However, in the normal situation, one would expect that a "ship to" designation on the invoice which agrees with the destination specified on the bill of lading will be the contract

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[7]Even if it had been proven that "Canada" was the contract destination of the last three loads, Calgary, Alberta, Canada is some 1,500 miles further from the Florida shipping point than the nearest likely destination point in "Canada," namely Toronto.

[8]*Cf.* Anonymous, 3 Agric. Dec. 425 (1994).

destination agreed to by the parties. When it is established that a certain destination is the contract destination, the fact that it is disclosed, at the time of shipment, to personnel belonging to the shipper, that the produce is actually going to a different destination than what was agreed to as the contract destination, does not alter the contract destination to which the parties have already agreed. In such circumstances it is quite proper for the shipper to presume that the buyer in shipping the commodity to a point beyond that which has already been agreed is assuming responsibility for any condition problems resulting from the added transit period. We conclude that a preponderance of the evidence herein shows that the contract destination for all four loads was Bainbridge, Georgia.

In Magic Valley Potato Shippers, Inc. v. C. B. Marchant & Co., Inc.,[9] we said:

> The diversion of the car to a different destination than that specified in the contract would not necessarily leave respondent totally without benefit of the warranty since the condition of the commodity at that different point may be relevant in determining whether the commodity would have been abnormally deteriorated at the destination specified.

The statement was apparently based on an analogy with the judicial exception to the requirement that transportation be normal in order for the warranty of suitable shipping condition[10] to apply. This exception allows a buyer to prove a breach of

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[9]42 Agric. Dec. 1602, 1606-07 (1983).

[10]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). 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. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co., 39 Agric. Dec. 703 (1980).

The case of lettuce provides an illustration of another facet of the suitable shipping condition rule which is often overlooked. The United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.* (1995)) allow lettuce to grade U.S. No. 1 with 1 percent decay at shipping point or 3 percent decay at destination. The good delivery standards, however, allow an additional "2 percent decay . . . in excess of the destination

(continued...)

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.
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> Since this is the rational 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.[11]

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[10](...continued)
tolerances provided . . . in the U.S. Standards for Grades of Lettuce." Thus lettuce sold as U.S. No. 1, f.o.b., could have 4 percent decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5 percent allowed by the good delivery standards. Of course, in the case of other commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See G & S Produce v. Morris Produce, 31 Agric. Dec. 1167 (1972), and Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (1959).

[11]Anonymous, 12 Agric. Dec. 694, 698 (1953).

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.[12]

In practice the exception is only applied when the condition found by inspection is so bad that a breach of the warranty is virtually certain to have occurred in spite of the abnormal transportation. In a recent case involving an analogous situation we enunciated the standard of proof which we think should apply to all these situations:

> The abrogation of the warranty of suitable shipping condition by the f.o.b. acceptance final terms of the contract still leaves in place the warranty of merchantability. Accordingly, if there is some way of showing that the goods, in an f.o.b.a.f. contract, were unmerchantable when shipped, a material breach may be proven, and damages for that breach may be awarded. In a similar situation we have stated that:
>
> > Respondent contends that even if we find that the contract was f.o.b. acceptance final, the condition of the strawberries as revealed by the federal inspection report at destination shows that the strawberries were not merchantable at time of shipment. Respondent thus seeks to show that there was a material breach of the contract, even though the suitable shipping condition rule does not apply. See 7 CFR 46.43(m). However, the use of condition at destination to show condition at time of shipment is exactly the function of the suitable shipping condition warranty. See Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co., 39 [Agric. Dec.] 703 (1980). In this case, where the suitable shipping condition warranty is specifically negated by the terms of the contract, we

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[12] See Sharyland Corp. v. Milrose Food Brokers of New Jersey, Inc., 50 Agric. Dec. 994 (1991); Sanbon Packing Co. v. Spada Distributing Co., Inc., 28 Agric. Dec. 230 (1969). See also Tony Mista & Sons Produce v. Twin City Produce, 41 Agric. Dec. 195, 201 n.1 (1981), where we said:

> Abnormal transportation service or condition voids the warranty of suitable shipping condition applicable in f.o.b. sales . . . unless the abnormal deterioration found at destination is of such a nature or extent that it could not have been caused or substantially aggravated by the [faulty] transportation.

> would not be justified in finding a breach of the warranty of merchantability unless condition at destination, in the light of transportation history, were such as to make it self-evident and certain that the commodity was nonconforming at shipping point. [Genbroker Corporation a/t/a General Brokerage Company v. Bronia Inc. a/t/a J & J Produce, 42 Agric. Dec. 281 (1983).]

> The certainty required is not certainty in some absolute sense, but reasonable certainty. [North American Produce Distributors, Inc. v. Eddie Arakelian, 41 Agric. Dec. 759 (1982)]. To understand what this means we may analogize to the reasonable doubt standard used in criminal trials. There it is commonly said that the doubt necessary for an acquittal is not a fanciful doubt, but a reasonable doubt. So here, we are seeking a certainty that is in accord with reason, not a certainty that excludes all fanciful doubt.[13]

Applying this standard to the produce shipped by Complainant we first note that sweet corn is extremely perishable. It has one of the highest respiration rates of all perishable produce.[14] The recommended transportation temperature for sweet corn is 32 degrees F.[15] The load shipped to California is easily disposed of. The 10 percent discoloration shown by the inspection in California would not indicate a breach of the suitable shipping condition warranty even if Tracy, California had been the contract destination.

The remaining loads were inspected in Calgary 6 to 8 days after shipment. Arrival in Bainbridge, Georgia, would have been on the same day as shipped, or at most the following day if shipment was commenced in the late afternoon or at night. The load shipped on March 12, 1996, was inspected in Calgary on March 19, 1996, and showed pulp temperatures at time of inspection of 43 to 46 degrees F. The temperature tape covering this load, submitted by Respondent, showed air temperatures of approximately 40 degrees during the transit period. The Canadian inspection showed an average of 86 percent decay affecting the cob and silk, and

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[13]Martori Bros. Distributors v. Houston Fruitland, Inc., 55 Agric. Dec. 1331, 1338-39 (1996).

[14]See Protection of Rail Shipments of Fruits and Vegetables, Agriculture Handbook No. 195, Agricultural Research Service, United States Department of Agriculture, p. 21 (Revised ed. 1969).

[15]Protecting Perishable Foods During Transport by Truck, Agriculture Handbook Number 669, Office of Transportation, United States Department of Agriculture, p. 40 (1987).

an average of 14 percent brown discoloration of the husks. The inspector did not note whether the decay was in early or advanced stages. In view of the temperatures and the time in transit it is impossible for us to say with certainty that this corn would not have been shown to have been in suitable shipping condition by a timely inspection following a timely arrival at the contract destination in Bainbridge, Georgia. We conclude that Respondent has not shown a breach of the warranty of suitable shipping condition as to this load. The remaining loads show similar temperatures at time of arrival, but a longer time between shipment and inspection, and somewhat less serious condition factors. As to the remaining two temperature tapes, one appears to cover a different load altogether, and both cover less than half of the transit period.[16] We also conclude that Respondent has not shown a breach of the warranty of suitable shipping condition as to these loads.

There is one remaining issue to be resolved. Respondent asserts that the amount alleged due in the formal complaint cannot be the correct amount because Complainant granted Respondent an allowance on each of the loads. In this connection we note that the informal complaint was for substantially reduced amounts as to each load, and totaled only $17,188.00. When Complainant's representative wrote to this Department on December 19, 1996,[17] he stated that in view of the fact that Respondent had filed an informal claim against Complainant arising out of the same transactions Complainant was withdrawing its "settlement offer" and amending its complaint to seek "the full amount due of $33,388.00." That a settlement offer that has not been accepted may be withdrawn is without question. However, in this case Complainant accomplished more than a settlement offer. This is shown by the copies of the invoices which were attached to the informal complaint. Each of these invoices has the original amount crossed out, and a new lesser amount written in. Three of the invoices have written across the bottoms: "Ok per John Alger," and the remaining invoice has written across the bottom: "adjustment Ok. Per John Alger." In our opinion these invoices show that adjustments were granted to Complainant which left $17,188.00 as the total amount due on the four loads.[18]

Section 5(a) of the Act requires that we award to the person or persons injured

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[16]Cf. 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).

[17]See Report of Investigation, exhibit s.

[18]See UCC § 2-209(1).

by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[19] 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.[20] 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. 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, $17,188.00, with interest thereon at the rate of 10% per annum from April 1, 1996, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

ROMNEY & ASSOCIATES, INC., a/t/a R & R DISTRIBUTING v. SUPER FRESH, INC.
PACA Docket No. R-98-0071.
Decision and Order filed July 27, 1998.

Protection Agreements – Allowance of Profit.

"Protection," "full protection," and "protection against loss" usually have the same meaning, and should be distinguished from "market protection," or "price protection." A protection agreement is a modification of the original sale contract which leaves the original sale price as the base line price for determining whether the buyer makes a profit, or is entitled to protection. The potential for profit remains after the conclusion of the protection agreement, and this potential can only be realized in the same manner as it is realized in any sale contract, namely by the buyer reselling at prices above the original price plus expenses. Therefore, when a buyer with protection fails to resell at such favorable prices, and experiences a loss, the protection should only compensate for the loss, and should not include a profit in the form of a commission, or

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[19] 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).

[20] 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).

handling fee.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Mark C.H. Mandell, Annandale, NJ, 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 $166,374.73 in connection with a eighteen transactions in interstate commerce involving mixed perishable produce.

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 exceeds $30,000.00, 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 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, and Complainant did not file a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Romney & Associates, Inc., is a corporation also trading as R & R Distributing, whose address is P. O. Box 2087, Mesa, Arizona.

2. Respondent, Super Fresh, Inc., is a corporation whose address is 245 Lakeview Ave., Suite 117, Clifton, New Jersey. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about April 13, 1996, Complainant (under its invoice 1433, Respondent's purchase order 10631) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load

[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).

containing 640 cartons of watermelons, size 4's, 41,692 lbs., at $.23 per pound, or $9,589.16. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

416 sold @ 12.00	$ 4,992.00
64 sold @ 10.00	640.00
160 sold @ 6.00	960.00
	$ 6,592.00
Less 15% commission	$ (988.00)
Less $ .50 handling	(320.00)
Less freight	(3,200.00)
Net return	$ 1,990.20

Respondent paid Complainant $1,990.20.

4. On or about April 16, 1996, Complainant (under its invoice 1438, Respondent's purchase order 2001-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

750 sold @ 6.00	$ 4,500.00
100 sold @ 4.00	400.00
150 sold @ 2.00	300.00
	$ 5,200.00
Less 15% commission	$ (780.00)
Less $ .50 handling	(500.00)
Less freight	(3,500.00)
Net return	$ 321.00

Respondent paid Complainant $321.00.

5. On or about April 18, 1996, Complainant (under its invoice 1439, Respondent's purchase order 2002-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the

load as follows:

875 sold @ 5.00	$ 4,375.00
103 sold @ 3.00	309.00
22 sold @ 1.00	22.00
	$ 4,706.00
Less 15% commission	$ (705.90)
Less $ .50 handling	(500.00)
Less freight	(3,500.00)
Net return	$ -98.90

6. On or about April 17, 1996, Complainant (under its invoice 1440, Respondent's purchase order 2003-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

800 sold @ 5.50	$ 4,400.00
78 sold @ 5.00	390.00
122 sold @ 2.00	244.00
	$ 5,034.00
Less 15% commission	$ (755.10)
Less $ .50 handling	(500.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$ 179.90

Respondent paid Complainant $179.90.

7. On or about April 19, 1996, Complainant (under its invoice 1441, Respondent's purchase order 2004-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

825 sold @ 6.00	$ 4,950.00
100 sold @ 5.50	550.00
75 sold @ 3.00	225.00
	$ 5,725.00
Less 15% commission	$ (858.75)
Less $ .50 handling	(500.00)
Less inspection fee	(80.50)
Less freight	(3,500.00)
Net return	$ 785.75

Respondent paid Complainant $785.75.

8. On or about April 24, 1996, Complainant (under its invoice 1442, Respondent's purchase order 2005-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

800 sold @ 5.00	$ 4,000.00
100 sold @ 4.50	450.00
75 sold @ 4.00	300.00
25 sold @ 2.00	50.00
	$ 4,800.00
Less 15% commission	$ (720.00)
Less $ .50 handling	(500.00)
Less inspection fee	(148.90)
Less freight	(3,500.00)
Net return	$ -68.90

9. On or about April 15, 1996, Complainant (under its invoice 1443, Respondent's purchase order 2806-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

97 sold @ 5.00	$ 485.00
903 sold @ 4.00	3,612.00
	$ 4,097.00
Less 15% commission	$ (614.55)
Less $ .50 handling	(500.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$ -616.55

10. On or about April 18, 1996, Complainant (under its invoice 1446, Respondent's purchase order 11784) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 640 cartons of watermelons, size 4's, 42,516 lbs., at $.23 per pound, or $9,778.68. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

480 sold @ 8.00	$ 3,840.00
64 sold @ 6.00	384.00
60 sold @ 5.00	300.00
36 sold @ 3.00	108.00
	$ 4,632.00
Less 15% commission	$ (694.80)
Less $ .50 handling	(320.00)
Less inspection fee	(130.00)
Less freight	(3,500.00)
Net return	$ (12.80)

11. On or about April 19, 1996, Complainant (under its invoice 1447, Respondent's purchase order 11289) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 672 cartons of watermelons, size 4's, 42,296 lbs., at $.20 per pound, or $8,459.00. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

416 sold @ 14.00	$ 5,824.00
192 sold @ 12.00	2,304.00
64 sold @ 11.50	736.00
	$ 8,864.60
Less 15% commission	$(1,329.60)

Less $ .50 handling	(336.00)
Less inspection fee	(86.00)
Less freight	(3,500.00)
Net return	$ 3,612.40

Respondent has paid Complainant $3,612.40.

12. On or about April 22, 1996, Complainant (under its invoice 1449, Respondent's purchase order 12001) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 640 cartons of watermelons, size 4's, 41,797 lbs., at $.25 per pound, or $10,449.25. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

448 sold @ 10.00	$ 4,480.00
192 sold @ 8.00	1,536.00
	$ 6,016.00
Less 15% commission	$ (902.40)
Less $ .50 handling	(320.00)
Less inspection fee	(74.00)
Less freight	(3,500.00)
Net return	$ 1,219.60

Respondent has paid Complainant $1,219.60.

13. On or about April 24, 1996, Complainant (under its invoice 1454, Respondent's purchase order 139241) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,672 cartons of tomatoes, size 5x6, at $15.85 per carton, or $26,501.20, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

1,144 sold @ 4.00	$ 4,576.00
352 sold @ 3.00	1,056.00
176 sold @ 2.00	352.00
	$ 5,984.00
Less 15% commission	$ (897.60)
Less $ .50 handling	(836.00)
Less inspection fee	(111.00)
Less freight	(3,500.00)

Net return	$ 639.40

Respondent has paid Complainant $639.40.

14. On or about May 1, 1996, Complainant (under its invoice 1468, Respondent's purchase order 3035) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,936 cartons of tomatoes, size 5x5, at $6.35 per carton, or $12,293.60, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

176 sold @ 4.00	$ 704.00
1,056 sold @ 3.00	3,168.00
504 sold @ 2.00	1,008.00
200 sold @ 1.00	200.00
	$ 5,080.00
Less 15% commission	$ (762.00)
Less $ .50 handling	(968.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$ -249.00

15. On or about May 2, 1996, Complainant (under its invoice 1471, Respondent's purchase order 3037) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,008 cartons of cantaloupes, size 18's, at $6.00 per carton, or $6,071.50, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

850 sold @ 4.00	$ 3,400.00
100 sold @ 2.00	200.00
58 sold @ 1.00	58.00
	$ 3,658.00
Less 15% commission	$ (548.70)
Less $ .50 handling	(504.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$ -993.70

16. On or about May 3, 1996, Complainant (under its invoice 1472, Respondent's purchase order 3038) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,008 cartons of cantaloupes, size 18's, at $6.00 per carton, or $6,071.50, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection. Respondent rendered an accounting on the load as follows:

840 sold @ 3.00	$ 2,520.00
56 sold @ 2.75	154.00
112 sold @ 1.00	112.00
	$ 2,786.00
Less 15% commission	$ (417.90)
Less $ .50 handling	(504.00)
Less inspection fee	(77.40)
Less freight	(3,500.00)
Net return	$-1,713.30

17. On or about May 15, 1996, Complainant (under its invoice 1473, Respondent's purchase order 3039) sold to Respondent, and shipped from Brawley, California, to Respondent in Patterson, New Jersey, one truck load containing 1,120 cartons of cantaloupes, size 18's, at $6.00 per carton, or $6,720.00, plus $23.50 for a temperature recorder, and $50.00 for air bags. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

723 sold @ 4.75	$ 3,458.00
224 sold @ 4.25	952.00
168 sold @ 3.00	504.00
	$ 4,914.00
Less 15% commission	$ (737.10)
Less $ .50 handling	(560.00)
Less inspection fee	(129.00)
Less freight	(3,900.00)
Net return	$ -412.10

18. On or about May 15, 1996, Complainant (under its invoice 1474, Respondent's purchase order 3040) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,064 cartons of cantaloupes, size 18's, at $6.00 per carton, or

$6,384.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

224 sold @ 5.00	$ 1,120.00
56 sold @ 4.75	266.00
728 sold @ 3.00	2,184.00
56 sold @ 1.00	56.00
	$ 3,626.00
Less 15% commission	$ (543.90)
Less $ .50 handling	(532.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$-1,048.90

Complainant and Respondent agreed to settle the load at a net loss of $516.90 which Complainant has not paid.

19. On or about May 19, 1996, Complainant (under its invoice 1475, Respondent's purchase order 3041) sold to Respondent, and shipped from Brawley, California, to Respondent in Patterson, New Jersey, one truck load containing 1,120 cartons of cantaloupes, size 18's, at $6.00 per carton, or $6,720.00, plus $23.50 for a temperature recorder, and $50.00 for air bags. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

75 sold @ 6.00	$ 450.00
840 sold @ 5.00	4,200.00
112 sold @ 4.75	532.00
93 sold @ 4.00	372.00
	$ 5,554.00
Less 15% commission	$ (833.10)
Less $ .50 handling	(560.00)
Less inspection fee	(62.00)
Less freight	(3,600.00)
Net return	$ 498.90

Respondent not paid Complainant the $498.90 in reported net returns.

20. On or about May 14, 1996, Complainant (under its invoice 1491,

Respondent's purchase order 3051) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 3,748 cartons of mangos, size 14's, at $3.25 per carton, or $12,181.80, plus $23.50 for a temperature recorder. Following arrival Respondent communicated the results of a federal inspection. Respondent rendered an accounting on the load as follows:

2,187 sold @ 2.00	$ 4,356.00
384 sold @ 1.50	576.00
1,186 sold @ 1.00	1,186.00
	$ 6,118.00
Less 15% commission	$ (917.70)
Less $ .50 handling	(1,874.00)
Less inspection fee	(123.00)
Less freight	(2,900.00)
Net return	$ 303.30

Respondent not paid Complainant the $303.30 in reported net returns.

21. An informal complaint was filed on June 15, 1996, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant seeks to recover the balance of contract prices applicable to the sale to Respondent of eighteen loads of perishable produce. The record shows, and Respondent does not dispute, that the eighteen loads were all accepted on arrival. However, the record also shows that Respondent complained about the condition of the produce on each load, and had each load inspected.

Respondent contends that the parties entered into a full protection agreement as to each of the loads, that an accounting was issued as to each load, and that under that accounting no further amounts are due from Respondent to Complainant. The record shows that, in accord with the accountings, Respondent has paid Complainant a total of $8,748.25, and has failed to pay an additional $802.20. In addition the accountings shows deficits which purport to be due from Complainant to Respondent in the total amount of $4,682.15.

Respondent has clearly shown by a preponderance of the evidence that there was an agreement for full protection as to all of the loads except one. That load, covered by Finding of Fact 18, was the subject of a settlement agreement, and the deficit due from Complainant to Respondent under that agreement is $516.90. The accountings for the remaining seventeen loads all show amounts deducted by

Respondent for a commission, and for handling fees. These deductions represent a basic misunderstanding as to the meaning of a protection agreement.

A protection agreement can apply to any type of sale of goods. "Protection," "full protection," and "protection against loss," usually are taken to mean the same thing,[2] namely, that the seller will protect the buyer against any loss resulting from the goods having arrived in poor condition, or from market decline, or both.[3] However, "price protection," and "market protection," refer to protection that is limited to protection against a drop in market price.

A protection against loss agreement is not the same as a consignment. In a consignment the goods remain the property of the seller. A party who is the beneficiary of a protection agreement is still the purchaser of the goods, and takes title to the goods as a result of the purchase. A protection agreement modifies, but does not obliterate, the original purchase and sale contract. Thus the original contract price remains the base line price.[4] The protected buyer still has the potential (though perhaps remote) to make a profit on the goods.[5] But 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, when the protection feature of the agreement is activated by returns that are lower than contract price

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[2]In Charles Johnson Company v. Timothy Hoversen, 57 Agric. Dec. 756 (1998), a distinction was drawn between "protection," and "full protection." However, the distinction is limited to the peculiar facts of the case. There, under a contract calling for two lots of lettuce to weigh 54 and 58 pounds gross respectively, the lettuce in fact weighed an average of 50.4 pounds gross, and it was contended unsuccessfully by Complainant that the modified contract was for protection against short weight. In fact it was found that the agreement was for "full protection," but it was indicated that if the agreement had been for "'protection' from losses associated with light weight lettuce," market price would somehow be relevant to the calculation of the amount of protection due. This dicta, which is irrelevant to the actual decision, does not indicate exactly how such a calculation would be made, and we think that unless the parties specify a different method for calculation of losses, the losses flowing from short weight would most naturally be calculated in the normal manner, without any reference to market price.

[3]Samuel E. Vener Co. v. McCaffrey Bros. Co., 15 Agric. Dec. 405 (1956).

[4]In Border Fruit Co. v. Fruit Distributing Corp., 45 Agric. Dec. 2453, 2455 (1986), we said:

> A protection agreement has reference to a base price, and concerns goods that are sold, whereas in the case of a consignment there is no sale of the produce.

[5]Suppose, for instance, that the goods arrive in poor condition and the parties negotiate a protection agreement. Even though the goods are in poor condition the market might under certain circumstances rise precipitously, and the protected party might sell for double the original contract price. In such case the buyer would be liable to the seller only for the original price, and would be able to keep all the profit.

plus out of pocket expenses, the protected party is not entitled to a profit, or a commission (which is a substitute for profit in a consignment transaction), or a handling fee (which, unless explained, might be a euphemism for profit.)[6] Maintenance of the ability to accurately calculate and substantiate the loss is an implicit obligation of the agreement. Therefore, we have stated that:

> . . . it is incumbent upon a receiver who has such an agreement to keep records which substantiate its resales and losses. . . . "failure to keep such records voids the protection agreement." (citing Dave Walsh Co. v. Liberty Fruit Co., 38 Agric. Dec. 533 (1979)).[7]

The fundamental object of the protection agreement, which is to protect the buyer against any loss, requires that no monetary loss occur. Thus a buyer must be credited with the cost of any legitimate and documented reconditioning of the goods. Also, a buyer who has paid freight must be credited with the freight paid. If the gross proceeds of the buyer's resale exceed the f.o.b. contract price plus freight, then the buyer gets to keep the excess as profit, and is only liable to the seller for the contract price. On the other hand, if the gross proceeds of the resale are less than buyer's costs [f.o.b. price, plus freight, if the buyer paid the freight], then the buyer deducts freight costs from such gross proceeds and remits the balance, thus suffering no loss. If the gross proceeds are not enough to cover freight (and/or other legitimate costs) then the seller who grants protection must chip in and pay the remainder of the costs. Any attempt to leave freight out of the equation will result in a loss to the buyer and thus infringe on the protection against loss granted by the seller.[8] However, any attempt to allow a commission, or other substitute for profit, after the protection feature of the agreement cuts in, is inappropriate, because the buyer's potential for a profit was never deleted from the original contract, and depended, as in any sale contract, exclusively on resale proceeds being above costs.[9]

Since Respondent, in its accountings, deducted substantial amounts for commission and for handling fees, these amounts must be allowed to

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[6]See Samuel E. Vener Co. v. McCaffrey Bros. Co., 15 Agric. Dec. 405 (1956).

[7]DeMarco Produce Co., Inc. v. J.R. Cortes & Co., 39 Agric. Dec. 1256, 1259 (1980).

[8]See Arthur G. Manzo v. Jarson & Zerrilli Co., 9 Agric. Dec. 1230 (1950).

[9]See generally Charles Johnson Company v. Timothy Hoversen,, 57 Agric. Dec. 756 (1998).

Complainant. For the seventeen transactions which were not settled commissions and handling fees total $23,565.20. To this should be added the total of $802.20 admitted by Respondent to be due and unpaid, and from this amount should be deducted the total of $4,682.15 in deficits. This brings the total amount due from Respondent to Complainant to $19,685.25. Respondent's failure to pay Complainant 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.[10] 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.[11] 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. 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, $19,685.25, with interest thereon at the rate of 10% per annum from June 1, 1996, until paid, plus the amount of $300.00.

Copies of this order shall be served upon the parties.

ROMNEY & ASSOCIATES, INC., a/t/a R & R DISTRIBUTING v. SUPER FRESH, INC.
PACA Docket No. R-98-0071.
Order on Reconsideration filed October 21, 1998.

George S. Whitten, Presiding Officer.
Complainant, Pro se.

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[10] 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).

[11] 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).

Mark C.H. Mandell, Annandale, NJ, for Respondent.
Order issued by William J. Genson, Judicial Officer.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued July 27, 1998, awarding reparation to Complainant against Respondent in the amount of $19,685.25, with interest, plus the amount of $300. The order was served upon Respondent, and subsequently Respondent was granted an extension of time until September 8, 1998, in which to file a petition for reconsideration. On September 8, 1998, Respondent filed a petition for reconsideration.

Respondent's petition is in the form of an affidavit. To the extent that the affidavit contains new evidentiary matter it has been discounted.[1] Respondent asserts that each of the findings of fact contain "fundamental factual errors" in that they find that Complainant granted Respondent full protection on each load. Respondent contends that it was Respondent's understanding that it was to "'handle' the shipments with full protection," and points to a few instances when these, or similar, words were used. Respondent's contention is that a consignment was agreed to on each load. However, use of the word "handle" does not always signal a consignment.[2] In any event, Respondent did not often couple the word "handle" with the "full protection" words, and Respondent's view of the meaning of the word "handle" would render the "full protection" words superfluous and meaningless. We have reviewed Respondent's petition and find nothing therein that was not adequately considered in our decision and order of July 27, 1998. Respondent's petition is without merit, and is dismissed without service upon Complainant. The reparation awarded in our order of July 27, 1998, shall be paid within 30 days of the date of this order.

Copies of this order shall be served upon the parties.

PREMIUM VALLEY PRODUCE, INC. v. SAM WANG FOOD CORP., INC.
PACA Docket No. R-98-0153.
Decision and Order filed December 10, 1998.

Consignments - adequacy of proof of failure to perform fiduciary duties as to consigned produce.

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[1] See 7 C.F.R. § 47.24(b).

[2] Ralph Samsel v. L. Gillarde Sons Co., 19 Agric. Dec. 374 (1960).

Where produce was shown by federal inspection following arrival and acceptance to be substantially damaged, and parties agreed to change contract from one of sale to consignment, the consignor failed to prove a failure by consignee to perform its fiduciary duties even though the first sale of the produce was made nine days after the agreement was made, and most of the produce was finally dumped. The consignee proved by affidavits from the firms to which the produce was offered that the goods were offered to the trade on the first two days after the consignment agreement, and also proved that the consignor participated unsuccessfully in trying to sell the produce.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Robert E. Richards, Silver Spring, MD, 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 $15,552.00 in connection with a transaction in interstate commerce involving broccoli crowns.

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 $30,000.00, 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 opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Complainant filed a brief.

Findings of Fact

1. Complainant, Premium Valley Produce, Inc., is a corporation whose address is 1107-A Harkins Road, Salinas, California.

2. Respondent, Sam Wang Food Corp., Inc., is a corporation whose address is 300-A Morse St. N.E., Washington, D.C. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about January 28, 1997, Complainant sold to Respondent 1,152

[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).

cartons of broccoli crowns at $14.35 per carton, plus $23.50 for a temperature recorder, and $64.00 for top ice, or a total for the load of $16,618.70, f.o.b. Complainant shipped the broccoli crowns on the evening of January 28, 1997, from loading point in California, to Respondent at Washington, D.C. On arrival at destination the broccoli crowns were accepted by Respondent when Respondent unloaded them from the truck.

4. On Monday, February 3, 1997, at 1:30 p.m., the broccoli crowns were federally inspected at Respondent's warehouse in Washington, D.C., with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/ MARKINGS	ORIGIN	LOT ID.	NO. OF CONTAINERS	INSP. COUNT
A	34 to 37 °F	Broccoli Crowns	"Cools Fresh"	Ca	Net wt 20lbs	1152 Cartons	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/ DEFECT	OTHER
A	00	%		%		%	No Quality defects	Crowns Generally 3½ - 6, m 4 -4½" in diameter
	17	%		%		%	Yellow to brown discoloration (0 to 30%)	Stalks 1½ - 2 inches in length
	10	%		%		%	Decay (3 to 18%) in early stages.	
	27	%		%		%	Checksum	

GRADE: No established U. S. Grade Standards

5. Respondent communicated the results of the federal inspection to Complainant, and on February 3, 1997, the parties agreed that Respondent should handle the broccoli crowns for Complainant's account.

6. Respondent showed the broccoli crowns to Harry Liu of CFI on February 4, 1997, and was told by Mr Liu that he did not want to handle the broccoli because he felt he "might not be able to merchandise it." On February 4, 1997, Respondent showed the broccoli to Kenny Chan of Chan's Market, and was told by Mr. Chan

that he "felt that the broccoli would be difficult to sell and [that he] did not want to purchase it, even at a reduced price." Again on February 4, 1997, Respondent showed the broccoli to Mr. Vnine of V-9 Market who also refused to purchase any. On February 5, 1997, Respondent showed the broccoli to Donald Chin, a Chinese food wholesaler. Mr. Chin stated he did not feel the broccoli could be resold, and declined to purchase any. On February 6, 1997, a fifth firm, Lucky Farm Produce, was induced by Complainant to view the broccoli, and refused to make any purchases.

7. On February 12, 1997, Sang Oh Choi, Respondent's president, induced Harry Liu of CFI to purchase 96 cartons of the broccoli as a personal favor for $8.00 per carton. On February 16, Mr. Choi induced Mr. Vnine of V-9 Market to purchase 96 cartons of the broccoli at $6.50 per carton as a personal favor. In addition, a total of 79 cartons were sold to individual walk-in customers for an average of $7.50 per carton. Respondent reported gross proceeds of $2,032.50 to Complainant. Respondent incurred expenses in the amount of $2,700 for freight, $78.00 and $65.00 for inspections, and a dumping fee of $250.00.

8. Respondent had 881 cartons of the broccoli, which remained unsold, federally inspected on February 19, 1997 at 11:15 a.m. The inspection showed temperatures of 50 to 52 degrees Fahrenheit. Yellow to brown discoloration of the crowns was shown as 42 percent, with a range of 30 to 60 percent. Decay was shown as 43 percent, with a range of 33 to 58 percent, in early to moderate stages. Subsequently the 881 cartons of broccoli were dumped.

9. The formal complaint was filed on July 14, 1997, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant and Respondent agree that the original contract was changed from one of sale to one of consignment. Complainant's claim is based solely upon the assertion that Respondent failed to fulfill its fiduciary duties in a reasonable manner. Complainant points to the fact that the first sale was made on February 12, nine days after the inspection of the broccoli, and to the fact that only a total of 271 cartons out of the original 1,152 were sold. Without more, these facts would certainly show a failure to sell the broccoli in a prompt and reasonable manner. However, there are other facts which must be considered before we reach the conclusion that Complainant has met its burden of proving by a preponderance of the evidence that Respondent failed to adequately perform its fiduciary duties.

Respondent submitted affidavits by representatives of four firms to which the broccoli crowns were offered on February 4, and 5. In addition, Respondent's

president stated in a sworn affidavit that following receipt of a faxed request to handle the broccoli for Complainant's account he expressed concern by phone to Complainant's representative that the broccoli would be hard to merchandise, and was told that Complainant would have someone from Lucky Farm Produce come by to purchase the broccoli and take it off Respondent's hands. This statement was never denied by Complainant. However, when a representative of Lucky Farm Produce arrived at Respondent's place of business on February 6, to view the broccoli, he refused to purchase it. If Complainant undertook to have a local merchant view the broccoli with a view to purchase it, Complainant was sharing in the effort to dispose of the broccoli. This was entirely appropriate, as the broccoli still belonged to Complainant by virtue of the consignment agreement. Nowhere does Complainant allege that it was not aware of the situation as to sales, and in view of the refusal of Lucky Farm Produce (the firm secured by Complainant) to purchase the broccoli, it seems unlikely that Complainant was not aware of the difficulties Respondent was having in selling the broccoli.

In a situation where consigned merchandise does not readily sell we like to see evidence that the offering price was dropped radically in an effort to stimulate sales. Respondent's affidavits do not directly address this issue, although one of the affiants stated that he "did not want to purchase [the broccoli] even at a reduced price." In regard to consignment transactions we have said:

> Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. [The consignee] was a company chosen by complainant to act as complainant's agent. . . . We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight.[2]

The statement quoted above is even more applicable when the produce is in a substantially damaged condition, as was the subject broccoli. If this were a situation where, following Respondent's acceptance, it had resold and claimed damages for Complainant's breach of contract, we would be disposed to hold

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[2]LaVern Co-operative Citrus Ass'n v. Mendelson-Zeller Co., Inc., 46 Agric. Dec. 1673, 1678 (1987).

Respondent to a slightly higher standard.[3] But here Complainant elected to have Respondent resell the broccoli on consignment, and involved itself in the effort to resell. Under these circumstances we are unable to find that Complainant has met its burden of proving by a preponderance of the evidence that Respondent breached its fiduciary duty relative to the broccoli. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

THE CHUCK OLSEN CO. v. PRODUCE DISTRIBUTORS INC., AND PRODUCE ETC. MARKETING.
PACA Docket No. R-98-0083.
Decision and Order filed September 29, 1998.

Suitable Shipping Condition — Applicable Only At Contract Destination

Where the parties to an f.o.b. contract agreed to a destination of Patterson, New Jersey, with the proviso that the goods were not to be shipped to wholesalers in New York or to the New York Terminal Market, and the buyer diverted the goods to the New York Terminal Market, it was held that the suitable shipping condition warranty was not applicable.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Richard J. Mendelsohn, Salinas, CA, for Respondent.
Decision 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 $12,373.55 in

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[3]We have in mind proof that the goods were offered to several potential buyers at progressively lower prices. If necessary, these offerings should proceed past the break even point, which, in the case of the broccoli, would have been $2.50 to $2.75 per carton. Respondent here may have done this, but the proof that it was done is lacking.

connection with a transaction in interstate commerce involving a truck load 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 Respondents which filed answers thereto denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00, 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 opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement, both Respondents filed answering statements, and Complainant filed a statement in reply. None of the parties filed briefs.

Findings of Fact

1. Complainant is an individual, Floyd Charles (Chuck) Olsen, doing business as The Chuck Olsen Co., whose address is P. O. Box 57, Cutler, California.

2. Respondent, Produce Distributors Inc. [hereafter sometimes Distributors], is a corporation whose address is 600 S. Livingston Ave., Suite 102, Livingston, New Jersey. At the time of the transaction involved herein this Respondent was licensed under the Act.

3. Respondent, Produce Etc. Marketing [hereafter sometimes Marketing], is the sole proprietorship of Tony Valenzuela. The address of this Respondent is 1000 S. Main St., Suite 550, Salinas, California. At the time of the transaction involved herein this Respondent was licensed under the Act.

4. On or about June 18, 1996, Complainant sold to Respondent Distributors, through Respondent Marketing acting as broker, one truck load consisting of 1,936 18-pound bagged boxes of U. S. No. 1 Table Grade Perlette Grapes, at $12.15 per box f.o.b., with a contract destination of Super Fresh, Inc., in Patterson, New Jersey, with the specific proviso that the grapes were not to go to any wholesalers in New York or to the New York Terminal Market.

5. On June 18, 1996, the grapes were shipped from loading point in Arizona, to Respondent Distributors' customer in Paterson, New Jersey. Respondent Distributor diverted the load to L & P Fruit Co., Inc., on the New York Terminal Market in Bronx, New York. On June 25, 1996, at 10:10 a.m., following

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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).

unloading from the truck, the grapes were federally inspected with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	36 to 38 °F	Table Grapes	"Table Top Mountain UVG Perlett"	AZ	Bagged 18Lbsnet	1936 Cartons	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	02	%	00	%		%	Quality Defects, Scars	
	06	%	00	%		%	Shattered Berries (0 to 11%)	
	02	%	02	%		%	Crushed and Split Berries	
	02	%	02	%		%	Wet and Sticky Berries	
	12	%	00	%		%	Externaly (sic) Brown Discoloration (8 to 17%)	
	01	%	01	%		%	DECAY (Early Stages.)	
	25	%	05	%		%	CHECK - SUM	

GRADE: FAILS TO GRADE US NO1, TABLE ACCOUNT CONDITION DEFECTS.

6. Respondent Distributors has paid Complainant $11,148.85 for the grapes leaving a balance due of $12,373.55.

7. The informal complaint was filed on September 21, 1996, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant and Respondent Marketing agree that the sale of the subject grapes was on an f.o.b. basis, Paterson, New Jersey, being the contract destination, with the specific proviso that the grapes were not to go to New York. Respondent Distributors submitted an answer signed by Thomas Gangemi, Jr., its president. In this statement Mr. Gangemi affirmed that at the time of the transaction Distributors had a joint venture agreement with Joe Russo. Mr. Gangemi attached a statement which he claimed was from Joe Russo, but which Russo declined to sign. This statement tells a vastly different story from all the other participants in the transaction, and because it is not signed or verified, it is not considered evidence in this proceeding. However, the participation of Joe Russo in the transaction as a representative of Distributors is attested to by the broker

Marketing, as is the agreement by Russo on behalf of Distributors to the contract destination and the restriction that the load not go to New York.

According to the statement of Tony Valenzuela, Joe Russo informed him, following the inspection of the grapes at the place of business of L & P Fruit Co. in New York, that the grapes were rejected by Super Fresh in Paterson, New Jersey, and were then unilaterally moved by Russo to New York for sale. This is uncontradicted by any competent evidence of record. Such a rejection would have been to Distributors, and since no rejection was communicated to Complainant, the subsequent diversion of the grapes to New York was an acceptance as between Distributors and Complainant.[2]

The grapes were sold on an f.o.b. basis. The Regulations,[3] 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,[4] 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[5] which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery,"[6] are based upon case law predating the adoption of the Regulations.[7] 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

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[2]See Phoenix Vegetable Distributors v. Randy Wilson, Co., 55 Agric. Dec. 1345 (1996).

[3]7 C.F.R. § 46.43(i).

[4]7 C.F.R. § 46.43(j).

[5]7 C.F.R. § 46.43(j).

[6]7 C.F.R. § 46.44.

[7]See Williston, *Sales* § 245 (rev. ed. 1948).

conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.[8] 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.[9] 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.[10]

The f.o.b. suitable shipping condition rule is applicable by its express terms only "at the contract destination agreed upon between the parties."[11] The reason for this qualification has to do with the fact that a warranty is being extended as to goods that are inherently perishable, and with the fact that the warranty goes beyond the condition of the goods at the time the goods are shipped. It guarantees that the goods are in such a condition at time of shipment as to carry, without abnormal deterioration, to a particular destination. This places a great amount of

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[8]See Pinnacle Produce, Ltd. v. Produce Products, Inc., 46 Agric. Dec. 1155 (1987); G & S Produce v. Morris Produce, 31 Agric. Dec. 1167 (1972); Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (1959); and Haines City Citrus Growers Ass'n v. Robinson & Gentile, 10 Agric. Dec. 968 (1951).

[9]As an illustration, the United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with 1 percent decay at shipping point or 3 percent decay at destination. The good delivery standards, however, allow an additional "2 percent decay . . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce." Thus lettuce sold as U.S. No. 1, f.o.b., could have 4 percent decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5 percent allowed by the good delivery standards. Of course, in the case of other commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See cases cited at note 8, *supra*.

[10]See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co., 39 Agric. Dec. 703 (1980).

[11]7 C.F.R. § 46.43(j).

responsibility on the seller to select goods that will carry to the destination specified. Since normally the only variables that will affect the condition of the goods at destination, beyond the condition of the goods themselves and the conditions under which they are transported, is the time the goods will be in transit, we have interpreted the contract destination requirement in terms, not of a specific destination, but in terms of distance from shipping point.[12] This expansive interpretation of the concept of "contract destination" has been followed only because it was obviously in accord with the underlying intent of the contracting parties. Where, however, the parties go beyond the naming of a contract destination to specifically exclude a locale as a destination point, that exclusion must be honored by us in the application of the suitable shipping condition warranty. In other words, it cannot be that Complainant here intended for the warranty to be applicable to the shipment of the grapes to New York, even though New York is not significantly further from shipping point than Paterson, New Jersey. It is not for us to inquire as to the reason Complainant and Respondent agreed to this exclusion. We can only assume that they had reasons, good and sufficient to them, for making it. The clearly manifested intent of the parties to a contract must be upheld where it is not illegal, and does not conflict with public policy. We find the warranty of suitable shipping condition to be inapplicable to this transaction.

Respondent Distributors has not proven a breach as to the grapes, and since it accepted the grapes, it is liable to Complainant for their full purchase price, or $23,522.40. Complainant has already been paid $11,148.85, which leaves $12,373.55 still due from Respondent Distributors to Complainant. Respondent Marketing acted only as a broker relative to the transaction. Accordingly, the complaint against Respondent Marketing should be dismissed.

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.[13] 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

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[12]See Magic Valley Potato Shippers, Inc. v. C. B. Marchant & Co., 42 Agric. Dec. 1602 (1983).

[13]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).

reparation award.[14] 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. 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 Produce Distributors Inc., shall pay to Complainant, as reparation, $12,373.55, with interest thereon at the rate of 10% per annum from July 1, 1996, until paid, plus the amount of $300.

The complaint against Respondent Produce Etc. Marketing is dismissed.

Copies of this Order shall be served upon the parties.

FRIEDRICH ENTERPRISES, INC. d/b/a ORIENTAL EXPRESS FRUIT & VEGETABLE CO. v. BENNY'S FARM FRESH DISTRIBUTING.
PACA Docket No. R-98-0134.
Decision and Order filed September 29, 1998.

Accord and Satisfaction – Amount of claim unliquidated.

After receipt and acceptance of blueberries, the parties agreed in writing to modify their contract to price after sale with full protection. Before the parties agreed on a price, the buyer tendered a check for this and another invoice that bore the notation "in full accord," and the seller negotiated the check. In accordance with UCC' 3-311, it was held that an accord and satisfaction may be accomplished when the amount of the claim is unliquidated, such as in a price after sale transaction where the parties have yet to agree upon a price and the check contained a statement indicating that the check was offered in full payment of the invoice.

Complainant, Pro se.
Respondent, Pro se.
Patrice Harps, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[14]See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, 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).

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 $11,058.00 in connection with one truckload of blueberries shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant.

Since the amount claimed in the formal complaint does not exceed $30,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an opening statement. Respondent filed an answering statement. Complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Friedrich Enterprises, Inc., doing business as Oriental Express Fruit & Vegetable Co., hereinafter referred to as Oriental Express, is a corporation whose post office address is P. O. Box 8288, Searcy, Arkansas 72145. At the time of the transaction involved herein, Oriental Express was not licensed under the Act.

2. Respondent is an individual, Ronald E. Pomerantz, doing business as Benny's Farm Fresh Distributing, hereinafter referred to as Benny's, whose post office address is 501 N. Wills Street, Chicago, Illinois 60610-1350. At the time of the transaction involved herein, Benny's was licensed under the Act.

3. On or about June 6, 1997, Oriental Express, by oral contract, sold to Benny's, one truckload of blueberries, consisting of 964 flats, at an f.o.b. price of $14.75 per flat, for which Oriental Express prepared invoice 1221, billing Benny's for a total of $14,219.00.

4. On June 20, 1997, the 964 flats of blueberries were shipped from loading point in Searcy, Arkansas, to three of Benny's customers located in Washington, D.C., and Jessup, Maryland, as follows: 100 flats were destined for Rock Garden/Cooseman in Washington, D.C., 464 flats were destined for Sid Goodman in Jessup, Maryland, and 400 flats were destined for Edward G. Rahll also in

Jessup, Maryland.

5. The three lots of blueberries arrived and were unloaded at the various destinations, where they were each federally inspected between the dates of June 23 and 24, 1997, with the following results, in relevant part:

Rock Garden, Washington, D.C.:

TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	NUMBER OF CONTAINERS	INSP. COUNT
42 to 44°	Blueberries Blueberries	No Brand Fresh	AR	100 cartons	Y

AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECTS	OTHER
44 %	44 %	--	Wet Berries (2 to 88%)	
03 %	03 %	--	Soft	
-1 %	-1 %	--	Decay	
48 %	48 %	--	**CHECKSUM**	

Sid Goodman, Jessup, MD:

TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	NUMBER OF CONTAINERS	INSP. COUNT
40 to 44°	Blueberries	"Oriental Express"	AR	500 cartons	N

AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECTS	OTHER
23 %	00 %	--	Wet Berries (15 to 38%)	Generally Firm.
05 %	05 %	--	Crushed and Leaking Berries (3 to 6%)	
04 %	02 %	--	Shriveling	
04 %	01 %	--	Sunken Areas	
06 %	06 %	--	Mold (2 to 8%)	
00 %	00 %	--	Decay	
42 %	14 %	--	CHECKSUM	

Edward G. Rahll, Jessup, MD

TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	NUMBER OF CONTAINERS	INSP. COUNT
40 to 42°	Blueberries	"Oriental Express"	AR	400 cartons	N

AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECTS	OTHER
31 %	00 %	--	Wet Berries (27 to 37%)	
06 %	02 %	--	Shriveling (4 to 8%)	
05 %	05 %	--	Crushed Berries (3 to 6%)	
04 %	04 %	--	Mushy	
04 %	02 %	--	Sunken Areas	
12 %	12 %	--	Mold (6 to 15%)	
00 %	00 %	--	Decay	
62 %	25 %	--	**CHECKSUM**	

6. On June 23, 1997, Benny's faxed a "PRICE AFTER SALE // PRODUCE MARKETING AGREEMENT" to Oriental Express, which was signed upon

receipt by its president, George Friedrich, on June 23, 1997, and which stated the following, in pertinent part:

Your firm has requested that we handle the product listed below. These are our terms and conditions:
1. USDA inspections will be at the shipper's request and cost.
2. Full price protection before and after settlement.
3. Full authority and discretion to employ any means necessary to dispose of the product including, but not limited to, the ability to consign, dump, or purchase the product; utilize any broker, auctioneer or dealer to sell, consign or joint account the product; contract with any trucking firm to transport the product to any other location at any reasonable cost with such costs deducted from proceeds.
4. All expenses incurred by ***Benny's farm fresh*** will be deducted from any and all receipts.
5. ***Benny's farm fresh*** is acting as a collect and remit broker in this transaction, not a shipper or a shipper's agent.

Since it is impractical to specify all the particular methods or circumstances that we may employ or encounter in an effort to dispose of the product, full authority is granted to ***Benny's farm fresh*** for the following product(s) listed below.

PRODUCT	5719:Rock Garden 100 flats	5720:Goodman 500 flats	5721:Rahll 464 flats
DESCRIPTION:	P.A.S. blueberries	P.A.S. blueberries	LESS $2.00 blueberries

Per our telephone conversation, the pre-cooled flats sat on the loading dock for several hours Friday afternoon, while the truck was loading. The truck was instructed to adjust his reefer unit to 32-25° (upon arrival, it was 44°). The last three (3) pallets were hand loaded on the floor, because there was insufficient room on the truck, according to the shipper. Prior to the first berry drop, the truck stopped at Wal-Mart (KY) and unloaded 2-pallets at their refrigerated loading dock. Upon arrival at the receivers', all the berries had significant wetness, with softness, crushed, leaking and shriveling also present. **Benny's farm fresh** will seek to have Checkmate (the truck broker) assume 50% of the damages.

Please sign, date and return the completed agreement via fax to ***Benny's farm fresh***. We will not accept your product until this agreement is properly executed and in ***our*** possession.

I HAVE READ, UNDERSTAND, AND AGREE TO THE ABOVE TERMS AND CONDITIONS AND HEREBY ACCEPT SAME. WE GIVE ***Benny's farm fresh*** AUTHORITY TO HANDLE OUR PRODUCT. I AM FULLY AUTHORIZED TO SIGN THIS DOCUMENT.

SIGNATURE: _____ DATED: ____/____/1997

7. On or about July 9, 1997, Benny's issued check number 6588, made payable to Oriental Express, in the amount of $6,111.00, $3,161.00 of which was intended as payment for the blueberries billed on Oriental Express's invoice 1221. On the memo portion of the check, Benny's added the notation "Inv 1213, 1221 (in full accord)". The check was cashed by Oriental Express, whose bank it cleared on or about July 16, 1997.

8. An informal complaint was filed on July 21, 1997, which is within nine months from when the cause of action accrued.

Discussion

Oriental Express brings this action to recover the balance of the agreed purchase price for one truckload of blueberries sold to Benny's. Oriental Express

admits that the blueberries arrived at the contract destinations in poor condition, but maintains that the deterioration resulted from improper handling in transit. Specifically, Oriental Express maintains that the trailer arrived loaded with blueberries destined for Wal-Mart in Kentucky, and that these blueberries had been loaded in a manner that did not leave sufficient pallet space on the trailer to accommodate the blueberries ordered by Benny's. In addition, Oriental Express maintains that the driver refused to cool the blueberries to 34°F, insisting that he had to keep the trailer temperature at 44°F as instructed by his dispatcher. Finally, Oriental Express states that the blueberries destined for Wal-Mart were loaded in the front of the trailer, which meant that the Oriental Express blueberries had to be off-loaded when the carrier stopped in Kentucky to make the Wal-Mart delivery.

The record shows that Oriental Express sold the blueberries to Benny's under f.o.b. terms. The Regulations[1] 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, 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."[2]

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[1] 7 C.F.R. § 46.43(i).

[2]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). 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 the 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

(continued...)

Typically in an f.o.b. sale such as this, the buyer, in this case Benny's, would assume all risk of damage and delay in transit not caused by the seller, as per the Regulations.[3] However, we have also found that the shipper bears the responsibility for damage in transit due to faulty transit equipment *if the shipper knew of the defect in the equipment when he loaded the commodity* (emphasis added). Joe Phillips v. Wisill, Inc., 34 Agric. Dec. 763 (1975). *See also* Berwick Vegetable Cooperative v. A. G. Shore Company, 37 Agric. Dec. 1247 (1978). In this case, the record shows that Oriental Express was aware at the time of loading that there was insufficient space for proper loading, that the driver had no intention of maintaining the 34°F temperature requested, and that its blueberries would have to be off-loaded in order to effect delivery of the other blueberries in the trailer. The record shows further that Oriental Express, having knowledge of these defects, opted nevertheless to load its blueberries into the trailer for shipment to the contract destinations. We conclude, therefore, that since Oriental Express was aware at the time of loading that transportation conditions would be less than favorable to the maintenance of the blueberries in proper condition, it cannot now attempt to benefit from the existence of these conditions by claiming that they voided the warranty of suitable shipping condition.

With the warranty of suitable shipping condition remaining intact, the inspections performed promptly upon arrival at the contract destinations clearly show that the blueberries arrived abnormally deteriorated, constituting a breach of warranty by Oriental Express. Following discovery of Oriental Express's breach of warranty, Benny's faxed the "Price After Sale/Produce Marketing Agreement" detailed in Finding of Fact 6 to Oriental Express. The agreement, which set forth the terms under which the blueberries would be handled by Benny's, was promptly signed by Oriental Express's president, George Friedrich,

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[2](...continued)
remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See Pinnacle Produce, Ltd. v. Produce Products, Inc., 46 Agric. Dec. 1155 (1987); G & S Produce v. Morris Produce, 31 Agric. Dec. 1167 (1972); Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (1959); and Haines City Citrus Growers Assn v. Robinson & Gentile, 10 Agric. Dec. 968 (1951).

[3] 7 C.F.R. § 46.43(i).

and returned to Benny's. Mr. Friedrich makes the unsworn allegation that he was coerced into signing the agreement because Benny's allegedly threatened to dump the blueberries if he refused to sign it. However, we note that if Benny's had chosen to take such ill-advised action upon Mr. Friedrich's failure to sign the agreement, Benny's actions would have constituted acceptance of the blueberries, and it would been liable to Oriental Express for the contract price less provable damages. Consequently, we find that Oriental Express has not proven that it was induced into signing the agreement by the threat of additional loss and that it must, therefore, abide by the terms contained therein.

The written agreement essentially changed the price terms of the contract to price after sale with full price protection. Although the agreement also includes the provision that Benny's would act as "collect and remit" broker, such an arrangement would create a contractual relationship between Oriental Express and the three firms that purchased the blueberries from Benny's, where none existed prior. In the absence of any evidence that the three firms acquiesced to this arrangement, we find this provision of the agreement to be invalid.

The term "price after sale" usually contemplates the parties agreeing to a price following the prompt resale of the produce. The evidence shows that after the blueberries were resold, Benny's offered a return of $3,161.00 to Oriental Express, representing a price of $4.00 per flat for the 100 flats shipped to Rock Garden, $7.00 per flat for the 464 flats shipped to Goodman, and $3.00 per flat for the 400 flats shipped to Rahll, less $1.25 per flat for freight, and $0.50 per flat for brokerage. Oriental Express claims that additional monies are due based upon Benny's agreement to seek recovery of 50% of the damages from the truck broker, as stated in the written agreement. Benny's responded to this claim with the allegation that Oriental Express effected an accord and satisfaction when it accepted Benny's check bearing the notation, "Inv 1213, 1221 (in full accord)."

In this regard, the Uniform Commercial Code § 3-311 states the following:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the

claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. . . .

With respect to part (a) above, the evidence shows that Benny's in good faith tendered payment in the amount of $3,161.00 to Oriental Express, and that this amount was intended to fully satisfy the amount due for blueberries at issue herein. The evidence shows further that at the time Oriental Express received this payment, the parties had agreed that the blueberries would be handled under price after sale terms, but had not yet settled upon a price. Therefore, Oriental Express's claim against Benny's was at that time unliquidated. Finally, the evidence shows that Oriental Express obtained payment of the amount tendered by cashing the check.

With respect to part (b) above, the evidence shows that the check tendered by Benny's bore restrictive language on its face which was intended to place Oriental Express on notice that the check was offered as payment in full for the invoices noted. Oriental Express argues that since the amount tendered did represent payment in full for invoice 1213, it believed that the notation "in full accord" was made in reference to that invoice only. However, assuming this was the case, we would expect that the notation would appear next to invoice number 1213, instead of next to the disputed invoice, number 1221, where it actually appears on the check. Regardless of its placement, however, we find that the notation is unambiguous in its reference to the transaction herein in dispute, and is sufficiently conspicuous as to have placed Oriental Express on notice that the

payment was offered in full satisfaction of both invoices.

It is therefore our finding that the check tendered by Benny's satisfies both subsections (a) and (b) of U.C.C. § 3-311, set forth above. Furthermore, Oriental Express has not shown that either of the conditions set forth under subsection (c) are applicable to this matter. Consequently, we find that Benny's has provided sufficient evidence to prove that Oriental Express accepted its payment of $3,161.00 in full satisfaction of the amount due for the blueberries billed on its invoice 1221. Accordingly, Oriental Express's claim for a balance due on this invoice should be dismissed.

Order

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MISCELLANEOUS ORDERS

In re: QUEEN CITY FARMS, INC.
PACA Docket No. D-97-0020.
Order Denying Petition for Reconsideration and Reopening Hearing filed July 7, 1998.

Petition to reopen hearing — Parties — Service — Petition for reconsideration.

The Judicial Officer denied Respondent's petition to reopen the hearing and petition for reconsideration. The Rules of Practice (7 C.F.R. § 1.146(a)(2)) provide 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 Respondent's petition to reopen the hearing, filed after the issuance of the Judicial Officer's Order Denying Late Appeal, was not timely filed. Even if Respondent's petition to reopen the hearing had been timely filed, it would be denied because no hearing had been held in this proceeding prior to Respondent's filing its petition to reopen the hearing. There is no requirement in the Rules of Practice that filings in the proceeding must be served on officers, owners, and directors of a corporate respondent. The filings were properly served on the only respondent in the proceeding, Queen City Farms, Inc.

Andre Allen Vitale, for Complainant.
Victor Dahar, Manchester, New Hampshire, and Peter M. Solomon, Londonderry, New Hampshire, 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 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 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 this proceeding to the Judicial Officer for decision.

On May 13, 1998, I issued an Order Denying Late Appeal in which I concluded that the Judicial Officer has no jurisdiction to hear Respondent's Appeal from Decision Without Hearing by Reason of Admissions [hereinafter Appeal Petition], which was filed after the Default Decision issued by the ALJ had become final. *In re Queen City Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 9-11, 22-23 (May 13, 1998).

On June 8, 1998, Respondent filed Petition for Reconsideration of Order Denying Late Appeal and for Reopening Hearing [hereinafter Petition for Reconsideration]. On June 25, 1998, Complainant filed Objections to Respondent's Petition for Reconsideration, and on June 30, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Order Denying Late Appeal, issued May 13, 1998.

APPLICABLE STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

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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)).

§ 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[.] . . .

§ 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.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

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).

In addition to Respondent's request that I reconsider the Order Denying Late Appeal, Respondent requests that the hearing be reopened (Pet. for Recons. at 1). 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, 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 Order Denying Late Appeal was issued May 13, 1998, and Respondent's petition to reopen the hearing was filed June 8, 1998. Therefore, Respondent's petition to reopen the hearing, filed 26 days after the issuance of the Judicial Officer's Order Denying Late Appeal, is untimely and is denied.[2]

Moreover, even if Respondent's petition to reopen the hearing had been timely filed, the petition would be denied because a petition to reopen a hearing to take further evidence may only be granted if a hearing in the proceeding in question

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[2]*See In re JSG Trading Corp.*, 57 Agric. Dec. ___, slip op. at 11 (June 1, 1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying respondent's petition to reopen the hearing because the petition to reopen the hearing was filed 57 days after the Judicial Officer's decision was issued); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying respondent's petition to reopen the hearing because the petition to reopen the hearing was filed approximately 2 months after the Judicial Officer issued the decision).

has preceded the petition to reopen the hearing. The Rules of Practice define the word "hearing" as follows:

> **§ 1.132 Definitions.**
>
> As used in this subpart [(7 C.F.R., pt. 1, subpart H)], 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:
>
> . . . .
>
> *Hearing* means that part of the proceeding which involves the submission of evidence before the Judge for the record in the proceeding.

7 C.F.R. § 1.132.

There has been no hearing in the instant proceeding. Rather, the Default Decision in this proceeding was issued by reason of admissions without hearing. Therefore, even if Respondent's petition to reopen the hearing had been timely filed, it would be denied because no hearing had been held in this proceeding prior to Respondent's filing its petition to reopen the hearing.[3]

Respondent contends that the Default Decision was improperly entered against it because Michael Litvin, a former vice president, director, and holder of 50 per centum of the outstanding stock in Respondent, did not receive a copy of the Motion for Default Decision, the Proposed Default Decision, and the Hearing Clerk's November 18, 1997, letter transmitting the Motion for Default Decision and the Proposed Default Decision (Pet. for Recons. at 2-3). Moreover, Respondent contends that the Order Denying Late Appeal should be set aside and its Appeal Petition should be considered because Mr. Litvin did not receive a copy of the Default Decision and the Hearing Clerk's letter transmitting the Default Decision, until March 14, 1998; and thus, Respondent's Appeal Petition was timely filed (Pet. for Recons. at 4-5).

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[3]*See In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1434-35 (1996) (Order Denying Late Appeal) (stating that a petition to reopen a hearing and take further evidence may only be granted if a hearing in the proceeding in question has preceded the petition to reopen the hearing); *In re Ow Duk Kwon*, 55 Agric. Dec. 78, 83 n.2 (1996) (Order Denying Late Appeal as to Ow Duk Kwon) (stating that while the Rules of Practice do provide for reopening a hearing to take further evidence, no hearing in the proceeding had been held which could be reopened).

As an initial matter, Mr. Litvin is not a party to this proceeding. The Rules of Practice identify parties to a proceeding, as follows:

§ 1.132 Definitions.

As used in this subpart [(7 C.F.R., pt. 1, subpart H)], 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:

. . . .

Complainant means the party instituting the proceeding.

. . . .

Respondent means the party proceeded against.

7 C.F.R. § 1.132.

The record establishes that the party who instituted this proceeding is the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, and the only party proceeded against is Queen City Farms, Inc. Mr. Litvin is not a party to this proceeding, and there is no requirement in the Rules of Practice that filings in this proceeding must be served on officers, owners, and directors of a corporate Respondent.

Moreover, I find that Respondent was served with the Motion for Default Decision and the Proposed Default Decision and that Respondent was served with the Default Decision on January 10, 1998.

Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) provides that proposed decisions, motions for adoption of proposed decisions, and final decisions are deemed to be received by a party on the date of delivery by certified mail to the last known principal place of business of the attorney or representative of a party, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual. . . .

7 C.F.R. § 1.147(c)(1).

The record reveals that Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on or about April 7, 1997.[4] Respondent filed a timely Answer. The Answer indicates that Respondent was represented by Peter M. Solomon, Esq., of Boutin & Solomon, P.A., Londonderry, New Hampshire. However, Mr. Solomon filed letters on September 30, 1997, and October 6, 1997, respectively, stating that he was withdrawing from representation of Respondent and that Mr. Victor Dahar is the only person who can represent Respondent, as follows:

September 23, 1997

Ms. Linda Hamlin
US Department of Agriculture
Room 2446, South Building
Washington, DC 20250-1400

Re: **Queen City Farms, Inc.**
PACA Docket #: D-97-0020

Dear Ms. Hamlin:

It is my obligation to withdraw from representation of Queen City Farms, Inc. In my attempt to represent Michael Litvin, a former

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[4]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.

Shareholder of that company, I raised defenses on behalf of Queen City Farms, Inc. which has gone through a bankruptcy. I believe that the only person who can appropriately represent Queen City Farms, Inc. would be the United States Bankruptcy Court Appointed Trustee. The Trustee is Victor Dahar, Esquire of 20 Merrimack Street, Manchester, New Hampshire 03101.

Thank you for your courtesy and cooperation.

Very truly yours,
/s/
Peter M. Solomon

Letter dated September 23, 1997, from Peter M. Solomon to Ms. Linda Hamlin, filed September 30, 1997.

September 30, 1997

Joyce A. Dawson, Hearing Clerk
US Department of Agriculture
OALJ, Room 1081
South Building
Washington, DC 20250-9200

Re: **Queen City Farms, Inc.**
PACA Docket #: D-97-0020

Dear Clerk Dawson:

It is my obligation to withdraw from representation of Queen City Farms, Inc. In my attempt to represent Michael Litvin, a former Shareholder of that company, I raised defenses on behalf of Queen City Farms, Inc. which has gone through a bankruptcy. I believe that the only person who can appropriately represent Queen City Farms, Inc. would be the United States Bankruptcy Court Appointed Trustee. The Trustee is Victor Dahar, Esquire of 20 Merrimack Street, Manchester, New Hampshire 03101.

In addition, I am also withdrawing the Answer which was filed on or

about May 23, 1997 on behalf of Queen City Farms, Inc.

Thank you for your courtesy and cooperation.

Very truly yours,
/s/
Peter M. Solomon

Letter dated September 30, 1997, from Peter M. Solomon to Joyce A. Dawson, filed October 6, 1997.

Moreover, Respondent states in its Petition for Reconsideration that "[t]he Bankruptcy Trustee . . . acted . . . as the representative of the Queen City Farms, Inc. estate, by managing the estate's funds for the benefit of creditors of the estate." (Pet. for Recons. at 4 (footnote omitted).)

On November 17, 1997, Complainant filed Motion for Default Decision and Proposed Default Decision. A copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a copy of a letter dated November 18, 1997, from the Hearing Clerk, were served on Mr. Victor Dahar by certified mail on November 24, 1997.[5]

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. A copy of the Default Decision and a copy of a letter dated January 6, 1998, from the Hearing Clerk, were served on Mr. Victor Dahar by certified mail on January 10, 1998.[6] Respondent failed to file 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 by

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[5]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.

[6]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.

certified mail on Mr. Victor Dahar on February 26, 1998.[7] On April 13, 1998, Respondent filed Respondent's Appeal Petition, which I rejected as untimely. *In re Queen City Farms, Inc., supra.*

I find no basis for Respondent's contentions that Respondent was not served with 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, and that Respondent was not served with a copy of the Default Decision and a copy of a letter dated January 6, 1998, from the Hearing Clerk, until March 14, 1998.

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

Order

Respondent's Petition for Reconsideration of Order Denying Late Appeal and for Reopening Hearing 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: 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.
Stay Order as to JSG Trading Corp. filed July 30, 1998.

Andrew Y. Stanton, for Complainant.
John V. Esposito and Mel Cottone, Hilton Head Island, South Carolina, and Mark C.H. Mandell, Annandale, New Jersey, for Respondent JSG Trading Corp.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

On March 2, 1998, I issued a Decision and Order as to JSG Trading Corp.,

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[7]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.

Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile, in which I concluded, *inter alia*, that JSG Trading Corp. [hereinafter Respondent] committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and revoked Respondent's PACA license. *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. 640, 659-60, 684, (1998). On April 28, 1998, Respondent filed a petition for reconsideration, which I denied. *In re JSG Trading Corp.*, 57 Agric. Dec. 710 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.).

On July 29, 1998, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Motion for a Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion for Stay Order] stating that "[o]n July 24, 1998, Respondent JSG Trading Corp. filed a Petition for Review of the June 1, 1998, Order with the United States Court of Appeals for the District of Columbia Circuit, No. 98-1342" and requesting "that the June 1, 1998, Order pertaining to Respondent JSG Trading Corp. be stayed until the appeal is resolved." Moreover, Complainant asserts in his Motion for Stay Order that his counsel, Mr. Andrew Y. Stanton, "has been informed by Counsel for Respondent JSG Trading Corp. that it also desires a stay of the June 1, 1998, Order."

On July 29, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion for Stay Order.

Complainant's Motion for Stay Order is granted. The Order issued in this proceeding on March 2, 1998, as it relates to Respondent, *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. 640 (1998), which Order was reinstated with allowance for time passed, *In re JSG Trading Corp.*, 57 Agric. Dec. 710 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.), 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: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Order Lifting Stay filed August 21, 1998.

Jane McCavitt, for Complainant.
Respondents, 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. 1865, 1881 (1997). On November 25, 1997, Respondents filed a petition for reconsideration, which I denied. *In re Tolar Farms*, 57 Agric. Dec. 775 (1998) (Order Denying Pet. for Recons.).

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]. 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 did not oppose Respondents' Petition for a Stay Order, and on March 5, 1998, I granted Respondents' Petition for a Stay Order. *In re Tolar Farms*, 57 Agric. Dec. 790 (1998) (Stay Order).

On July 23, 1998, Complainant filed Motion to Lift Stay Order which states, as follows:

> On March 4, 1998[, R]espondents filed a notice in letter form requesting that a stay order be granted because [R]espondents intended to appeal the Judicial Officer's Decision and Order and his Order Denying Petition for Reconsideration. A Stay Order was issued on March 5, 1998.
>
> To date, [R]espondents have not submitted any evidence that an appeal petition has been filed.
>
> Therefore, Complainant hereby requests that the Stay Order be lifted and the previous orders issued in this case become final.

On August 14, 1998, Respondents filed a response to Complainant's Motion

to Lift Stay Order which states, as follows:

> We have sent all the proper paper work to Atlanta.[] We never received any information on where to file an appeal. We had to research all that on our own. We still want a day in court where we can tell our side of the story. We think we have been good for the industry and will continue to be good for the produce industry.
>
> We feel if you ask the produce industry, not people in offices outside the industry[,] they will tell you the same.
>
> The Atlanta court of appeals will let us know after [it has] looked at all the paper work.
>
> We are faxing this to keep the Stay Order active.

On August 14, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

The United States Court of Appeals for the Eleventh Circuit has no record of Respondents' having sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). I telephoned Respondents on two occasions after I received the record from the Hearing Clerk for a ruling on Complainant's Motion to Lift Stay Order and asked that Respondents immediately send me, by telefax, evidence of their having sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). Respondents have failed to provide any evidence that they sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997).

For the forgoing reasons, Complainant's Motion to Lift Stay Order is granted. The Stay Order issued March 5, 1998, *In re Tolar Farms*, 57 Agric. Dec. 790 (1998), is lifted, and the Order issued in *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997) ordering the publication of the facts and circumstances set forth in the November 6, 1997, Decision and Order, is effective 65 days after service on Respondents of this Order Lifting Stay.

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Order Denying Request for Stay filed September 22, 1998.

Jane McCavitt, for Complainant.
Respondents, 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. 1865, 1881 (1997). On November 25, 1997, Respondents filed a petition for reconsideration, which I denied. *In re Tolar Farms*, 57 Agric. Dec. 775 (1998) (Order Denying Pet. for Recons.).

On March 4, 1998, Respondents filed a letter requesting "a stay to give the evidence to a higher court" [hereinafter 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 did not oppose Respondents' March 4, 1998, Petition for a Stay Order, and on March 5, 1998, I granted Respondents' Petition for a Stay Order. *In re Tolar Farms*, 57 Agric. Dec. 790 (1998) (Stay Order).

On July 23, 1998, Complainant filed Motion to Lift Stay Order, which I granted on August 21, 1998, based on the lack of any record of Respondents' having sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). *In re Tolar Farms*, 57 Agric. Dec. ___ (Aug. 21, 1998) (Order Lifting Stay).

On September 3, 1998, Respondents requested that I issue a stay order, and in support of their oral request, Respondents sent me proof of delivery of a package from Tony Tolar to the United States Court of Appeals for the Eleventh Circuit on August 14, 1998.[1] On September 14, 1998, Respondents informed me by telephone that they had received a letter from the United States Court of Appeals for the Eleventh Circuit stating that they had not filed a notice of appeal with that court. Respondents then sent me a facsimile of the letter which they

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[1]See letter, dated September 2, 1998, from Federal Express Corporation to Ruth Ann Fralye, filed September 3, 1998.

had received from the United States Court of Appeals for the Eleventh Circuit, which states as follows:

September 4, 1998

Mr. Tony Tolar
3000 Case Road
LaBelle, Florida 33935

RE: Money Order j/a/o $100.00

Dear Mr. Tolar:

The enclosed check in the amount of $100.00 was received by us for appellate docket and filing fees. The above referenced check is being returned to you since it does not appear that the notice of appeal was filed in this court. Due to lack of documentation, we are unable to process it. Please send a copy of the petition, along with the check, in order for us to identify this docketing.

Sincerely,

THOMAS K. KAHN, Clerk

By: Patricia F. Thomas
Deputy Clerk

The record reveals that Respondents have attempted to seek judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). However, the record also reveals that Respondents have not filed a petition for review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997).

For the forgoing reasons, Respondents' September 3, 1998, oral request for a stay order is denied.[2]

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[2]On September 21, 1998, Mr. Tony Tolar, one of the principals of Tolar Farms and Tolar Sales, Inc., advised me, by telephone, that Respondents intend to file a petition for review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997), in the future. I advised Mr. Tolar that I would deny Respondents' September 3, (continued...)

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Order Granting Stay filed September 30, 1998.

Jane McCavitt, for Complainant.
Respondents, 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. 1865, 1881 (1997). On November 25, 1997, Respondents filed a petition for reconsideration, which I denied. *In re Tolar Farms*, 57 Agric. Dec. 775 (1998) (Order Denying Pet. for Recons.).

On March 4, 1998, Respondents filed a letter requesting "a stay to give the evidence to a higher court" [hereinafter 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 did not oppose Respondents' March 4, 1998, Petition for a Stay Order, and on March 5, 1998, I granted Respondents' Petition for a Stay Order. *In re Tolar Farms*, 57 Agric. Dec. 790 (1998) (Stay Order).

On July 23, 1998, Complainant filed Motion to Lift Stay Order, which I granted on August 21, 1998, based on the lack of any record of Respondents' having sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). *In re Tolar Farms*, 57 Agric. Dec. ___ (Aug. 21, 1998) (Order Lifting Stay).

On September 3, 1998, Respondents requested that I issue a stay order, and in support of their oral request, Respondents sent me proof of delivery of a package from Tony Tolar, one of the principals of Tolar Farms and Tolar Sales, Inc., to the United States Court of Appeals for the Eleventh Circuit on August 14, 1998. However, on September 14, 1998, Respondents informed me by telephone that they had received a letter, dated September 4, 1998, from the United States Court of Appeals for the Eleventh Circuit stating that Respondents had not filed a notice

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[2](...continued)
1998, oral request for a stay order, but that Respondents would not be precluded by the denial from filing another request for a stay order. I urged Mr. Tolar to attach to any future request for stay order, evidence that a petition for review had actually been filed.

of appeal with that court. Based on the September 4, 1998, letter from the United States Court of Appeals for the Eleventh Circuit to Respondents, I denied Respondents' September 3, 1998, request for a stay and urged Respondents to attach to any future request for a stay order, evidence that a petition for review has actually been filed. *In re Tolar Farms*, 57 Agric. Dec. ___ (Sept. 22, 1998) (Order Denying Request for Stay).

On September 28, 1998, Respondents sent me a facsimile of the letter, dated September 25, 1998, which they received from the United States Court of Appeals for the Eleventh Circuit, which indicates that Respondents have now filed a petition for review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997).[1]

For the foregoing reasons, Respondents' September 28, 1998, request for a stay order is granted. The Order issued in this proceeding on November 6, 1997, *In re Tolar Farms*, 56 Agric. Dec. 1865 (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: H. SCHNELL & COMPANY, INC.
PACA Docket No. D-97-0024.
Remand Order filed September 17, 1998.

Due process — Conference calls — Evidence — Admissions — Opportunity for hearing — Remand order.

The Judicial Officer vacated Administrative Law Judge Baker's (ALJ) Decision Without Hearing and remanded the case to the ALJ to provide Respondent with an opportunity for an oral hearing. While admissions made by a party during a prehearing conference can constitute an adequate basis for findings of fact in a decision and the issuance of a default decision, Respondent's attorney's *indication*, during a conference call, that Respondent would not be able to pay all of its produce sellers by the date of the hearing, appears to be contrary to Respondent's position, taken during the April 29, 1998, and May 13, 1998, conference calls, that it does not concede the amounts which remain unpaid. Moreover, the ALJ states in the Decision Without Hearing that Respondent declined to admit an inability to pay. Under these circumstances, Respondent's attorney's *indication* does not constitute an admission of the material allegations of the Complaint or an admission that Respondent would be unable to make full payment of amounts owed to produce sellers by the date of the hearing. Accordingly, the Decision Without Hearing was not properly issued, and Respondent was deprived of its rights under the due process clause of the Fifth Amendment to the United States Constitution.

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[1]Specifically, the letter, dated September 25, 1998, from the United States Court of Appeals for the Eleventh Circuit states that Respondents' docketing fee has been received and that their case is docketed as "Case No.: 98-5456."

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, New York, New York, for Respondent.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Remand 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 May 29, 1997.

The Complaint alleges that: (1) H. Schnell & Company, Inc. [hereinafter Respondent], during the period January 22, 1995, through April 14, 1996, failed to make full payment promptly to 39 sellers of the agreed purchase prices in the total amount of $2,435,869.17 for 317 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce (Compl. ¶ III); (2) Respondent, during the period September 17, 1995, through April 2, 1996, failed to make full payment promptly to 9 consignors net proceeds in the total amount of $1,103,343.19 derived from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in interstate and foreign commerce (Compl. ¶ IV); and (3) by reason of the facts alleged in paragraphs III and IV of the Complaint, Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ V). Complainant requests: (1) a finding that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) an order that such violations be published (Compl. ¶ V(2)).

Respondent filed an Answer on June 20, 1997, denying the material allegations of the Complaint and requesting a hearing.

On November 14, 1997, Complainant filed Motion to Set Oral Hearing stating that "the issues have been joined, [C]omplainant requests that a pre-hearing conference be held and that this case be assigned a date certain for oral hearing." On January 21, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] filed Designation of Oral Hearing Date stating that "[p]ursuant to prehearing conference call of January 20, 1998, the oral hearing herein is to commence at 9 a.m., local time, on May 20, 1998, in New York City."

On March 17, 1998, Complainant filed Complainant's Request for a Conference Call Regarding Respondent's Payment of its Produce Indebtedness and

Motion for a Decision Without Hearing [hereinafter Motion for Conference Call and Default Decision] stating that Complainant believes that it is highly unlikely that Respondent will be able to make full payment of the debt for produce alleged in the Complaint by the date of the hearing, as follows:

> . . . [C]omplainant requests a conference call to determine whether [R]espondent will be able to make full payment of its produce indebtedness and will be in full compliance with the PACA by the date of the hearing. If it is determined that [R]espondent will be unable to make full payment of its produce indebtedness or be in full compliance with the PACA by the May 20, 1998, hearing date, an order should be issued finding that [R]espondent has committed willful, repeated and flagrant violations of the PACA and that the finding be published.
>
> . . . .
>
> In the case at hand, it is [C]omplainant's belief that [R]espondent is claiming to have made partial payment of the amounts alleged in the [C]omplaint, although well over $1,000,000 remains past due and unpaid. Complainant believes it highly unlikely that [R]espondent will be able to make full payment of the amount alleged in the [C]omplaint by the date of the hearing. . . . [A] conference call should be held to determine if there is a reasonable likelihood that [R]espondent will be able to pay off the amounts owed by the date of the hearing, May 20, 1998. If, at the conference call, [R]espondent indicates that it will not be able to make full payment of the amounts alleged in the [C]omplaint or will not be in full compliance with the PACA by the May 20, 1998, hearing date, an order such as the one appended should be issued finding that [R]espondent has committed willful, repeated and flagrant violations of the PACA and ordering that the finding be published.

One copy each of Complainant's Motion for Conference Call and Default Decision and Complainant's proposed Decision Without Hearing were served on Respondent by certified mail on March 27, 1998.[1] Respondent failed to file objections to Complainant's proposed Decision Without Hearing within 20 days after service, as provided in 7 C.F.R. § 1.139. However, two conference calls were

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[1]See Return Receipt for Article Number P 093 143 267.

conducted on April 29, 1998, and May 13, 1998, respectively (Decision Without Hearing at 2).

On May 14, 1998, Complainant filed a motion for immediate issuance of Complainant's proposed Decision Without Hearing in which Complainant asserts that Respondent has no expectation of making full payment of the debt for produce alleged in the Complaint by the date of the hearing, as follows:

> Complainant hereby sets forth the current status of Respondent's produce indebtedness for the transactions alleged in the [C]omplaint, as agreed during a May 13, 1998, telephone conference call involving Administrative Law Judge Dorothea A. Baker, Paul T. Gentile, attorney for Respondent, and Andrew Y. Stanton, Attorney for Complainant. . . . Complainant asserts that Respondent currently owes $1,557,776.93 to 34 of the 45 sellers and consignors for the transactions set forth in the [C]omplaint.
>
> . . . .
>
> During the conference call, Complainant's counsel asserted that he had been advised by Respondent's counsel of payments that Respondent . . . had made to its produce creditors. . . . Complainant's counsel stated that he had deducted the payments allegedly made to the produce creditors in the [C]omplaint and found that Respondent currently owed approximately 1.5 million dollars for the transactions alleged in the [C]omplaint. . . .
>
> . . . .
>
> As Respondent currently owes $1,557,776.93 to 34 of the 45 sellers and consignors for the transactions set forth in the [C]omplaint and as Respondent has no expectation of making full payment by the date set for hearing in this matter, a Decision in the form of the proposed Decision Without Hearing filed with Complainant's Request for a Conference Call Regarding Respondent's Payment of its Produce Indebtedness and Motion for a Decision Without Hearing should immediately be issued finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA, and directing that such finding be published.

Current Status of Respondent's Produce Indebtedness for the Transactions Alleged in the Complaint at 1-3, 5.

Later, on May 14, 1998, the ALJ filed an order canceling the hearing scheduled to commence on May 20, 1998 (Cancellation of Oral Hearing) and a Decision Without Hearing in which the ALJ concluded, based on the April 29, 1998, and the May 13, 1998, conference calls, that Respondent had not made full payment of the amounts alleged in the Complaint to be owed to produce sellers and consignors and would not be able to make full payment of the amounts alleged in the Complaint to be owed to produce sellers and consignors by the date of the scheduled hearing, as follows:

> Upon a motion filed by [C]omplainant, a conference call was held at which [R]espondent's attorney indicated that, by the date of the hearing, May 20, 1998, [R]espondent would still owe in excess of $1,000,000 to produce creditors for the purchases and consignments set forth in the [C]omplaint. . . .
>
> The Motion for a Decision Without Hearing, filed by Complainant on March 17, 1998, requested a [c]onference call in connection therewith. On April 29, 1998, and May 13, 1998, such conference calls took place. As a result thereof[,] Respondent stated its position that it is entitled to an oral hearing because, prior to the proof which Complainant would be required to put forth at an oral hearing, the Respondent will not concede the amounts which remain unpaid and that absent an oral hearing[,] it is denied due process because of the employment restrictions which would result from a finding that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA.
>
> The Complainant, on May 14, 1998, filed a document indicating that taking into account the amounts that Respondent indicated had been paid as of May 13, 1998, the Respondent still owed $1,557,776.93 to 34 of the 45 sellers and consignors in the Complaint. Complainant filed no Motion for admissions, but, from the [c]onference calls[,] I conclude that it is highly unlikely that Respondent will be able to make full payment of the amounts owed by the date of the hearing, six days away. Although Respondent declines to formally admit this inability to pay, it appears that an oral hearing would serve no useful purpose and that Complainant's Motion for Decision Without Hearing should be, and is hereby, granted.

Decision Without Hearing at 2-3.

The ALJ: (1) found that Respondent, during the period January 22, 1995,

through April 14, 1996, failed to make full payment promptly to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of $2,435,869.17; (2) found that Respondent, during the period September 17, 1995, through April 2, 1996, failed to make full payment promptly to nine consignors of net proceeds in the amount of $1,103,343.19 resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in interstate or foreign commerce; (3) found that, by the date of the hearing, May 20, 1998, Respondent would still owe an amount of $1,557,776.93 to produce creditors for the purchases and consignments set forth in the Complaint; (4) concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) ordered the publication of the findings (Decision Without Hearing at 4-5).

On July 16, 1998, Respondent 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).[2] On July 31, 1998, Complainant filed Complainant's Response to Respondent's Appeal, and on September 3, 1998, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, the Decision Without Hearing is vacated and the proceeding is remanded to the ALJ to provide Respondent with an opportunity for an oral hearing.

Respondent states in Respondent's Appeal that the ALJ's Decision Without Hearing was rendered without affording Respondent an oral hearing; thereby denying Respondent due process.

I agree with Respondent's contention that the failure to provide Respondent with an opportunity for a hearing in this proceeding constitutes a denial of due process.

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides that the Secretary of Agriculture's determination that a commission merchant, dealer, or broker has violated any provision of section 2 of the PACA (7 U.S.C. § 499b) must be made in accordance with section 6 of the PACA (7 U.S.C. § 499f (Supp. II 1996)), 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-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)).

§ 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. § 499h(a).

Section 6(c)(2) of the PACA (7 U.S.C. § 499f(c)(2) (Supp. II 1996)) provides that the Secretary of Agriculture must afford the person against whom a disciplinary action for a violation of the PACA is instituted an opportunity for a hearing, as follows:

§ 499f. Complaints, written notifications, and investigations

. . . .

(c) Investigation of complaints and notifications

. . . .

(2) Issuance of complaint by Secretary; process

In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. . . .

7 U.S.C. § 499f(c)(2) (Supp. II 1996).

However, a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held.[3] Therefore, a decision without hearing, based upon a respondent's admission that the respondent has failed to make full payment promptly for perishable agricultural commodities in accordance with the PACA, as alleged in the complaint, generally is not set aside.[4] However, on rare occasions default decisions have been set aside for good cause shown or where the complainant did

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[3]*Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating that the due process clause does not require an agency hearing where there is no disputed issue of material fact); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir.) (stating that an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 117 S. Ct. 282 (1996); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating that an agency may ordinarily dispense with a hearing when no genuine dispute exists); *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986) (rejecting petitioner's contention that the Federal Energy Regulatory Commission's failure to hold an evidentiary hearing denied petitioner procedural due process and stating that since no material factual dispute exists, the Federal Energy Regulatory Commission was not required to hold a hearing); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) (stating that a request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held), *cert. denied*, 475 U.S. 1123 (1986); *United States v. Cheramie Bo-Truc #5, Inc.*, 538 F.2d 696, 698 (5th Cir. 1976) (stating that even when a statute mandates an adjudicatory proceeding, neither that statute, nor due process, nor the Administrative Procedure Act requires an agency to conduct a meaningless evidentiary hearing when the facts are undisputed); *Independent Bankers Ass'n. of Georgia v. Board of Governors*, 516 F.2d 1206, 1220 (D.C. Cir. 1975) (stating that the case law in this circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose); *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971) (stating that it is settled law that when no fact question is involved or the facts are agreed, an agency hearing is not required); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (stating that no agency hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law).

[4]*See In re Tolar Farms*, 56 Agric. Dec. 1865, 1877-78 (1997) (stating that in view of respondents' answer and respondents' promissory notes evidencing failure to make prompt payment, 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 administrative law judge 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).

not object.[5] I find Respondent's constitutional challenge to the proceeding sufficiently persuasive to warrant my vacating the Decision Without Hearing and remanding the proceeding to the ALJ to afford Respondent an opportunity for a hearing.

The Decision Without Hearing is based on Respondent's attorney's indication during a conference call that, by May 20, 1998, the date of the then-scheduled hearing, Respondent would still owe in excess of $1,000,000 to produce sellers for the purchases and consignments of perishable agricultural commodities listed in the Complaint (Decision Without Hearing at 2). However, the Decision Without Hearing also states that Respondent took the position during the April 29, 1998, and May 13, 1998, conference calls, that it is entitled to an oral hearing because, prior to the proof which Complainant is required to introduce at an oral hearing, Respondent does not concede the amounts which remain unpaid (Decision Without Hearing at 2-3).

While oral admissions made by a party during a prehearing conference may, in unusual circumstances, constitute an adequate basis for findings of fact in a decision and the issuance of a default decision,[6] I find that, in order to constitute

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[5]*See In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision 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) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the PACA had lapsed before service was attempted) (Remand Order), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer) (Order Vacating Default Decision and Remanding Proceeding), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because complainant had no objection to respondent's motion for remand) (Remand Order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (setting aside a default decision and accepting a late-filed answer because complainant did not object to respondent's motion to reopen after default) (Order Reopening After Default).

[6]*See In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (stating that where a respondent admitted in its answer that it failed to pay at least one produce seller in full, the administrative law judge should determine through a prehearing conference whether the respondent admits owing more than a *de minimis* amount for perishable agricultural commodities, in which case a hearing would not be necessary) (Ruling on Certified Question); *In re Fava & Company, Inc.*, 46 Agric. Dec. 79 (1984) (stating that where a respondent admitted in its bankruptcy petition that it owes most of sums alleged in the complaint and since it is so unlikely that produce sellers expressly agreed to a 15-month delayed payment, the administrative law judge should determine through a prehearing conference whether, at the time that the contracts for produce were made, the respondent's produce sellers expressly agreed to delayed payment) (Ruling on

(continued...)

a basis for findings of fact and a default decision, the oral statements relied upon during the conference call must clearly constitute an admission of the material allegations of the complaint. The statements made by Respondent's attorney's do not meet this criterion. First, the ALJ does not refer to an admission made by Respondent, but rather describes Respondent's attorney's statements as an *indication* that, by the date of the hearing, Respondent would owe in excess of $1,000,000 to produce creditors for the purchases and consignments set forth in the Complaint (Decision Without Hearing at 2). Second, Respondent's attorney's *indication* appears to be contrary to Respondent's position, which position Respondent took during the conference call, that it would not concede amounts which remain unpaid (Decision Without Hearing at 3). Finally, although the ALJ issued the Decision Without Hearing based on Respondent's attorney's indication during a conference call that Respondent would not be able to make full payment of the amounts owed to produce sellers by the date of the hearing, the ALJ states that "Respondent declines to formally admit this inability to pay" (Decision Without Hearing at 3). Under these circumstances, I do not find that the record clearly establishes that Respondent's attorney's *indication* constitutes an admission of the material allegations of the Complaint or an admission that Respondent would be unable to make full payment of amounts owed to produce sellers by the date of the hearing.

Accordingly, the Decision Without Hearing, filed May 14, 1998, was not properly issued in this proceeding, and Respondent was deprived of its rights under the due process clause of the Fifth Amendment to the United States Constitution.

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

Order

The Decision Without Hearing, filed on May 14, 1998, is vacated, and this proceeding is remanded to the ALJ to afford Respondent an opportunity for a hearing.

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[6](...continued)
Certified Question); *but cf. In re Rex Kneeland*, 50 Agric. Dec. 1571, 1573 (1991) (stating that under the Rules of Practice, findings of fact cannot be based on "evidence" adduced during a telephone conference).

DEFAULT DECISIONS

In re: BOBBY E. ROBERTSON, d/b/a BOBBY ROBERTSON PRODUCE.
PACA Docket No. D-98-0009.
Decision and Order filed April 20, 1998.

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, 145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 16, 1998.-Editor]

In re: STEPHEN WERNER.
PACA Docket No. D-98-0022.
Decision and Order filed July 8, 1998.

Default — Failure to file answer — Failure to make full payment promptly — Willful, flagrant, and repeated violations — Operating without a license.

Andre Vitale, for Complainant.
Thomas Pragies, Garden City, NY, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This notice to show cause and disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter the PACA, was instituted on June 4, 1998 by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, by the filing of a Notice to Show Cause and Complaint alleging that Respondent is unfit to engage in the business of a commission merchant, dealer, or broker, because he has engaged in practices of a character prohibited by the PACA, and has committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices, in the total amount of $309,664.55, to 13 sellers for 69 lots of perishable agricultural commodities which he purchased, received, and accepted in interstate and foreign commerce between June 28, 1996, and May 1, 1998. Respondent was served with the Notice to Show Cause and Complaint and did not file an answer within the time period required by section 1.136 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136), hereinafter the Rules of Practice.

The period for filing a timely answer has elapsed and Complainant has 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).

Findings of Fact

1. Stephen Werner, herein referred to as Respondent, is an individual with a business mailing address of 41 Leeside Drive, Great River, New York 11739.

2. Pursuant to the licensing provisions of the PACA, license number 960900 was issued to Respondent on February 22, 1996, but was terminated on February 22, 1998, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required license renewal fee.

3. After Respondent's license terminated, he continued to buy and sell perishable agricultural commodities in wholesale or jobbing quantities in interstate commerce without a valid or effective PACA license. At all times material herein, Respondent has operated subject to the PACA.

4. As set forth in section IV of the Notice to Show Cause and Complaint, Respondent failed to make full payment promptly of the agreed purchase prices, in the total amount of $309,664.55, to 13 sellers for 69 lots of perishable agricultural commodities which he purchased, received, and accepted in interstate and foreign commerce between June 28, 1996, and May 1, 1998.

5. On May 6, 1998, Respondent submitted a complete application for a PACA license. Complainant determined that Respondent is unfit to engage in the business of a commission merchant, dealer, or broker, because he has engaged in practices of a character prohibited by the PACA, and withheld the issuance of a PACA license to Respondent, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Conclusions

1. Respondent operated subject to the PACA without having a valid or effective license.

2. Respondent's failures to make full payment promptly for produce purchases, as set forth in Finding of Fact 4, constitute wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3. Respondent's actions of operating subject to the PACA without a license and failing to make full payment promptly for produce purchases are practices of a character prohibited by the PACA. Therefore, Respondent is unfit to be licensed under the PACA.

Accordingly, the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

The denial of the Respondent's application for a license is upheld.

This Decision and Order 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, .145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 17, 1998. Editor]

In re: FARM FRESH PRODUCE, INC.
PACA Docket No. D-97-0010.
Decision and Order filed July 7, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), was instituted on December 2, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, by the filing of a complaint alleging that Respondent wilfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly of the purchase prices, in the total amount of $773,340.16, to 37 sellers for 294 shipments of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce between October 1993 and July 1996. The complaint requests a finding that Respondent has committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations of the PACA be published.

Respondent was served with the complaint on December 6, 1996 and did not 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). As a result of the Respondent's failure to file a timely answer, Complainant filed a motion for the issuance of a Decision Without Hearing by Reason of Default.

After the time period for filing an answer expired, Respondent submitted four documents which Complainant attached to a Motion for Decision Without Hearing by Reason of Admissions. The information contained in those four documents, constitutes admissions that Respondent had fully paid three sellers set forth in the complaint[1], had fully paid three other sellers between December 31, 1996, and April 30, 1997, for purchases which had become due between November 1994 and November 1995, and that as of April 30, 1997, had not paid the full amounts that

[1]Respondent did not provide the dates on which it paid these three sellers. Without this information we can not determine whether or not Respondent paid them promptly, in compliance with the PACA. For the purpose of this decision, those three sellers will not be included in the discussion of Respondent's admitted violations of the PACA.

it owed to twelve sellers[2] for purchases which had become due between December 1995 and July 1996. In addition to the admissions Respondent made in the documents it submitted, its failures to admit, deny, or explain the allegations that it failed to make full payment promptly to nineteen sellers named in the complaint, constitute admissions that it had not paid those nineteen sellers. 7 C.F.R. § 1.136(c).

It is a violation of Section 2(4) of the PACA to fail to make full payment promptly for produce purchases. 7 U.S.C. § 499b(4). The PACA requires that full payment must be made within ten days of receipt of a shipment or within an alternative time period upon which the parties have agreed and put into writing before the purchase was made. 7 C.F.R. § 46.2(aa)(5), (11); *In re Havana Potatoes of New York Corp. et. al.*, 55 Agric. Dec. 1234 (1996). Respondent has admitted that it failed to fully and promptly pay 34 sellers for 282 purchases which it made between September 1993 and July 1996, the purchase prices of which total $699,943.23. Respondent's failures to make full payment promptly for its produce purchases are violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent's admitted failures to make full payment promptly to numerous sellers (34 sellers), in more than *de minimus* amounts (totaling $699,943.23), which it made over an extended period time (almost three years), constitute wilful, flagrant, and repeated violations of Section 2(4) of the PACA. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1211 (1996); *In re Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

Respondent's failure to admit, deny, or explain the allegation that its PACA license was terminated on May 17, 1996, is an admission of that allegation. 7 C.F.R. § 1.136. Given that Respondent does not have a PACA license, the only appropriate sanction for its admitted violations is a finding that Respondent has committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations of the PACA be published.

Upon motion by Complainant, the following Decision Without Hearing by Reason of Default or Admissions is issued without further investigation or

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[2]Respondent indicated that as of April 30, 1997, it had lower amounts past due than the amounts alleged with respect eleven sellers listed in the complaint. Respondent also submitted evidence that its principals entered into a promissory note with another seller which the complaint alleges it had not promptly paid. Neither Respondent's attempts to make incremental payments to eleven sellers, nor the promissory note into which its principals entered with Delta Packing, mitigates against the finding that Respondent violated Section 2(4) of the PACA or the finding that its violations were wilful, flagrant, and repeated. *In re: Scamcorp, Inc.*, PACA Dkt. No. D-95-0502, slip op. at 50-51 (Jan. 29, 1998); *In re: Tolar Farms and/or Tolar Sales, Inc.*, PACA Dkt. No. 96-0530, 1997 WL 730379 (USDA Nov. 6, 1997).

proceeding, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Farm Fresh Produce, Inc., herein referred to as Respondent, is a corporation, organized and existing under the laws of the State of Rhode Island with a business mailing address of 40 Harris Avenue, Providence, Rhode Island 02903.

2. PACA License number 851157 was issued to Respondent on May 17, 1985, and terminated on May 17, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because Respondent failed to pay the required annual renewal fee.

3. Respondent failed to fully and promptly pay the purchase prices, in the total amount of $699,943.23, to 34 sellers for 282 shipments of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce between September 1993 and July 1996.

Conclusions

Respondent's failures to make full payment promptly for its produce purchases, as set forth *ante,* Finding of Fact 3, constitute wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). As a result of Respondent's violations of the PACA and the fact that it does not have a valid and effective PACA license, the following Order is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

This Decision shall 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, .145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 19, 1998.-Editor]

In re: DAVID FISHGOLD, INC.
PACA Docket No. D-97-0025.
Decision and Order filed June 8, 1998.

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 June 26, 1997, 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 January 1996 through January 1997, respondent failed to make full payment promptly to 31 sellers in the total amount of $707,262.08 for 254 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the Complaint was served upon respondent on July 3, 1997, which 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, David Fishgold, Inc., was a corporation organized and existing under the laws of the State of New York. Its mailing address was P.O. Box 22806, Rochester, New York, 14692.

2. At all times material herein, respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 951393 was issued to respondent on May 25, 1995. This license was suspended on January 31, 1997, for failure to pay a reparation award pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g), and terminated on May 25, 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 January 1996 through January 1997, respondent purchased, received and accepted, in interstate commerce from 31 sellers, 254 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 $707,262.08.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Findings 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, .145).

Copies hereof shall be served upon the parties

[This Decision and Order became final August 27, 1998.-Editor]

In re: ADAMS PRODUCE, INC.
PACA Docket No. D-98-0016.
Decision and Order filed July 23, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*), hereinafter the PACA, 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 make full payment promptly of the net proceeds, in the total amount of $844,876.25, to 26 sellers for 555 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between January 1994 and January 1996. Respondent was served with a copy of the complaint, for which it was granted four extensions of time in which file an answer—the last of which expired May 11, 1998–but did not file an answer within the time provided.

The period for filing a timely answer has elapsed and Complainant has 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 Governing Formal Adjudicatory Administrative Proceeding Instituted by the Secretary (7 C.F.R. § 1.139), hereinafter the Rules of Practice.

Findings of Fact

1. Adams Produce, Inc., referred to herein as Respondent, is a corporation organized and existing under the laws of State of Texas with a business address of 10554 King William Drive, Dallas, Texas 75220, and a business mailing address of P.O. Box 541715, Dallas, Texas 75354.

2. At all times material herein, Respondent operated subject to the PACA. PACA license number 940809 was issued to Respondent on March 14, 1994, and was suspended on March 5, 1996, because Respondent failed to pay a reparation award that had been entered against it. Respondent's PACA license terminated on March 14, 1996, 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 make full payment promptly of the net proceeds, in the total amount of $844,876.25, to 26 sellers for 55 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between January 1994 and January 1996.

Conclusions

Respondent's failures to make full payment promptly, as set forth in Finding of Fact 3, constitute wilful, repeated, and flagrant violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the following order is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

This Decision and Order 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, .145).

Copies hereof shall be served upon parties.

[This Decision and Order became final August 31, 1998.-Editor]

In re: ROMNEY & ASSOC., INC., a/t/a R&R DISTRIBUTING.
PACA Docket No. D-98-0007.
Decision and Order filed September 15, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*) (PACA), was initiated on December 30, 1997, by a complaint alleging that Respondent wilfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, in the total amount of $354,420.43, to nine (9) sellers for 44 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce during May 1996 and June 1996. The complaint requests a finding that Respondent committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of its violations be published.

Respondent was served with the complaint by regular mail on February 18, 1998, after service by certified mail was unsuccessful—having been returned as unclaimed. On March 26, 1998, Respondent filed an answer admitting the allegations in sections II and III of the complaint, but denied that it owed the amounts claimed as past due. Respondent's answer states that it filed a Chapter 11 bankruptcy petition which it claimed would enable it to make full payment to

its creditors. A copy of Respondent's bankruptcy petition which was filed on October 22, 1997, in the U.S. Bankruptcy Court for the District of Arizona (Case No. B-9714458 PHX RGM), was attached to a motion filed by Complainant requesting the issuance of a Decision Without Hearing by Reason of Admissions.

The bankruptcy petition includes a list of the creditors holding the twenty largest unsecured claims against Respondent, hereinafter referred to a the "List of Unpaid Creditors", in which Respondent admits that it is indebted to six out of the nine sellers named in the complaint, for at least $311,846.03 out of the $319,551.48 which the complaint alleges that it owes those six sellers. Respondent's answer also admits that it failed to make full payment promptly to the remaining three sellers listed in the complaint, but not in the List of Unpaid Creditors, denying that it owes the amounts alleged as past due. Respondent's admissions warrant the immediate issuance of a decision finding that it has committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA and ordering the publication of the facts and circumstances of its violations.

On motion of 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 governing this proceeding (7 C.F.R. § 1.139), hereinafter referred to as the "Rules of Practice".

Findings of Fact

1. Romney & Assoc., Inc., also trading as R & R Distributing, herein referred to as Respondent, is a corporation organized and existing under the laws of the State of Arizona with a business mailing address of 2049 North Doran, Mesa, Arizona 85203.

2. At all times material to this matter, Respondent operated subject to the PACA. PACA license number 941065 was issued to Respondent on April 25, 1994, and was suspended on January 14, 1997, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)), because Respondent failed to pay a reparation award that had been entered against it. Respondent's PACA license was terminated on April 25, 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. On October 22, 1997, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*), designated case No. B-9714458 PHX RGM, in the U.S. Bankruptcy Court for the District of Arizona.

4. In Respondent's List of Unpaid Creditors and answer, it admitted that it

failed to make full payment promptly, for at least $311,846.03, to nine sellers for at least 44 loads of perishable agricultural commodities which it purchased in interstate commerce during May 1996 and June 1996.

Conclusions

Respondent does not have a valid or effective PACA license and has admitted to actions which constitute wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, the following Order is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

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, .145).

Copies hereof shall be served on the parties.

[This Decision and Order became final October 26, 1998.-Editor]

In re: GROCERY IMPORT & EXPORT INTERNATIONAL CORP., a/k/a G.I.E. INTERNATIONAL CORP.
PACA Docket No. D-97-0032.
Decision and Order filed August 28, 1998.

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 September 10, 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 of December 8, 1995, through July 24, 1996, respondent purchased, received and accepted, in interstate commerce from 3 sellers, 111 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $453,267.72.

A copy of the Complaint was mailed to the respondent by certified mail on September 12, 1997, and again by regular mail on January 13, 1998, which 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, Grocery Import & Export International Corp., a/k/a G.I.E. International Corp., is a corporation organized and existing under the laws of the State of California. Its business mailing address is 2133 Violet Street, Los Angeles, California 90021.

2. At all times material herein, respondent was not and has never been licensed under the Act. However, respondent at all times pertinent herein, has conducted business subject to the Act.

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 8, 1995, through July 24, 1996, respondent purchased, received and accepted, in interstate commerce from 3 sellers, 111 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $453,267.72.

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 of such violations 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 thereof 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, .145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 20, 1998-Editor]

In re: JAMES O'SULLIVAN d/b/a H&M PRODUCE.
PACA Docket No. D-98-0006.
Decision and Order filed October 8, 1998.

Andre 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, brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), which was instituted on December 29, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, through the filing of a complaint alleging that Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of $205,838.85, to 12 sellers for 40 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce between July 1995 and October 1995. In accordance with section 1.147 of the Rules of Practice governing this proceeding (7 C.F.R. § 1.147), hereinafter the "Rules of Practice", Respondent was served with the complaint by regular mail on February 5, 1998, after service by certified mail, return receipt requested, to Respondent's last known address of record, was returned unclaimed. Respondent did not file an answer to the complaint and the time for filing a timely answer, as provided by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), has elapsed. On Complainant's motion for the

issuance of a default decision, 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).

Findings of Fact

1. James O'Sullivan, herein referred to as Respondent, is an individual doing business as H&M Produce with a business mailing address of 547 Seaton Street, Los Angeles, California 90013.

2. At all times material herein, Respondent did not have a valid and effective PACA license, but was operating subject to the PACA.

3. As set forth more fully in section III of the complaint, Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of $205,838.85, to 12 sellers for 40 lots of perishable agricultural commodities which he purchased, received, and accepted in interstate and foreign commerce between July 1995 and October 1995.

Conclusions

Respondent's failures to make full payment promptly for his produce purchases, as set forth above in Finding of Fact No. 3, constitute wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

This decision will become final without further proceedings thirty-five (35) days after it has been served on Respondent, unless appealed to the Secretary by a party to the proceedings within thirty days (30) after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 1, 1998.-Editor]

In re: SANFORD PRODUCE EXCHANGE, INC.
PACA Docket No. D-98-0012.
Decision and Order filed October 16, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*), hereinafter the PACA, was instituted on February 6, 1998, 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 make full payment promptly of the net proceeds, in the total amount of $256,025.66, to 21 sellers for 91 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between August 1996, and June 1997. Respondent was served with the complaint by regular mail on April 1, 1998, after service by certified mail, return receipt requested, to Respondent's last known address of record, was returned unclaimed. Respondent did not file an answer to the complaint and the time for filing a timely answer, as provided by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), has elapsed. Complainant has 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 Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.139), hereinafter the Rules of Practice.

Findings of Fact

1. Sanford Produce Exchange, Inc., referred to herein as Respondent, is a corporation organized and existing under the laws of the State of Florida, with a business address of 1300 French Avenue, Stall 18, State Farmers Market, Sanford, Florida 32772, and a business mailing address of 1300 S. French Avenue, Box 2C, Sanford, Florida 32771.

2. License number 960105 was issued to Respondent on October 13, 1995, and terminated on October 13, 1997, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because Respondent failed to pay the required annual renewal fee. At all times material herein, Respondent operated subject to the PACA.

3. As set forth in section III of the complaint, Respondent failed to make full

payment promptly of the net agreed purchase prices, in the total amount of $256,025.66, to 21 sellers for 91 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between August 1996 and June 1997.

Conclusions

Respondent's failures to make full payment promptly, as set forth in Finding of Fact 3, constitute wilful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

This Decision and Order 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, .145).

Copies hereof shall be served upon parties.

[This Decision and Order became final December 14, 1998-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

TKO Farms, Inc. PACA Docket No. D-98-0003. 7/29/98.

Finest Fruits, Inc. PACA Docket No. D-98-0017. 9/15/98.

Fruit Salad, Inc. PACA Docket No. D-97-0027. 10/9/98.

Lakeside United Foods, Inc., d/b/a Farm Fresh Dist., Farm Fresh Distributors, Farm Fresh Fruit & Veg., and Farm Fresh Produce. PACA Docket No. D-98-0015. 10/28/98.

Rick Ray Fruits and Vegetables, Inc. PACA Docket No. D-99-0003. 11/12/98.

Campo Tropical, Inc. PACA Docket No. D-98-0020. 11/19/98.

L A Vegetable Exchange, Inc. PACA Docket No. D-98-0031. 12/4/98.